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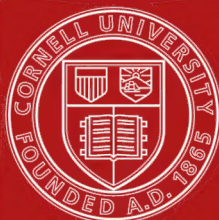
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**A selection of cases on equity jurisdict**



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A SELECTION OF CASES

ON

EQUITY JURISDICTION

BY

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# CASES ON EQUITY JURISDICTION.

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## CHAPTER I.

### SPECIFIC PERFORMANCE OF CONTRACTS.<sup>1</sup>

#### SECTION I.—EXTENT OF JURISDICTION.

##### (a) *Affirmative Contracts.*

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#### CUD *v.* RUTTER.

IN CHANCERY, MICHAELMAS TERM, 1719.

[*Reported in 1 Peere Williams 570.*]

THE defendant, in consideration of two guineas paid down, did by note under hand agree to transfer £1,000 South-Sea stock at a fixed price at the end of three weeks; the plaintiff on the day demanded the stock, and offered to pay the price; but on the defendant's insisting that he would only pay the difference, and not transfer the stock,

<sup>1</sup> It has been stated on a previous page that, while equity assumes jurisdiction over torts chiefly for the purpose of supplying a remedy by way of prevention, it assumes jurisdiction over contracts chiefly for the purpose of supplying a remedy by way of specific reparation. This latter remedy is, indeed, constantly termed specific performance; but that is in strictness a misnomer. The remedy by way of prevention is the true specific performance; for the object of that remedy is to prevent a violation by the defendant of the plaintiff's right, and, whenever the remedy is successful, that object is completely accomplished. But to prevent a defendant from violating a plaintiff's right is to compel him specifically (*i. e.*, strictly and literally) to perform his duty to the plaintiff. There is, indeed, this difference between the terms "prevention" and "specific performance," namely, that the former is negative, while the latter is affirmative; and hence, when equity enforces performance of a negative duty, the remedy is properly called prevention, while, if equity did in truth enforce performance of affirmative duties, the remedy would properly be called specific performance. . . . What is commonly called the specific performance of contracts is the doing of what was agreed to be done, but not at the time when it was agreed to be done; *i. e.*, not till after the time when it was agreed to be done

the plaintiff brings this bill for a specific performance, and to have the stock assigned.

*Objected.* That the compelling a specific execution of contracts must be allowed to be discretionary in this court, and there was not a single instance or precedent where it had been done in such a case

is past, and hence not till the contract is broken.—Langdell, "A Brief Survey of Equity Jurisdiction," 1 *Harvard Law Review* 355.—ED.

It may have occurred to the reader to ask why the jurisdiction exercised by equity over contracts and other obligations is designated as specific performance, since equity always exercises its jurisdiction by compelling performance, and always makes such performance as specific as it is practicable to make it, and since the performance which equity enforces, in cases of contracts and other obligations, is no more specific than it is in other cases. The answer to this question seems to be that the term "specific performance" is used, not to indicate the nature of the relief given by equity, but to indicate the reason and the object of the jurisdiction assumed by equity,—the reason being that a compensation in money is an inadequate remedy, and the object therefore being to afford a remedy by way of specific performance or specific reparation. In other words, the term "specific performance" is used, not to indicate that the relief given by equity in such cases differs from the relief which equity gives in other cases, but to mark the distinction between the relief given by equity and the relief given at law in such cases. Accordingly, when (as is often the case) equity assumes jurisdiction over contracts and other obligations, not because a compensation in money is an inadequate remedy for a breach, but for some other reason,—when in fact the relief given is the same in equity as at law, namely, a compensation in money,—the jurisdiction is never designated by the term "specific performance."—Langdell, "A Brief Survey of Equity Jurisdiction," 2 *Harvard Law Review* 241.—ED.

English and American lawyers are so familiar with the jurisdiction of equity in enforcing the specific performance of contracts, that it probably occurs to very few of them that there is anything extraordinary in this remedy of the courts of chancery. The doctrine of specific performance is, however, one of the paradoxes of legal history. Only in the United States and the British Empire, the two countries in which popular government has attained its highest development, is it permitted so far to invade the liberty of the individual as to compel him specifically to perform his contracts upon pain of imprisonment. "*Nemo potest præcise cogi ad factum*," was a rule of the Roman law. In France, Germany, and presumably in the other European States, pecuniary compensation is the sole remedy for a breach of contract (Fry, *Specific Performance*, 2d ed., 3)

Even in England the practice of the chancellors met with strenuous opposition from the common-law judges, and was finally established only at a comparatively late period. Mr. Spence, it is true, has expressed the opinion to which Lord Justice Fry has added the weight of his authority (*Ibid*, 8), that "bills for specific performance of contracts for the sale of land are amongst the earliest that are recorded in the court of chancery" (1 *Spence*, *Eq. Jur.* 645). But this opinion would seem to be erroneous. In its support these eminent writers cite a case of the time of Richard II. (1377-1399) (2 *Cal. Ch. II.* Two similar cases are reported: 1 *Cal. Ch. XLI.* and *Y. B. 8 Edw. IV. 4*, pl. 11. The other author-

as this; that the plaintiff was put to no inconvenience, since the defendant had offered, and by his answer continued to offer, to pay the difference; that the plaintiff might for asking have the same quantity of stock anywhere upon the exchange. Indeed, had the agreement been for a house or land, which might be a matter of moment and

ities cited by Mr. Spence are cases of uses). The bill alleged that the plaintiff, trusting in the defendant's promise to convey certain land to him, had paid out money in traveling to London and consulting counsel, and prayed for a *subpoena* to compel the defendant to answer of his "disceit." There is no allusion to specific performance; the bill sounds in tort rather than in contract; and its object was, in all probability, not specific performance but reimbursement for the expenses incurred. Indeed, this probability becomes almost a certainty when it is remembered that equity at this time gave no relief even against feoffees to uses who refused to convey to their *cestuis que usent*, and that the common law gave no action for damages for the breach of a parol promise.

It is probable that the willingness of equity to give pecuniary relief upon parol promises hastened the development of the action of *assumpsit*. Fairfax, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to chancery (Y. B. 21 Edw. IV. 23, pl. 6); and Fineux, C. J., remarked, in 1505, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to sue a *subpoena* in such cases (Y. B. 21 Hen. VII. 41, pl. 66).

Brooke, in his "Abridgment," adds to this remark of Fineux, C. J.: "But note that he shall have only damages by this [action on the case], but by *subpoena* the chancellor may compel him to execute the estate or imprison him *ut dicitur*" (Bro. Ab. Act. on Case, pl. 72). Brooke died in 1558. This note by him and the following meagre report of a case in 1547 (Carington v. Humphrey, Toth. 14),—"It is ordered that the defendant and his wife shall make an absolute assurance for the extinguishment of her right in the lands," if, indeed, this can be said to be in point,—seem to be the earliest allusions to the equitable doctrine of specific performance. Against these should be set the statement of Dyer, J., in 1557 (Wingfield v. Littleton, Dy. 162a): "And no *subpoena* will lie for her [the covenantee], as for a *cestui que use*, to compel Sir A. [the covenantor] to execute the estate . . . because she has her remedy at common law, by action of covenant."

In the reign of Elizabeth, however, there are several reported cases in which specific performance of contracts was decreed (Pope v. Mason (1569), Toth. 3; Hungerford v. Hutton (1569), Toth. 62; Foster v. Eltonhead (1582), Toth. 4; Kempe v. Palmer (1594), Toth. 14; King v. Reynolds (1597), Ch. Cas. Ch. 42; Beeston v. Langford (1598), Toth. 14).

There were many similar decrees in the reign of James I., one of which, according to Tothill, was "by the judge's advice" (Throckmorton v. Throckmorton (1609), Toth. 4). This is, possibly, an error of the reporter. At all events, the hostility of the common-law judges to the jurisdiction of equity over contracts was very plainly expressed, two years later, in Gollen v. Bacon (1 Bulst. 112), by Fleming, C. J.: "If one doth promise for to give me a horse for 20 shillings, afterwards he doth not perform this; I am not in this case to go and sue in chancery for my remedy, but at the common law, by an action on the case for a breach of promise, and so to recover damages; and this is the proper remedy,

use in that case (supposing all things to have been fairly transacted), there might be some reason why equity should execute such agreement; but in a matter of so little consequence as the present case, there could be no necessity for this court to interpose.

*Cur.* : The plaintiff ought to have an execution of the contract; for the agreement is a fair one, and in writing, and part of the money paid. Suppose the whole money had been paid, should not equity have executed it? If so, where is the difference betwixt a great sum and a small one? If the agreement had been to transfer stock or pay the difference, this might have looked like stock-jobbing; but the plaintiff, as is proved in the cause, refused to let the note be so penned, notwithstanding that the defendant had desired it. Decreeing an execution of such an agreement is beating down and preventing stock-jobbing. Wherefore, let the defendant transfer £1,000 South-Sea stock accounting for the dividends, and paying the costs;

and the common law warrants only a remedy at the common law; and if the law be so in the case of a horse, *a multo fortiori* it shall be so in case of a promise to make an assurance of his land upon good consideration, and doth not perform it, he is not to sue in chancery for this, but at the common law, which is most proper." Croke, J., and Yelverton, J., agreed herein with the chief justice, who added: "There are too many causes drawn into chancery to be relieved there, which are more fit to be determined by trial at the common law, the same being the most indifferent trial, by a jury of twelve men." As might be supposed, the most determined opponent of this new encroachment of equity upon the common law was Lord Coke. In *Bromage v. Genning* (1 Roll. R. 368), the plaintiff applied to the King's Bench for a prohibition against a suit for specific performance of a lease brought against him in the Marches of Wales, on the ground that Genning's proper remedy was an action at law. Sergeant Harris, in reply, urged that the object of the suit was not the recovery of damages but the execution of the lease, and that this was regularly done in chancery. Coke, C. J., Doddridge and Houghton, JJ.: "Without doubt a court of equity ought not to do so, for then to what purpose is the action on the case and covenant; and Coke said that this would subvert the intent of the covenantor, since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will; and so it is if a man binds himself in an obligation to enfeoff another, he cannot be compelled to make the feoffment."

Sergeant Harris then confessed that he acted in the matter against his conscience, and the court accordingly granted the prohibition. This was in 1616, the year of the memorable contest between Lord Coke and Lord Ellesmere as to the power of equity to restrain the execution of a common-law judgment obtained by fraud. Lord Coke was alike unsuccessful in this contest, and in his attempt to check the jurisdiction of equity in matters of contract. The right of equity to enforce specific performance, where damages at law would be an inadequate remedy, has never since been questioned.—Ames, *Specific Performance of Contracts*, 1 Green Bag 26,—ED.

and let the plaintiff pay the defendant interest for the money from the time that it ought to have been paid, according to the contract.<sup>1</sup>

But afterwards on an appeal the Lord Chancellor Parker reversed this decree, delivering his opinion with great clearness, that a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may, if he pleases, buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land, but £1,000 South-Sea stock, whether it be A, B, C, or D's, is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover in damages, with which, when received, he may buy the stock himself.<sup>2</sup>

### BUXTON v. LISTER AND COOPER.

IN CHANCERY, BEFORE LORD HARDWICKE, C., JULY 15, 1746.

[*Reported in 3 Atkyns 383*]

THE defendants entered into an agreement for the purchase of several timber trees, marked and growing at the time it was reduced into writing; and on the first of November, 1744, the following memorandum was signed by the parties:

"Matthew Lister and John Cooper have agreed with Joseph Buxton for the purchase of all those several large parcels of wood, con-

<sup>1</sup> Reg. Lib. A. 1719, fol. 35.

<sup>2</sup> Reg. Lib. B. 1719, fol. 411. "His Lordship declared he did not think a specific performance of the said agreement to be reasonable, and doth therefore order that the plaintiff's bill, so far as seeks a specific performance of the said agreement, be dismissed. But his Lordship declared that the defendant, not having acted fairly, but having given occasion to the plaintiff to hope that he would transfer the stock, he thought it reasonable that the defendant should not only lose his costs, which he would otherwise have been entitled to, but that he should pay the plaintiff the difference of the stock, not only as it was upon the 20th of November, 1718, but as it was when the plaintiff bought his stock" (*i. e.*, the 23d of December following, on which day plaintiff gave notice to the defendant that he should attend at the South-Sea House to accept the stock to be transferred by the defendant, and upon the defendant's not attending the plaintiff purchased £1,000 stock on that day at 118 $\frac{3}{4}$  per cent.), "and it appearing that the plaintiff bought afterwards at 118 $\frac{3}{4}$  per cent., which is £14 5s. more than the defendant was to deliver the stock at, doth therefore order that the defendant do pay the plaintiff after the rate of £14 5s. per cent. for £1,000, with interest for the same from the time the plaintiff bought his stock."

sisting of oaks, ashes, elms, and aspens, which are numbered, figured, and ciphered, standing and being within the township of Kirkby, for the sum of £3,050, to be paid at six several payments, every Ladyday for the six following years; and Lister and Cooper to have eight years for disposing of the same; and that articles of agreement shall be drawn and perfected as soon as conveniently can be, with all the usual covenants therein to be inserted concerning the same."

There were two parts of the agreement.

The plaintiff signed one, and the defendants the other; one was left in the custody of the plaintiff, and the other in the custody of the defendants.

The bill was brought by the vendor for the specific performance of the agreement.

LORD CHANCELLOR, upon the opening, said he did not know any instance of a bill of this nature, where it is a mere chattel only, and nothing that affects the realty.

That a bill might as well be brought for compelling the performance of an agreement for the sale of a horse, or for the sale of stock, or any goods or merchandise.

Sir Joseph Jekyll did, in *Cud v. Rutter*,<sup>1</sup> decree a specific performance in the case of a chattel, but Lord Macclesfield reversed it, and it has been the rule of the court ever since not to retain such a bill.

The proper remedy is an action at law, where you may recover damages for the non-performance of the agreement.

The defendants' counsel, to show the impropriety of such a bill, and that the parties ought to be left to law, cited Roll's Reports 493 and Latch's 172.

Upon hearing what the plaintiff's counsel could allege, in order to take this case out of the general rule of the court, Lord Chancellor delivered his opinion as follows:

The general question is, as to the decree for specific performance, and this divides itself into two subordinate ones.

First, whether the plaintiff is entitled to seek his remedy in a court of equity for a specific performance.

Secondly, whether, as to the merits of his case, he is entitled to such a decree.

As to the first, I am of opinion that this is such an agreement, though for a personal chattel, that the plaintiff may come here to have a specific performance.

To be sure, in general this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, etc., for as

those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above a shilling damage.

Therefore, the court have always governed themselves in this manner, and leave it to law, where the remedy is so much more expeditious.

As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade.

But, however, notwithstanding this general distinction between personal contracts, and for goods, and contracts for lands, yet there are indeed some cases where persons may come into this court though merely personal, and the plaintiff's counsel have cited a case in point, *Taylor v. Neville*.<sup>1</sup>

That was for a performance of articles for sale of eight hundred tons of iron, to be paid for in a certain number of years, and by installments, and a specific performance was decreed.

Such sort of contracts as these differ from those that are immediately to be executed.

There are several circumstances which may concur.

A man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this on the part of the buyer.

On the part of the seller, suppose a man wants to clear his land, in order to turn it to a particular sort of husbandry, there nothing can answer the justice of the case but the performance of the contract in specie.

In the case of *John Duke of Buckinghamshire v. Ward*, a bill was brought for a specific performance of a lease relating to alum works, and the trade thereof, which would be greatly damaged if the covenant was not performed on the part of Ward.

The covenants lay there in damages, and yet the court considered if they did not make such a decree an action afterwards would not answer the justice of the case, and therefore decreed a specific performance.

This is something of the like kind; the memorandum appears not to be the final contract, but is to be made complete by subsequent articles.

<sup>1</sup> *Vide* *Colt v. Netterville*, 2 P. W. 504.

I am doubtful whether at law the plaintiff would not have been told this was an incomplete agreement.

Suppose two partners should enter into an agreement by such a memorandum as is in the present case, to carry on a trade together, and that it should be specified in the memorandum that articles should be drawn pursuant to it, and before they are drawn one of the parties flies off, I should be of opinion, upon a bill brought by the other in this court for a specific performance, that notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed.

On the circumstances of the present case such a bill ought to be entertained, but at the same time I will add that courts ought to weigh with great nicety cases of this kind before they determine the bill proper, where it is a mere personal chattel.

Secondly, if the plaintiff on the merits of the case is entitled to a decree.

Nothing is more established in this court than that every agreement of this kind ought to be certain, fair, and just in all its parts.

If any of those ingredients are wanting in the case, this court will not decree a specific performance.

For it is in the discretion of the court whether they will decree a specific performance, because otherwise, as I said before, a decree might be made which would tend to the ruin of one party.

One objection made by the defendant's counsel to the decreeing a specific performance was misrepresentation.

This depends upon the evidence of John Cooper, son of the defendant Cooper, that his father offered the plaintiff £2,800, but he insisted on £3,500, and said Fenwick and Clark, two timber merchants, had valued it at so much, and that this was true on his honor, and when he said a thing on his honor the defendant ought to believe it.

Afterwards the defendants agreed to give £3,050 for the wood, on the opinion they had of Fenwick and Clark's judgment.

If this be true, it is an ingredient which will induce a court of equity not to decree a specific performance, for it comes out now that Fenwick and Carter did not set any greater valuation than £2,500 upon the timber, and this misrepresentation was the ground which induced the defendants to come into the agreement.

This fact is very particularly put in issue, and yet the plaintiff, who examined Okey and his wife that were present when this discourse passed, do not ask them as to this fact.

There is nothing inconsistent therefore in their deposition from Cooper's.



The next point is, as to the preparation of the articles.

Whether there are defects or omissions which ought to have been inserted.

It has been insisted by the defendants that they would have had the usual clause inserted in the articles relating to the buyer's horses being permitted to graze on the land where the timber stands, and likewise would have had a covenant for indemnifying the defendants in falling the timber, because, as it grows in hedge-rows, one side belongs to a stranger, but the plaintiff refused it.

Therefore, if it is most natural to suppose it would fall on that side, the defendant ought to have been indemnified from actions which might have been brought for a trespass on the stranger's land.

But then the counsel differ as to the consequences.

The plaintiff insists the articles ought to be sent to the Master to see if there are usual covenants.

In case of land the plaintiff's counsel would have been right.

But a personal contract is quite different, because, when the defendants saw that the plaintiff would not insert these covenants they had no occasion to wait the event of a Chancery suit, but might go to another market to supply themselves.

Upon the whole, I am of opinion the bill must be dismissed, and if it was to be dismissed upon the misrepresentation it ought to be with costs; but what I would propose is, that if the plaintiff will consent to give up the agreement, I will dismiss it without costs; but if he will bring an action, then with costs.

The plaintiff waving the agreement, his Lordship decreed accordingly.

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## WRIGHT AND OTHERS v. BELL.

IN THE COURT OF EXCHEQUER, JANUARY 21, 1818.

[*Reported in 5 Price 325.*]

THIS was a bill, filed (Mich. Term, 1811) by the assignees of a bankrupt, and the bankrupt, to compel the specific performance of a contract for the purchase of a debt, due to the bankrupt before his bankruptcy, and his then partner, from a merchant resident at Demerara, since deceased.

The bill stated that the plaintiff, Compton (the bankrupt), and Pourtales (who resided abroad), carried on business in partnership together in London as merchants; that in 1806 Compton (Pourtales being out of the kingdom) was duly declared bankrupt, and the other

plaintiffs were chosen his assignees; that at a meeting of the partnership creditors (12th November, 1808) it was resolved that the outstanding debts should be sold, and amongst others the debt in question, due from the estate of Lespinasse, a West India merchant; that the defendant proposed to purchase it, and authorized his managing clerk, David Milne (who was the executor of Lespinasse), to treat for it; that he (Milne) having ascertained the balance to be £550 agreed, on the part of the defendant, to give £500 for it, as would appear by his letter (2d June, 1809) to the plaintiffs on the subject (to which they referred); that the plaintiffs then caused a deed of assignment to be prepared and submitted to the defendant's solicitors, who, after making some slight alterations in it, returned it to the plaintiffs with a note, stating that they considered that the plaintiffs had no right to transfer more of the debt than Compton's share without Pourtales joining in the assignment; when plaintiff Compton, having then obtained his certificate, agreed to indemnify the defendant, which his said solicitors accepted, and inserted a covenant to that effect in the draft, and returned it approved.

The defendant, by his answer, admitted, or did not deny any of the circumstances stated, the main facts on which the bill was founded, except as to the proposal having originated with him, but said that it was made by the plaintiff Compton to Milne, who, the defendant admitted, acted as his agent in the treaty; but he submitted that as plaintiffs could not make a complete title to the whole debt without Pourtales, he was not, therefore, bound to purchase; and he stated that he never intended to accept Compton's indemnity, but that on having a complete assignment of the whole debt, he was still ready to give the £500 for it.

By an amendment in their bill the plaintiffs stated that to obviate all difficulty they had procured an assignment (dated May, 1811) from Pourtales to the assignees of his share of the debt, and that he had constituted them his attorneys.

*Dauncey* and *Girdlestone*, for the plaintiffs (having adverted to the facts and dates), submitted that the present was a valid, equitable agreement for the assignment of a debt, and one which a court of equity would enforce; that this was a chose in action of an assignable nature, and the consideration was fair. The facts being established, they observed, the only question before the court was, whether this is a contract of such a description as the court will recognize to be one of those which they will order to be carried into execution; and they contended that though there might be no case precisely applicable to the present, it was, nevertheless, within the governing principle, on which, on all other occasions, the courts had

interfered to assist a party, on a bill for the specific performance of an agreement.

*Agar and Roupell*, for the defendants (having observed that this was a case of much novelty and great importance), acceded to the facts as stated, for the sake of argument, and in order that the question might be as fully and fairly discussed as if it had arisen on demurrer.

Admitting that a debt was assignable in equity, they insisted that the plaintiff's source of redress was purely legal, and that a contract for such an assignment as was now in question was one of which a court would not compel a specific performance. This being the case of a chattel, the general rule is against the plaintiffs; for, in all the cases on the subject, it has been held that the remedy for non-performance of such contracts as these is properly by action at law for damages, and therefore courts of equity have not jurisdiction, and cannot interfere to order the parties to carry them into execution. And they cited *Dorison v. Westbrook*,<sup>1</sup> *Capper v. Harris*,<sup>2</sup> *Cud v. Rutter*, *Douglas v. Vincent*,<sup>3</sup> and *Pearne v. Lisle*.<sup>4</sup>

In *Buxton v. Lister and Cooper*,<sup>5</sup> which was the case of a contract for the purchase of timber, Lord Hardwicke goes fully into the doctrine, and declares the rule to be that bills for the performance of contracts for the sale of a chattel could not be retained by a court of equity, and that the party should be left to his remedy at law. The reason there given is, that contracts for the sale of stock, corn, hops, etc., vary according to different times and circumstances, so that parties might be ruined by a suit in equity, when in a court of law, perhaps, only a shilling damage might have been recovered. If that doctrine applies to goods, *à fortiori* will it to cases of this sort, where the daily accidents affecting the credit and solvency of parties subject such contracts to fluctuation in value.

[LORD CHIEF BARON. That objection, I take it, would apply equally to contracts for the purchase of land, which sinks and rises in value in an extraordinary manner. We all know very well that the same quantity of land was worth very considerably more four years ago than it is at the present time.]

In the case of land the distinction is that the specific thing can always be given. Here the court cannot give the thing demanded, which is a debt; it can only give what will confer a right of action. This is not a contract executed, but merely and peculiarly executory. Nothing has passed in writing between the parties; no act has

<sup>1</sup> 5 Vin. Abr. 540, pl. 22.

<sup>2</sup> Bunb. 135.

<sup>3</sup> 2 Vern. 202.

<sup>4</sup> Amb. 75.

<sup>5</sup> 3 Atk. 383.

been done on either side. The court is therefore literally called upon, not to compel the performance of a contract, but to compel the parties to contract, and that founded on what may be considered as merely conversation.

Then it is obvious that the court could not effectually decree what is prayed. To give the defendant a title to sue at law, Pourtales must be ordered to permit his name to be used, and the court cannot make any such order against him, who is not a party to the suit, and is resident out of the jurisdiction.

Adverting to the dates, they argued *ab inconvenienti* against the interposition of the court in cases of this sort, submitting that in the lapse of time the party may have become insolvent; or the court might be called on to entertain such suits in cases where the debt might be barred by the statute, before a decree could be obtained.

*Dauncey*, in reply, submitted that the real question was, whether the court can interfere in this case and order the assignment prayed. The novelty of the case furnishes no objection to it; on the contrary, it fully justifies the bill. In the case of *Buxton and Lister*, which was quite a new case, the principle was admitted generally by the Chancellor that bills of this nature might be entertained. In this case the party has no remedy at law, and that it is which forms the ground of his equity. Lord Hardwicke said, in *Buxton and Lister*, that he would decree a specific performance of an agreement between two persons to carry on a trade together, notwithstanding it is in relation to a chattel interest. The decision in that case is therefore entirely in favor of this bill, and as the engagement between the parties is completely proved, performance of the contracts ought to be decreed.

RICHARDS, LORD CHIEF BARON. I certainly do not remember any case of this description before. I acknowledge the principle of the decision in *Buxton v. Lister*, which has been quoted by the counsel for the defendant. My only doubt is, whether this case does not come within the exception. As to the other cases, I do not think they have much application.

This contract was made in 1808 by the defendant, through the medium of Milne, and his acts were undoubtedly binding on the defendant. He agreed to purchase the debt for a sufficiently ample consideration where any doubt existed about it. All that was wanted to enable the purchasers to assert their claim of this debt was the authority to use the plaintiffs' names. Now there is not the least suggestion that any difficulty was thrown in his way by them, as that they had been required to permit their names to be used, and had refused. It does not even appear that the defendant applied to them

for that purpose; he was completely quiescent; and if he did not use diligence, what right has he to complain of the consequences of delay? It is not at this moment suggested that there is any doubt about the debt being recoverable. One party agrees to purchase the debt and the other agrees to give the best assignment they can, and they can now make a perfect assignment.

But the nature and object of the bill and its principle is what has been chiefly objected to in argument. It is said that the contract is not for the payment of money, but to enable the party to recover a debt. So it certainly is; and then the question is, whether this court can and ought to assist the plaintiff in such a suit. And, on the present answer, I think the case is brought within the exception noticed in the case of *Buxton v. Lister*, and that the court may make such a decree. [His Lordship read the admissions from the answer, that the defendant had acceded to the proposal of purchasing the debt.] The only object of dispute then was the assignment, and it seems that now the plaintiffs are enabled to furnish an effectual assignment. I, however, cannot order a complete assignment to be made without a reference; therefore the parties must go before the Deputy Remembrancer, and if he is of opinion that an assignment can be made, he must also prepare the draft, which is all that I can order.

On this answer I cannot compel the defendant to receive the assignment when made unless there be an existing debt, which is not admitted; and that must also be referred to him to ascertain the fact.

Decree accordingly, and reference ordered.

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### ADDERLEY v. DIXON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., DECEMBER 8, 1823;  
FEBRUARY 23, 1824.

[*Reported in 1 Simons and Stuart 607.*]

THE plaintiffs having purchased and taken assignments of certain debts which had been proved under two Commissions of Bankrupt, agreed to sell them to the defendant for 2s. 6*d.* in the pound.

The defendant's solicitor accordingly gave notice of the sale to the assignees, and prepared an assignment of the debts, and the plaintiffs, notwithstanding the purchase money had not been paid, executed it, and signed the receipt for the consideration money, and left it in the solicitor's hands. The bill was filed to compel the defend-

ant specifically to perform the agreement and to pay the purchase money to the plaintiffs.

The defendant, by his answer, submitted that the matter of the agreement was not the proper subject of a bill in equity for a specific performance, and claimed the same benefit as if he had demurred to the bill.

*Mr. Sugden* and *Mr. Garratt* for the plaintiffs.

*Mr. Hari* and *Mr. Treslove* for the defendant.

The VICE-CHANCELLOR. Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.

In *Taylor v. Neville*, cited in *Buxton v. Lister*, specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years and by installments; and the reason given by Lord Hardwicke is that such sort of contracts differ from those that are immediately to be executed. And they do differ in this respect, that the profit upon the contract, being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it at a conjectural price. In *Ball v. Coggs*<sup>1</sup> specific performance was decreed in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundredweight of brass-wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the

<sup>1</sup> 1 Bro. P. C. 140.

annual provision during his life for which he had contracted, at a conjectural price. In *Buxton v. Lister*, Lord Hardwicke puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land, and assumes that as, in both those cases, damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance.

The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of *Ball v. Coggs* and *Taylor v. Neville*, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price.

It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled, by repeated decision, that the remedy in equity must be mutual; and that, where a bill will lie for the purchaser, it will also lie for the vendor.

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DUNCUFT v. ALBRECHT.

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V.C.,

JUNE 9, 1841.

[*Reported in 12 Simons 189.*]

By the London and Southampton Railway Act, passed in the 4th and 5th of Wm. 4th, the subscribers to the undertaking and their successors, executors, administrators and assigns were incorporated, and were empowered to purchase and hold lands for the purposes of the undertaking, and to sell and demise or otherwise dispose of the same in the manner thereby directed, and also to raise, for the purposes of the act, £1,000,000, which was to be divided into 20,000 shares of £50 each, and each share was to be numbered from one to twenty thousand, and distinguished by its number, and the shares were to be vested in the parties raising and paying the same<sup>1</sup> and their respective successors, executors, administrators and assigns, to their

<sup>1</sup> So in brief.

proper use and benefit, proportionably to the sums they should severally contribute; and all subscribers for shares were to be proprietors of a proportionate share of the capital stock of the company, and were to receive a proportionate part of the profits of the undertaking; and the company were to cause the names, additions and places of abode of the subscribers, with the number of shares which they were respectively entitled to, and the amount of the subscriptions paid thereon, and also the number by which every such share should be distinguished, to be entered in a book to be kept by the secretary of the company; and the shareholders were authorized to sell or otherwise dispose of, and to transfer their shares, subject to the rules and conditions therein provided and to such restrictions and regulations as the directors might think necessary to impose; and the form of transfer was set forth in the act; and, on every sale of a share, the deed of transfer, when executed by the seller and purchaser, was to be produced to the secretary, who was to enter in a book a note of the transfer, and to indorse the same on the deed of transfer, and, until such note should have been so entered, the purchaser was not to be deemed a proprietor of the company, nor to have any of the rights or privileges of a proprietor.

By an act passed in the 1st Vict., to amend the preceding act, the company were to cause a certificate, signed by two of the directors and the secretary, to be delivered to every proprietor, specifying the share or shares to which he should be entitled, and the certificate was to be admitted in all courts as *prima facie* evidence of the title of such proprietors, their successors, executors, administrators or assigns, to the share or shares therein specified; and the form of the certificate was set forth in the act; and in case of a transfer of any share to a new proprietor, an indorsement of the transfer on the certificate was to be considered as a new certificate; and the before-mentioned provision in the preceding act respecting the production of the deed of transfer to the secretary, and the entry and indorsement to be made by him, was repealed, and, in lieu thereof, it was enacted that, on every sale of a share, the conveyance, having been executed by the seller and purchaser, should be produced to and kept by the secretary, and, on the production thereof and of the certificate of the share or shares sold, the secretary was to enter in a book a memorial of the transfer and sale, and indorse the entry of the memorial on the deed of transfer, and, on request, he was to make an indorsement of the transfer on the existing certificate of each share sold, and the indorsement, signed by the secretary, was to be considered the same as a new certificate, and, after the memorial should have been made and entered, the seller was to be released



from all liability in respect of the share transferred, and then, and not before, the purchaser was to be deemed a proprietor, and to have the rights and privileges of a proprietor; and the company were empowered to raise an additional capital of £400,000, to be divided into 16,000 shares of £25 each, and the shares were to be numbered from 20,001 to 36,000, and every share was to be distinguished by its number, and was to be vested in the persons who should subscribe for the same and their respective successors, executors, administrators and assigns, to their proper use and benefit, proportionably to the sums by them subscribed; and all subscribers to the new shares were to be proprietors of stock in the company, to the same extent and as beneficially as proprietors of the same number of original shares, and were to be entitled to the rights and privileges, and be under and subject to the powers, provisions, indemnities, remedies and penalties contained in the two acts, in like manner as if the new shares had been original shares, except where altered or varied by the present Act.

By an Act of the 2d and 3d Vict., the title of the company was changed to that of "The London and South-western Railway Company."

The bill, after stating as above, alleged that on the 17th of February, 1840, the defendant was possessed of fifty shares and upwards in the company and of the certificates for them; and that it was then agreed between him and the plaintiff that, in consideration of £53 then paid to him by the plaintiff, he should, at the plaintiff's request, to be made at any time on or before the 31st of December, 1840, transfer to the plaintiff fifty shares at the price of £46 per share; that the agreement was a verbal one, but that on the same day the plaintiff, at the defendant's request, reduced or put it into writing as follows: "Manchester, February 17th, 1840. To MR. JOHN DUNCUFT. SIR: In consideration of the sum of £53 this day paid to me by you, I undertake to transfer to you, or to your nominee by indorsement hereon, at any time, upon request in writing, on or before the 31st day of December, 1840, fifty shares in the London and South-western Railway, upon receiving the amount of £46 per share, with all calls paid; and I further engage to deliver, with the said fifty shares, any new shares or any part of a share that may be created before the expiration of this contract, and to which, as the holder of the said fifty shares, I may be entitled, on your paying me, for such new creation of shares, only such payment as I may have to make, without any interest on such payment. The transfer of the said shares to be at the expense of yourself or your nominee and to be given in exchange for this engagement, and, in default of

such request by you or your nominee within the time so limited, the aforesaid sum of £53 so paid to me for the option hereby given to you of taking the shares I have so contracted to deliver, shall be forfeited to me, and my engagement as to the delivery of the said shares shall be absolutely at an end." The bill further alleged that, in the afternoon of the 17th of February, 1840, the plaintiff presented the above memorandum of agreement or letter to the defendant for his signature; that the defendant read it and said it would require some alteration, and then wrote on the back of it the substance of the alterations, which the plaintiff assented to; and it was then agreed between the parties that the memorandum should be re-copied and the alterations introduced in it, and, when re-copied, should be signed by the defendant on the following morning, and that, at the same time, the plaintiff should pay him the deposit of £53; that the memorandum was accordingly re-copied, with the alterations, and was as follows: "SIR: In consideration of the sum of £53 this day paid to me by you, I undertake to transfer to you or your nominee by indorsement hereon, at any time, upon request in writing, on or before the 31st day of December, 1840, fifty shares, with all calls paid, in the London and South-western Railway, upon receiving the amount of £46 per share; and I further engage to deliver, with the said fifty shares, any new shares or any part of a share that may be created before the expiration of this contract, and to which, as the holder of the said fifty shares, I may be entitled, on your declaring to take such new shares certain, whether the other shares are taken or not, on your paying me, for such new creation of shares, such payment as I may have to make, with interest at the rate of £5 per cent. per annum; the transfer of the said shares to be at the expense of yourself or your nominee, and to be given in exchange for this engagement; and, in default of such request by you or your nominee within the time so limited, the aforesaid sum of £53, so paid to me for the option hereby given to you of taking the shares I have so contracted to deliver, shall be forfeited to me, and my engagement as to the delivery of the said shares shall be absolutely at an end. Should you not take the shares before the first day of July, I am to receive any dividend that may be declared for the then past six months." The bill then alleged that on the 18th of February, 1840, the plaintiff presented the altered agreement to the defendant for his signature, and, at the same time, tendered to him the £53, but he refused to receive the same or to sign the altered agreement; that no more shares in the railway had been created since the date of the agreement; and that the plaintiff made several applications to the defendant between the 18th of February and the 31st of December, 1840, to transfer and

assign the fifty shares to him, and offered to pay the purchase-money for the same, and that, in particular, on the 5th of November, 1840, the plaintiff tendered to the defendant the sum of £2,353, being the purchase-money for fifty shares, and, at the same time, requested the defendant to transfer and deliver the shares and the certificates thereof to him; but the defendant refused to accept such tender or to assign the shares to the plaintiff; that on the 6th of February, 1841, the plaintiff wrote and sent to the defendant a letter requesting the defendant to transfer and deliver to him the fifty shares in the railway sold to him on the 17th of February, 1840, and adding that, unless the shares were so transferred and delivered, a bill would be filed against the defendant for a specific performance of the contract; and that the plaintiff and his solicitor had frequently given notice to the defendant to perform the contract on his part, and that, on the 29th of December, 1840, the plaintiff's solicitor applied to the defendant to accept the purchase-money for the shares, and to transfer and assign them to the plaintiff, and the defendant then expressly refused to perform the contract. The bill prayed that the defendant might be decreed specifically to perform the said agreement for the sale to the plaintiff of the fifty shares in the railway company, and such, if any, new shares as had been or might be created since the 17th of February, 1840, and to transfer all such shares to the plaintiff, and to deliver up the certificates thereof to him, and to account to him for any dividends which might accrue on such shares previous to such transfer; the plaintiff being willing thereupon to pay to the defendant the purchase money, after deducting thereout such sums, if any, as might be received by the defendant for dividends before the transfer of the shares, and the expenses of the transfer; and that the defendant might be decreed to make compensation to the plaintiff for the difference in value of any of the shares at the time when the same should be transferred to the plaintiff, and the time within which the agreement ought to have been performed, the amount of such difference to be ascertained by the highest price which could have been obtained in the market for the shares during such time as aforesaid, and that the plaintiff might be entitled to retain the same out of the purchase money.

The defendant demurred to the bill for want of equity.

*Mr. G. Richards* and *Mr. Mylne* in support of the demurrer.

Then the only question is whether there has been any decision from whence you can extract a conclusion that the court will not decree a specific performance of an agreement for the sale of such shares.<sup>1</sup> Now, I agree that it has been long since decided that you

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market) and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market. And, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this court will enforce.

Then there is nothing, as I understand, either in the Statute of Frauds or in the law of this court which prevents the execution of such an agreement as is here stated; and, though it may be true that the plaintiff has asked more than this court would give or might give under certain circumstances, my opinion is that he has stated quite enough to show that he is entitled to some relief; and, therefore, the demurrer must be overruled.<sup>1</sup>

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DOWLING v. BETJEMANN.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., MAY 13, 27,  
1862.

[*Reported in 2 Johnson and Hemming 544.*]

THE plaintiff was an artist, and the defendants, H. J. and G. S. Betjemann, carried on business as upholsterers in Oxford Street, and had also had dealings in pictures. In the month of May, 1861, the plaintiff, who had painted a picture of "The Raising of Lazarus," entered into an agreement with Messrs. Betjemann, to the same effect as the agreement of September 17, 1861, hereinafter stated, except as to the variations mentioned below, and delivered the picture to Messrs. Betjemann pursuant thereto.

On September 17, 1861, a second agreement was executed in substitution for the first, differing from it in having the month of November, 1863, instead of May, 1863, fixed for the payment of the price in the event of a purchase, and also giving two years from the date of the new in lieu of that of the old agreement, for the engraving and exhibition of the picture.

<sup>1</sup> On the 23d of July, 1841, the Lord Chancellor affirmed the decision in the case above reported.—REPORTER.

According to the plaintiff's allegations, the second agreement was only executed because the original had not been stamped, and the variations in its effect were introduced by Messrs. Betjemann without the plaintiff's knowledge.

The agreement of September 17th was in the following terms :

"The said Robert Dowling hereby agrees to grant to the said Henry John Betjemann and George Stanley Betjemann the sole right to engrave, or cause to be engraved, for their own advantage and benefit, his the said Robert Dowling's picture of 'The Raising of Lazarus,' and further to give up possession to the said Henry John and George Stanley Betjemann the said picture, for the space of two years from the date of this agreement, for the purpose of engraving, and also for the purpose of exhibiting for their own advantage and benefit. In consideration of the said grant of copyright and permission to exhibit the said picture, the said Henry John and George Stanley Betjemann hereby agree to pay the said Robert Dowling the sum of £150, on or before the 1st of November, 1862. They the said Henry John and George Stanley Betjemann further covenant and agree to insure the said picture against damage or injury by fire in the sum of £300, and to keep it so insured during the term of this agreement in the like sum of £300. The said Robert Dowling further agrees to sell the said picture itself, and all its rights and privileges connected therewith, to the said Henry John and George Stanley Betjemann, upon payment of a further sum of £150, on or before the 1st of November, 1863. The said Henry John and George Stanley Betjemann to transfer the policy of insurance of the said picture to the said Robert Dowling, so that he may receive the amount thereof if the picture should be injured or damaged by fire, or any that may be due to him the said Robert Dowling from the said Henry John and George Stanley Betjemann, on the said picture 'Lazarus come forth,' or 'Raising of Lazarus.' And it is further agreed by and between the said parties to this agreement, that the said picture shall remain the sole property of the said Robert Dowling until the full payment of the sum of £300 have been paid him, as before set forth herein. And the said Henry John and George Stanley Betjemann hereby agree, that, on failure of the performance on their part of any of the covenants of this agreement, the said Robert Dowling shall have full right to demand the said picture to be delivered up to the custody of the said Robert Dowling; and the said Henry John and George Stanley Betjemann hereby agree duly to deliver up the same on such demand being made to them in writing by the said Robert Dowling."

The bill alleged that the defendants Messrs. Betjemann entered

into arrangements for the engraving of the picture, but did not carry them out, in consequence of the sale of the picture, hereinafter mentioned, to the defendant Gotto, "although the defendants well knew that, and it is the fact, that the agreement that the same should be engraved formed the principal inducement to the plaintiff to entrust the picture to Messrs. Betjemann, and to offer to dispose of the same for the small sum of money mentioned in the agreement."

The defendants, however, exhibited the picture, and by a placard and by advertisements announced that it was on view at their premises.

The defendants did not insure the picture, alleging that they were unable to effect an insurance.

In November, 1861, Messrs. Betjemann gave to the plaintiff a bill of exchange for £50 on account of the sum of £150 payable for the copyright. The bill was dishonored, but ultimately paid after the sale to Gotto. No other payment was made to the plaintiff.

On March 8, 1862, the defendants Betjemann sold the picture for £375 to the defendant Gotto, who stated in his answer that he had no notice or suspicion that the plaintiff or any other person or persons other than Messrs. Betjemann claimed to be owners thereof; and that he believed they were in possession of the picture as the true owners thereof; and he claimed to be protected as a *bona fide* purchaser for value without notice.

About the same time, but, as appeared, after the agreement for the sale, Messrs. Betjemann, without disclosing the sale, proposed to the plaintiff to take £200 in cash for the picture, in lieu of the £300 payable as provided in the agreement; but this was refused.

In April, the plaintiff accidentally discovered that the picture had been sold to Gotto, and was in his possession; and his solicitors applied without effect both to Messrs. Betjemann and Mr. Gotto for the delivery up of the picture.

The bill contained a charge "that the said picture is a chattel of a special and peculiar value," and also a submission to perform the said agreement, and to sell the said picture to the defendants on being paid the balance of £250, and upon the said picture being duly exhibited and engraved, but not otherwise; and also a submission on the delivery to him of the picture to repay the £50 paid by Messrs. Betjemann to such of the defendants as the court should think fit.

The bill prayed :

1. That it might be declared that the picture had always remained and still continued the sole property of the plaintiff, subject only to the provisions of the agreement entered into with Messrs. Betjemann; and that it might be declared that the plaintiff had never transferred

or parted with the sole legal property, or right of property, in the said picture ; and that he was entitled to have the same delivered up to him, and to retain the same and the sole and absolute right of property therein until the full payment of the said sums of £150 and £150, and until the picture should have been duly exhibited and engraved ; or at all events that it might be declared that the plaintiff had, as against all the defendants, a right of lien upon the picture for the sum of £250, and to have the picture delivered up as a security for the same.

2. That, if and so far as necessary to the relief prayed, the agreement of the 17th of September, 1861, might be specifically performed ; and that, if necessary, the defendants might be decreed to deliver up the picture free of injury, and either pay to the plaintiff the sum of £250, and duly exhibit the picture and cause the same to be engraved ; or otherwise that the agreement might be cancelled, the plaintiff submitting in such case to repay the sum of £50.

3. That the defendants might be restrained from parting with the picture except to the plaintiff, and from suffering the same to be injured or damaged.

4. That the defendants might be declared liable respectively for any accident, injury, or damage to the picture by fire or otherwise, to be assessed as the court should direct. And for payment of costs and further relief.

Evidence was given by a number of eminent artists, to the effect that it was customary with artists to dispose of the right to engrave a picture separately from the right to the picture itself, and to deposit pictures with publishers for the purpose of being engraved and exhibited, without parting with the property in the picture itself.

It also appeared that Messrs. Betjemann had styled their shop a Fine Art Repository, and had placed some pictures therein shortly before the sale to Gotto ; and that they had bought an earlier picture from the plaintiff in 1860 ; but it did not appear that they had ever sold any pictures publicly in their shop before the sale to Gotto.

*Mr. Rolt*, Q.C., *Mr. Powell* (of the Common Law Bar), and *Mr. Everitt* for the plaintiffs.

*Mr. Giffard*, Q.C., and *Mr. Greenside* for the defendant Gotto.

VICE-CHANCELLOR SIR W. PAGE WOOD. This case involves some points of considerable interest ; but from the first it has appeared to me that the great difficulty on the part of the plaintiff was in making out the jurisdiction of this court to interpose in a case so circumstanced as the present. That the court has jurisdiction to order the delivery of a specific chattel of a peculiarly valuable kind, such as a picture, I have never entertained a doubt ; but the observations in

*Fells v. Reed* and cases of that class apply only to chattels of which the value cannot be properly ascertained by a jury. They would very pointedly apply to the case of an artist insisting that the value of his picture should not be left to the estimate of a jury. But the difficulty which has weighed on my mind throughout the case is, that the bill is framed, not by any slip, but advisedly and of necessity, on this principle: the plaintiff has agreed to sell his picture, at a given time and under certain circumstances, for the sum of £300; he has granted the right of engraving the picture and of exhibiting it for a fixed time for £150, at the end of which he agrees to part with the picture itself for the payment of the further sum of £150. The prayer of the bill is founded on the idea that there was some positive engagement to engrave and exhibit the picture; but, on the contrary, the actual agreement was, that the defendants, Messrs. Betjemann, should pay for the privilege of engraving and exhibiting the picture, without any undertaking on their part to do anything of the kind. It is equally clear that the plaintiff retained the property in the picture during this interval. I cannot for a moment entertain the argument that the property passed to Messrs. Betjemann immediately on the execution of the agreement. The terms of the contract are quite conclusive on that point. The rights of the parties under the agreement are plain. The plaintiff agrees to sell at a given future time, and in the meantime to allow the exhibition and engraving of the picture without parting with the property.

Then the bill is framed on this principle: it claims the property subject to the agreement. The first paragraph of the prayer asks a declaration that the picture is the property of the plaintiff until payment, and until the picture shall have been duly exhibited and engraved (this last condition being founded on a mistaken view of the agreement). Then the prayer goes on to claim a lien for the unpaid purchase-money, and that the agreement may be cancelled unless the same is paid and the picture duly exhibited and engraved. It was, moreover, admitted at the bar that the payment of the £300 would dispose of the whole question in the suit. That is the fair view of the case which is made by the bill. Upon this an insuperable difficulty arises in the way of the jurisdiction which this court exercises, to order the delivery of a specific chattel of a peculiar value, as in the *Pusey Horn* case. In such a case as this it appears to me that it would be an innovation on the practice of the court, to say that a jury could not adequately estimate by damages the non-payment of a price fixed, as it is here, by the agreement of the parties.

The bill might possibly have been framed on this footing. It might have said, "You have broken the agreement, and I insist that it shall



be cancelled, and that my picture shall be restored." I do not say that that contention might not have prevailed. But upon the bill as it stands the plaintiff says he is quite satisfied with the agreed price of £300, and it is only in the event of that not being paid that he asks for the restoration of the picture. That reduces the contest to a mere money demand. The plaintiff has bound himself to sell for £300. He says the defendants have attempted to cheat him out of the price, and comes, not primarily to have the chattel returned on the ground of its intrinsic value, but to have the contract performed. The same considerations which dispose of the claim to have the picture returned also displace the right to have a vendor's lien on the picture enforced in this court.

The plaintiff may get the value he has himself put upon his picture from the verdict of a jury. No doubt has been suggested as to Gotto's solvency, and very strong arguments have been urged to show that Gotto would have no defense to an action of trover. According to his own arguments, the plaintiff will get at law the £300, which is all that he asks by this bill. The difficulty in this court is, that he does not found his bill on the right to have a specific chattel restored; but on his title to be paid the price of £300, with which he still professes to be content.

It only remains to dispose of the costs. As to Messrs. Betjemann, there can be no question. Anything more disgraceful than their conduct can scarcely be conceived. They sold the picture as if it were their own; and knowing that they had made more than £300 out of it, they endeavored to beat down the plaintiff, and induce him to accept £200, without informing him of the sale which they had succeeded in effecting. It is clear that they can have no costs.

With respect to Gotto, the plaintiff may either succeed or fail against him at law, and in either view Gotto is entitled to his costs in this court. He ought not in any case to be fixed with the costs of a double litigation. The bill must therefore be dismissed as to Messrs. Betjemann without costs; as to Gotto, with costs.

I have carefully abstained from saying anything as to the defense of purchaser without notice, which it is unnecessary to discuss, on the view which I have taken of the jurisdiction of the court.

## HOMFRAY v. FOTHERGILL.

IN EQUITY, BEFORE SIR JOHN STUART, V.C., JANUARY 27, 29;  
FEBRUARY 9, 1866.

[*Reported in Law Reports, 1 Equity Cases 567.*]

THE plaintiffs, Messrs. Homfray, were two of the partners in the Tredegar Iron Works, and the defendants, Fothergill and Forman, the remaining two partners.

The partnership was established in 1800, and consisted of twenty-four shares, of which ten and a half shares were now held by the defendant Forman, five and a half by the defendant Fothergill, four by the plaintiff S. Homfray, and the remaining four shares by the plaintiff W. Homfray, as trustee for himself and his brothers.

The partnership deed, which was executed in 1816, and now regulated the rights of the present partners so far as was material to the present question, provided as follows :

That no partner should sell one or more share or shares in the company but under the regulations and restrictions next thereafter mentioned, viz., that whenever any partner should be desirous of selling one or more share or shares held by him or her in the said concern, he or she should leave at the place of abode of the other partners notice in writing of such his or her intention at least two calendar months before the then next ensuing annual meeting, and should at such annual meeting next after such notice offer such share or shares as she or he might be desirous of selling to the other partners collectively, to be held, if purchased, in the same proportion as the said partners were for the time being entitled to the said joint capital; and if all the said partners should collectively decline to purchase, then he or she so desirous of selling should offer such share or shares to be sold to the said partners desirous of collectively purchasing, if any, and if no two partners should be desirous to purchase jointly, then the partner or partners desirous to sell should offer such share or shares so to be disposed of to any individual partner as he or she might think proper; and if the said partners should individually decline to purchase, the partner desirous of selling should then, and not before, be at liberty to sell his or her share or shares, so to be sold, to any person or persons not a partner or partners in the said concern, provided he or she sold the same fairly and *bona fide* for £500 per share at the least more than the price at which he or

she offered the same to his or her partners collectively and individually, but not otherwise, without the consent of all the other partners in writing.

In 1864, certain negotiations having been opened by the defendants for the sale of these shares to strangers, it was agreed by all the partners to vary the provisions of the deed as follows:

“That as the articles of partnership require a notice to be given upon the sale of any shares in the concern, it is agreed by the respective partners to waive the notices, and, if it is necessary, to sign any legal paper confirming their assent when required.”

Negotiations were shortly afterwards opened between the plaintiffs and defendants for the purchase of defendants' shares, but they went off chiefly because the parties could not agree upon a stipulation as to the use of a railway called the Sirhowy railway, in which the partners had a large interest. The plaintiffs' solicitor then verbally informed the defendants that the resolution as to the waiver of notices was no longer binding. On the 20th of March, 1865, the defendants wrote to the plaintiffs offering to sell their shares at £16,375 per share, provided the railway should be used. The letter also stated that, as the articles of partnership, as modified, no longer required notice, the defendants requested a definite answer within a fortnight. The letter concluded as follows:

“If we hear nothing from you to the contrary within that period, we shall assume that you decline the offer, and shall consider ourselves at liberty to sell our shares to any other party without further notice.

“We are yours,

“W. H. FORMAN,

“ROWD. FOTHERGILL.”

In reply to this letter, the plaintiffs wrote to Messrs. Forman and Fothergill stating that they considered the offer not an offer according to the deed, that no sale could be made, subject to such stipulations, and declined the offer; but they offered (without prejudice) to purchase Fothergill's five and a half shares without the condition to use the railway at £16,375 per share, and if that offer were accepted, to allow Forman's ten and a half shares to be sold to strangers without previous offer to the partners, so that the sale was completed within six months. They intimated that if any sale to strangers should be attempted, either with or without the condition, they would take proceedings to prevent it.

One of the usual half-yearly meetings of the partners at the works

was summoned for the 17th of May, 1865, and on the 12th of May the plaintiffs received from Forman the following letter:

“LONDON, 11th May, 1865.

“ROWLAND FOTHERGILL, Esq.,

“SAMUEL HOMFRAY, Esq.,

“REV. WATKIN HOMFRAY.

“DEAR SIR: I beg to inform you that I am desirous of selling the ten and a half shares at present held by me in the Tredegar Iron Company, and that it is my intention to offer them at our next meeting at the works, on the 17th instant, to you as my partners in the concern, in accordance with the articles of partnership, at the price of £16,375 per share.

“I beg to add that I give you this intimation of my desire and intention with reference to my shares that my offer to sell them may not take any of you by surprise, but without prejudice to the resolution and agreement passed and entered into between us in March, 1864, and without acknowledging that I am under any obligation to give you any notice or intimation of my desire or intention to sell.

“Yours truly,

“W. H. FORMAN.”

A duplicate of this letter was sent by Forman to Fothergill, and on the 13th of May Fothergill sent the following letter to the plaintiffs:

“HENSOL CASTLE, 12th May, 1865.

“DEAR SIR: Although after the resolution of the 2d of March, 1864, no previous notice is necessary, I beg, out of courtesy to you, but without prejudice to that resolution, to give you notice that it is my intention to offer you, as my partners in the Tredegar Iron Works, according to the terms of our articles of partnership, the five and a half shares which I hold therein, and which I am desirous of selling at our next meeting to be held at the works on the 17th instant. I propose to offer them at the rate of £16,375 per share.

“I am, etc.,

“ROWD. FOTHERGILL.”

A duplicate of this letter was sent by Fothergill to Forman.

On the 17th of May, 1865, a meeting of the partners was held at the works, and after the conclusion of the business Forman offered his ten and a half shares in the works to the partners, Fothergill and the plaintiffs, on the terms contained in the letter of the 12th of May, 1865. The plaintiffs expressed their willingness to purchase them,

but Fothergill declined to purchase them collectively with the plaintiffs. The plaintiffs then said they were willing to purchase the shares jointly, to which Forman replied, "I make no offer to you."

A meeting took place on the 7th of June between the plaintiffs and defendants, at which a proposal was considered for the admission of a Mr. Pilditch into the partnership by purchase of the defendants' shares, or some of them. The negotiations failed, because, as the plaintiffs alleged, the defendants insisted on the condition that the Sirhowy railway should be used. Some further negotiations took place, but ultimately the plaintiffs filed this bill alleging that Fothergill at the last-mentioned meeting went on to threaten that the defendants would sell their shares to other parties without offering them to the plaintiffs; and that the defendants had actually entered into a negotiation with Pilditch, or some other persons, to sell their shares, and "all through the said transaction had been, and now were, acting in concert, and combining together with a view to evade the provision in the deed of co-partnership as to the sale of shares by partners to the other partners in preference to persons not partners, and contrary to the deed to sell these shares to strangers without giving the plaintiffs the option of purchasing, which they were willing to do, and also to bind the company to use the Sirhowy railway.

The bill prayed, 1. That Fothergill might be restrained from selling his shares to any persons until he should have offered them to the plaintiffs, under the partnership articles, and they had declined to purchase them; and that Forman might be restrained from selling his shares to any persons other than the plaintiffs. 2. That it might be declared that the plaintiffs were, on the 17th of May, 1865, entitled to exercise the option of purchasing Forman's ten and a half shares at £16,375 per share; and, 3. That, if necessary, the true construction of the deed might be declared, and that it might be declared that the provisions respecting the sale of their shares by partners to their co-partners had not been varied.

Both defendants, by their answer, denied that any intention existed, or had been expressed, of violating the provisions of the partnership deed, and alleged that the reason why Forman declined to offer his shares to the plaintiffs was that the plaintiffs had not the means of effecting the purchase.

There was a great deal of evidence, but there was not much conflict as to the facts.

The *Attorney-General* (*Sir R. Palmer*), *Mr. Bacon*, Q.C., and *Mr. Darby* for the plaintiffs.

*Mr. Rolt*, Q.C., *Mr. W. Collins*, Q.C., and *Mr. Bedwell* for the defendants.

Feb. 29. SIR JOHN STUART, V.C. This suit is instituted to obtain the assistance of the court to restrain an alleged violation of an important clause in a deed of partnership. The construction of this clause, as applied to the acts and conduct of the parties, is very difficult, and the duty of the court is to construe it with a proper regard to the rights and benefits which it gives to each and all of the contracting parties.

In cases of private partnership composed of a few individuals, as distinguished from joint-stock companies, clauses relating to a partial dissolution by a sale or transfer of shares are of vital importance. The introduction of any stranger to whom the caprice of one partner may sell and transfer his share might not only produce disagreeable consequences by a compulsory association with a stranger, but might disconcert and perhaps destroy a successful business.

To the retiring partner who wishes to sell his shares, the principal, if not the only, matter of importance is the price which he is to obtain. But if, by contract, the continuing parties have a right of pre-emption, the great value and importance of that right must be recognized, and this court will restrain by injunction the violation of it, and will, in a proper case, enforce its performance by decree.

For the defendants, the question in this case has been argued as if the jurisdiction of this court to enforce the performance of such a clause was as much a discretionary jurisdiction as the performance of an ordinary contract between vendor and purchaser.

That cannot be a correct view, because the rights of the parties under a clause of pre-emption in partnership articles is not, generally speaking, the subject of cognizance in a court of law. This court cannot say, as in the ordinary contract between vendor and purchaser, that it will leave the parties to their legal remedy.

Nor can this court say, where there is a right of pre-emption, that the person desirous of selling may choose to which of his partners he will offer to sell, and that he may choose to exclude some from the offer unless on the true construction of the clause such a choice is clearly given. Exclusion of all choice to the vendor, and an absolute right to the continuing partners, is the great object of such a clause. As soon as the character of vendor is assumed the right of pre-emption is an absolute right, excluding choice by the vendor.

How far there may be a right to retract an offer before acceptance, and to what extent the *locus penitentiae* may be permitted, must depend on a fair consideration of the terms of the clauses and the conduct of the parties.

Where, as is usual, and as occurs in this case, a preliminary notice is necessary, and a day is fixed when the offer is to be accepted or rejected, if a question arise whether the offer might be retracted at any

time between the notice and the day fixed for acceptance or rejection, although on the first impression there might seem to be a right to retract, still that may be modified by acts fairly done by the continuing partners on the faith of and in reliance on the *bona fides* of the notice.

In the present case no difficulty arises on the question of notice. Both plaintiffs and defendants admit the sufficiency of the notice. The question which occurs on the pleadings as to the waiver of the notice seems not of much importance. If it was necessary to decide it, there would be difficulty in holding that there was a permanent and complete waiver of that notice which is required by the deed. As to the offer, the clause seems compulsory in its terms. On an offer being made, first to all the other partners collectively, if that offer be declined, the language of the clause is clear and positive that there shall be an offer to the other partners desirous of collectively purchasing. As to this second offer, the language might have been such as to leave it to the will and discretion of the vendor, whether he should go on to make any further offer than the first offer. There might have been the words "may if he shall think fit," or other words giving an option, not to go further than the first offer. But the words of this clause are so clear as to exclude any such option. The words are: "And if all the said partners shall collectively decline to purchase, then he or she so desirous of selling shall offer such share or shares to be sold to the said partners desirous of collectively purchasing, if any."

This language is clear and peremptory. After the first offer the other partners desirous of purchasing collectively are persons whose desire to purchase is protected by imperative words requiring that the shares shall be offered to them. If this right is conferred upon them by the words of the contract the court has no warrant for refusing to enforce it, and no warrant for giving to the person desirous of selling an option or a power to retract the rights conferred by a clause which he has advisedly and upon notice brought into operation. The right arises and comes into active operation as soon as the notice is given. There is a great difference between a clause framed so as to make the second offer compulsory and a clause which should give to the person desirous of selling an option to stop after the first offer. The notice of the offer is required in order to give time for consideration and preparation. So large a sum as the purchase-money in this case probably requires efforts, and perhaps expenses and collateral arrangements, which, when once made for the acceptance of the offer, might render the exercise at the last moment of an option to stop at the first offer an intolerable hardship. This was probably the reason for the clear and positive language of the clause, that after the first offer to sell there shall then be an offer to the

other partners desirous of purchasing. The notice is in fact the offer, and the day named for the formal offer is only named for the purpose of fixing the last moment for acceptance. Unless then accepted the vendor's right of selling to a stranger comes into immediate operation.

The conduct of the defendants shows the importance of having had the clause so framed as to give the plaintiffs the right to have and accept the next offer.

A benefit so important as the right of pre-emption which is secured by this clause is not to be taken away by any illusory proceeding, or by evading the language of the contract. But the struggle of the defendants is in fact to evade the operation of the clause. Before the notice of the 11th of May, 1865, there had been on four occasions negotiations by the defendants for the sale of their shares. When the offer of the 11th of May, 1865, was sent to the plaintiffs, it was a matter of certainty that the defendant Fothergill did not intend to purchase, and, therefore, that the only offer which the defendant Forman could make in good faith was an offer to sell to the plaintiffs. Accordingly, the notice contains no limitation or reservation. It contains no intimation confining it to all the other partners collectively, to the exclusion of the two plaintiffs collectively. It was well known that Fothergill would not purchase, and that an offer which included him must be refused. Nevertheless, the defendant Forman might have worded his notice so as to restrict the offer to the others, including Fothergill, and might have stated that there was no offer to the plaintiffs collectively unless in conjunction with Fothergill. But the notice of the offer not being so expressed, and being read as an offer in compliance with the clause, no honest interpretation can be put upon it other than that it was an offer to the plaintiffs.

Moreover, the language of the notice of the 11th of May, 1865, is such that, unless the plaintiffs had insisted on accepting, and if they had been silent at the meeting, the defendant Forman would have been entitled to sell to a stranger.

According to the defendant's construction, the notice and the meeting were for a purpose illusory and absurd. But if the notice is to be construed according to the imperative language of the clause, and the plaintiffs, believing that the defendants were acting in good faith, came to the meeting to accept an offer which the defendants had given them notice would be made, and at the meeting stated their acceptance of the offer which the defendants were bound to make, their right to compel the defendants to sell to them must be complete, unless the court is authorized to construe words which are imperative as giving an option which it is the object of the clause to exclude.

Looking at the answer of the defendants and the evidence, it is



plain that they have two objects in view: one is to sell to a stranger, the other is to evade the plaintiffs' positive right of pre-emption. The meeting of the 17th of May, 1865, at which they set up the pretence of refusing to make any offer to the plaintiffs, was immediately followed by an attempt to persuade the plaintiffs to consent to a sale to a stranger. According to the defendants' own statement of their case, the only reason for refusing to the plaintiffs their right of pre-emption is that they have not money to complete the purchase. But as this is a matter easily brought to the test, and the defendants refuse to bring it to the test, it bears the appearance of a mere pretext. The right to limit a time for payment of the purchase-money affords a sufficient protection. To refuse to give to the plaintiffs that to which they have a right, on the pretext that they are not able to exercise the right, and at the same time to refuse to employ the obvious means of putting the alleged inability to the test, is an injustice which this court ought not to permit.

No question arises as to the price, for it has been fixed by the defendant Forman himself. It seems unnecessary to consider the attempt of the defendants to embarrass the plaintiffs in their right to the specific performance of the contract for pre-emption by the repeated proposal to impose a condition as to the use of the Sirhowy railway.

In the 27th and 35th paragraphs of the answer the account which the defendants give of their conduct and motives manifests a settled disposition to deprive the plaintiffs of the benefit of pre-emption. Therefore, unless the clear and positive words of the clause, unqualified as they are, can be read as giving to the defendants an option and a discretion which seems to have been carefully and intentionally excluded, the court is bound to protect and enforce by its decree the plaintiffs' right of pre-emption. For this purpose there must be a declaration that, according to the true construction of the clause of pre-emption in the pleadings mentioned, and having regard to the notice of the defendant Forman, of the 11th of May, 1865, and the proceedings at the meeting on the 17th of May, 1865, the plaintiffs are entitled to be considered and declared the purchasers of the shares of the defendant Forman as from the 17th of May, 1865, at the price of £16,375 per share, and decree the same accordingly.

Solicitors for the plaintiffs, *Messrs. Hooke & Street.*

Solicitors for the defendants, *Messrs. Oliverson, Peachy & Co.*

## P. &amp; F. CORBIN v. THOMAS TRACY AND ANOTHER.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, SEPTEMBER TERM, 1867.

[Reported in 34 Connecticut Reports 325.]

BILL in equity, brought by the petitioners, a joint stock corporation, to the Superior Court for Hartford County, to compel the specific performance of a contract to assign a patent right. The Superior Court (Loomis, J.) passed a decree in favor of the petitioners, and the respondents filed a motion for a new trial and a motion in error. The case is sufficiently stated in the opinion.<sup>1</sup>

*C. E. Perkins* in support of the motions.

*Hubbard* and *C. E. Mitchell*, *contra*.

CARPENTER, J. Under the motion in error, it is objected that the petitioners have not made out a case for the interference of a court of equity; that courts of equity in this State will not interfere to enforce agreements to sell personal property unless the circumstances are such as to make a trust, because there is in such a case a remedy at law by an action for damages.

The objection assumes that there is a distinction in questions of this character between real and personal property. If any such distinction exists it does not go to the extent claimed.

The ground of the jurisdiction of a court of equity in this class of cases is that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which in many cases would fall far short of the redress which his situation might require. Whenever, therefore, the party wants the thing *in specie*, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. They will decree the specific performance of a contract for the sale of lands, not because of the peculiar nature of land, but because a party cannot be adequately compensated in damages. So in respect to personal estate; the general rule that courts of equity will not entertain jurisdiction for a specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy.<sup>2</sup>

The jurisdiction, therefore, of a court of equity does not proceed upon any distinction between real estate and personal estate, but

<sup>1</sup> So much of the opinion as relates to the motion for a new trial has been omitted.—ED.

<sup>2</sup> 2 Story's Eq. Jur., §§ 717, 718.

upon the ground that damages at law may not in the particular case afford a complete remedy.<sup>1</sup> When the remedy at law is not full and complete, and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personalty.<sup>2</sup>

An application of these principles to the case before us relieves it of all difficulty. The contract relates to a patent right, the value of which has not yet been tested by actual use. All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand, it may be so simple in its principle and construction as to defy all competition, and give its owner a practical monopoly of all branches of business to which it is applicable. In any event its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages. On the whole we are satisfied that justice can only be done in a case like this by a specific performance of the contract.

There is, therefore, no error in the decree complained of.

In this opinion the other judges concurred.

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## THE EQUITABLE GAS LIGHT COMPANY OF BALTIMORE CITY *v.* THE BALTIMORE COAL TAR AND MANUFACTURING COMPANY.

IN THE COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1884.

[*Reported in 63 Maryland Reports 285.*]

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the court.

The cause was argued before ALVEY, C. J., YELLOTT, MILLER, IRVING, and BRYAN, J.

*Thomas W. Hall* for the appellant.

*William Reynolds* for the appellee.

ALVEY, C. J., delivered the opinion of the court. This is a bill filed by the appellee, the plaintiff below, for an injunction, and for

<sup>1</sup> 1 Story's Eq. Jur., §§ 716, 717, 718, and cases there cited; *Clark v. Flint*, 22 Pick. 231.

<sup>2</sup> 3 Parsons on Contracts (5th ed.) 373.

specific performance of a contract set forth in the bill. The injunction was granted, and, upon answer filed by the defendant, an appeal was taken from the order granting the injunction. We are to enquire therefore whether, upon the allegations of the bill, assuming that they will be supported by proof, there is such case stated as justified the court in granting the injunction? And this depends upon the antecedent question whether, upon proof of the allegations of the bill, there will be such case presented as will justify the court in decreeing specific performance of the contract alleged.

The contract alleged in the bill is, that on the 14th of Feb., 1882, the defendant agreed to sell to and allow the plaintiff to take away all the coal-tar that might be produced at the defendant's gas-works in the city of Baltimore, for and during the term of five years from that date, for a stipulated price per gross ton, payable four months from the 20th of each month. That this contract, at the time the terms thereof were agreed upon, was not otherwise reduced to writing than in the form of a mere memorandum in a pocket memorandum-book of the president of the plaintiff company, and that such memorandum was not signed by any one for or on behalf of the defendant. It is alleged that the terms of the contract, as briefly noted in the memorandum made at the time, were expressly assented to by the vice-president, then acting as president, of the defendant company; and that it was then and there distinctly agreed that the terms of the contract thus agreed upon should be reduced to writing in proper form, and be signed by the parties thereto; and to that end it was agreed that the president of the plaintiff should have the contract prepared in writing for the signatures of the proper officers of the respective parties. That such contract was, in due time, prepared in duplicate form, one of which duplicates was signed by the president of the plaintiff company, and both duplicates were submitted to and left with the president of the defendant for execution, and that said president approved of the contract thus prepared, and promised that it should be signed forthwith by the proper officers of the defendant. That the plaintiff, supposing that the contract had been duly signed on the part of the defendant, and confiding in the good faith of its officers, failed to call for the duplicate that was, or should have been, signed on the part of the defendant, but proceeded at once to carry out the terms of the contract on its part, by taking away the coal-tar from the works of the defendant, and paying therefor as required by the terms of the agreement; and that it has continued so to take away and pay for such coal-tar down to the time of filing the bill.

It is then alleged that the defendant, through its president, in Nov., 1882, notified the plaintiff that the latter should pay a higher

price for the coal-tar than was agreed upon by the contract recited, or otherwise it could not get the coal-tar; but the plaintiff refused to accede to such proposition, and insisted upon the observance of the terms of the contract. That the plaintiff then demanded the production of the written contract, which was supposed to have been signed by the proper officers of the defendant, but which demand was refused, under the profession of ignorance of the existence of such contract. It is then charged that the written contract left with the president of the defendant was either signed on behalf of the defendant and afterwards fraudulently withheld by its officers, with the view of obtaining an undue and fraudulent advantage of the plaintiff, or such officers had purposely refrained from signing such contract, with the fraudulent intent of deceiving the plaintiff, and of keeping the matter within their own control, to enable the defendant to extort from the plaintiff a higher price for such coal-tar than that agreed upon in the contract. It is then alleged, that in June, 1884, the defendant gave notice to the plaintiff that the latter would not be allowed to take away any more of the coal-tar after the last day of that month; and the bill then proceeds to charge, that if the defendant is permitted to evade or escape from the obligation of its contract, and be allowed to sell and deliver the coal-tar to other parties, the plaintiff will thereby suffer great and irreparable damage, for which no adequate redress or remedy could be obtained at law, for the reason that the plaintiff is engaged in the manufacturing of certain articles for which the coal-tar is a necessary material, and relying upon the contract with the defendant, the plaintiff has contracted for the sale, in advance, of all the products that can be made by it from the coal-tar to be obtained from the defendant's gas-works for the next twelve months; and as a supply of such coal-tar cannot be otherwise obtained in the city of Baltimore, it would be impossible for the plaintiff to fulfill its contracts otherwise than by purchasing the coal-tar in other and distant cities, and transporting the same at great expense and loss, the amount of which it is impossible to estimate in advance, etc.

Upon these allegations the plaintiff prays that the defendant may be required to produce in court the written contract prepared and left with its president to be signed, and if not already signed on behalf of the defendant, that the latter be required to execute the same as originally contemplated; or, if the duplicates be lost or destroyed, that the defendant, by its officers, be required to sign the original memorandum made at the time the terms of the contract were agreed upon, and which is filed with the bill as an exhibit. The plaintiff also prays that the contract, as set forth in the bill, be specifically

enforced ; and that the defendant, in the meantime, be restrained by injunction from disposing of the coal-tar to any third party ; and for general relief.

It is very clear that the contract alleged, unless evidenced by a sufficient writing, is within the prohibition of the fifth clause of the fourth section of the Statute of Frauds, of 29 Charles II., ch. 3, which declares that no action shall be brought "upon any agreement that is not to be performed within the space of one year from the making thereof," unless such agreement, "or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Here the memorandum made of the contract, not being signed by the party sought to be charged, is not sufficient to charge the defendant at law ; yet the contract is not void. The statute only interposes a prohibition to maintaining an action thereon. But it seems to be regarded as a settled principle, that the equity of part performance, to entitle the plaintiff to specific execution of contracts within the statute, does not extend to contracts within the prohibitory clause just recited, when such contracts, not being evidenced by writing, relate to personal service, or the subject-matter of them is the sale and delivery of mere personal chattels.<sup>1</sup>

But in this case there is a preliminary question that may relieve the case of the difficulty just stated, and that is, whether, upon the allegations of the bill, in respect to the fraudulent withholding of the written contract, or the fraudulent refusal to sign such contract, in accordance with the express agreement alleged, a court of equity should not exercise jurisdiction, either to require the contract to be produced, if signed, or if it be not signed, that the defendant be required to produce and execute the written contract, prepared and left to be signed, in pursuance of the express agreement in that behalf. This agreement was, according to the allegations of the bill, of a distinctive character, and was looked to by both the contracting parties at the time as essential to the security of their rights. To allow either of the parties to evade its liability and to get the advantage of the other by resorting to such a fraudulent subterfuge as that charged upon the defendant, would be against all equity and conscience, and such as no well-adjusted system of jurisprudence could tolerate. The authorities, we think, fully warrant a court of equity in the exercise of its jurisdiction in such case, to enforce the production of the con-

<sup>1</sup> Pom. Spec. Perf. of Contr., secs. 99, 100; *Britain v. Rossiter*, on Appeal, 12 Q. B. Div. 123, referred to with approval by the Lord Chancellor and Lord Blackburn, in the recent case of *Madison v. Alderson*, 8 App. Cas. 474, 490.

tract fraudulently withheld to the injury of the plaintiff, or to enforce the due and proper execution of the contract, if such execution be fraudulently and without justifiable excuse delayed, to the injury of the plaintiff. In the case of *Stoker v. Wedderburn*,<sup>1</sup> an application for specific performance of a contract, the proposition was fully acceded to by Vice-Chancellor Wood, that where there was an agreement to execute a deed or other instrument containing certain provisions, the court would order the execution of such instrument, without regard even to the question whether or not its provisions were such as the court could decree them to be specifically performed, the object being to vest in the parties the legal rights which they had mutually agreed to confer on each other. And the enforcement of such principle is not by any means of a novel or doubtful character, or of unfrequent occurrence.<sup>2</sup> If, therefore, the allegations of the bill, in respect to the withholding, or refusal to execute the contract, be established by proof, this court is of opinion that the defendant should be decreed to produce or to execute the contract in manner and form in accordance with the agreement and understanding of the parties.

And this being done, the question then arises, whether the contract is of a nature that a court of equity will specifically enforce it; for it seems to be a well-settled general rule that the court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform. In such case the party injured by the breach of the contract is left to his remedy at law.<sup>3</sup>

It is certainly a well-recognized general principle by courts of equity that they will not decree specific performance of contracts for the sale of goods and chattels, not however because of the nature of the property, the subject-matter of the contract, but because damages at law, calculated on the market price of the goods and chattels bargained for, furnish, in ordinary cases, an adequate redress to the purchaser for the breach of the bargain by the vendor.<sup>4</sup> But there are many exceptions to this general rule, founded principally upon the inadequacy of the remedy at law in the particular case, or the special and peculiar nature and value of the subject-matter of the contract. In the 2d vol. of Story's Equity, §§ 718 to 725, the general rule, with the exceptions thereto, will be found fully discussed, with reference to all but the very recent cases. And among the cases forming

<sup>1</sup> 3 K. & J. 403.

<sup>2</sup> *Taylor v. Fire Ins. Co.*, 9 How. 390.

<sup>3</sup> *Fothergill v. Rowland*, L. R., 17 Eq. 132.

<sup>4</sup> 2 Sto. Eq., § 717; *Sullivan v. Tuck*, 1 Md. Ch. Dec. 63.

exceptions to the general rule, there is one stated of a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by installments, of which specific performance was decreed ; for the reason, as supposed by the author, that, under the particular circumstances of the case, there could be no adequate compensation in damages at law ; for the profits upon the contract being dependent upon future events could not be correctly estimated in an award of present damages. And so in the case put by Lord Hardwicke, in the case of *Buxton v. Lister*,<sup>1</sup> and repeated by Judge Story, as an apt illustration ; a man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the seller ; and in such case a specific performance would seem to be indispensable to justice. And so Mr. Pomeroy in his excellent work on Specific Performance of Contracts, § 15, p. 20, states it as a well-settled principle in the doctrine of specific performance, that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such case the plaintiff could not be indemnified by any such amount of damages as he could recover at law.

In this case the allegation is that the coal-tar contracted to be supplied by the defendant is indispensable to the business of the plaintiff, and that the latter cannot otherwise obtain a supply in the city of Baltimore, and that if the defendant were permitted to withhold the supply, the plaintiff would be subjected to great additional expense and labor in procuring the material from distant cities. This gives the material a special and peculiar value to the plaintiff in Baltimore, and makes it specially inequitable in the defendant to refuse to perform its agreement. As was said by the Chancellor in *Sullivan v. Tuck*,<sup>2</sup> it would be impossible, or at all events extremely difficult, for a court of law to give the plaintiff adequate damages, that is, to determine and measure the amount of damages which the plaintiff may sustain in the future, by the refusal to allow it to take away the material from the defendant's works, in fulfillment of the contract. The contract, therefore, according to the allegations of the bill, being one of a nature proper to be specifically enforced, the court will interfere by injunction to restrain the defendant from otherwise disposing of the subject-matter of the contract, though the negative obligation not to otherwise dispose of the material may be only implied from the positive terms of the agreement. This principle is abundantly estab-

<sup>1</sup> 3 Atk. 385.

<sup>2</sup> *Supra*.



lished by repeated decisions.<sup>1</sup> We shall therefore affirm the order appealed from, with costs in this court to the appellee.

Order affirmed, and cause remanded.

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GEORGE B. ADAMS v. WILLIAM T. MESSINGER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 19,  
1888.

[*Reported in 147 Massachusetts Reports 185.*]

BILL in equity, filed March 15, 1887, alleging that the defendant, who was the owner of letters patent of the United States, and the plaintiff, who was the owner of similar letters patent of the Dominion of Canada, executed the following instrument under seal :

“Memorandum of agreement made this sixth day of May, 1886, between William T. Messinger and George B. Adams, both of Cambridge, Massachusetts, which witnesseth as follows :

“Said Messinger agrees to furnish and deliver to said Adams, within three months from this date, one perfect working injector of the sizes one, two, three, four, five, and six, in place of the same number of said machines now in possession of said Adams, the said injectors to be tested under the following conditions, viz.: to be connected with street water-main and steam pressure varying from twenty to one hundred and fifty pounds; to lift from four to twenty feet steam pressure varying from twenty to one hundred and fifty pounds. Upon delivery of said injectors, so tested, said Adams agrees to pay said Messinger (\$500) five hundred dollars in cash.

“Said Messinger further agrees to furnish and deliver to said Adams, within six months from this date, one perfect working injector of sizes seven, eight, nine, ten, and twelve, which shall be tested under the same conditions as numbers one, two, three, four, five, and six, and also to permit said Adams to copy any drawings which said Messinger may make, or have made, of any of said sizes of injectors or alterations therein. Upon the delivery of said injectors, so tested, said Adams agrees to pay said Messinger for said sizes seven, eight, nine, ten, and twelve the list price according to catalogue now printed, with eighty per cent. discount, and surrender to said Mes-

<sup>1</sup> *Wolverhampton, etc., R. Co. v. London & N. W. R. Co.*, L. R., 16 Eq. 433, 440; *De Mattos v. Gibson*, 4 De G. & J. 276; *Le Blanch v. Granger*, 35 Beav. 287; *Holroyd v. Marshall*, 10 Ho. L. Cas. 191, 210, per Lord Chancellor Westbury.

singer his promissory note for \$181.13, to order of George B. Adams, dated of even date herewith. The foregoing tests shall be made in presence of said Adams or some person appointed by him for that purpose.

"By the term 'injector' in this agreement is meant the W. T. M. injectors for steam boilers made under and according to letters patent of the Dominion of Canada issued to said Messinger, dated August 1, 1884, and numbered 19,876, dated September 8, 1884, and numbered 20,162, and dated September 8, 1884, and numbered 20,164, and similar letters patent of the United States.

"Any and all improvements that said Messinger may make in injectors for steam boilers shall be, so far as the Dominion of Canada is concerned, for the benefit of said Adams, and whenever said Messinger shall take out any letters patent of the United States for said injectors for steam boilers, he or his heirs or assigns shall forthwith apply for letters patent of the Dominion of Canada, and upon receiving the same shall immediately, without any further consideration, assign and convey the same to said Adams or his legal representatives, and further, that in any business or operation he may engage in under letters patent of the United States, or in any other business, he will not directly nor indirectly do any act to the prejudice of the said letters patent of the Dominion of Canada, or the monopoly thereby secured.

"Witness our hands and seals the day and year first above written.

"WM. T. MESSINGER. (L. S.)

"GEO. B. ADAMS. (L. S.)"

The bill also alleged that the defendant, since the date of the agreement, had taken out letters patent of the United States for improvements in such injectors, viz.: Letters Patent No. 350,545, No. 350,546, and No. 350,547, all bearing date October 12, 1886; that the plaintiff had always been ready, and had offered specifically to perform the above agreement on his part; that the plaintiff had frequently applied to the defendant and requested him to perform the agreement on his part, but he had refused and neglected to perform the same, or any part thereof; and that by reason of the peculiar nature and construction of such injectors, of which the defendant was the inventor, the plaintiff had been unable to supply himself therewith elsewhere, but could only obtain them at the hands of the defendant, and had suffered great and peculiar and unusual damage by reason of the defendant's refusal to furnish them, and by reason of the defendant's refusal to apply for and assign to him Canadian letters patent.

The prayer of the bill was, 1st, that the defendant might be decreed specifically to perform the agreement, and that for the purposes aforesaid all proper directions might be given and inquiries made; 2d, that there might also be an assessment of the damages sustained by the plaintiff by reason of the defendant's neglect to perform his agreement, and that the defendant might be ordered to pay the same; and, 3d, that in the meantime the defendant might be restrained from alienating or encumbering his right to letters patent of the Dominion of Canada.

The defendant demurred to the bill on the following grounds: "1. That the plaintiff has not stated such a case as entitles him to any relief in equity against the defendant. 2. That the plaintiff has a plain and adequate remedy at law. 3. That the agreement, specific performance of which the plaintiff prays may be decreed, is a contract for personal services. 4. That the specific performance, which the plaintiff prays may be decreed, requires the exercise of mechanical skill, intellectual ability and judgment. 5. That the specific performance of said agreement involves the building of a machine embodying a patent. 6. That the securing of letters patent in Canada involves the action of officers of a foreign government, and cannot be the subject of an order for specific performance. 7. That it does not appear by said bill what relief the plaintiff prays for, and the plaintiff's bill is entirely indefinite and uncertain."

W. ALLEN, J., sustained the demurrer, and the plaintiff appealed to the full court.

*C. S. Knowles* for the defendant.

*W. B. Durant* for the plaintiff.

DEVENS, J. It is the contention of the defendant that the plaintiff has a full, complete and adequate remedy at common law by an action for damages, and that the court sitting in equity cannot grant the relief sought by the prayer of the bill.

The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the Statute of Frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have, of course, no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character.

Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully sat-

ified by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract.<sup>1</sup> A contract for bank, railway, or other corporation stock freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained.<sup>2</sup>

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed.<sup>3</sup> An agreement to assign a patent will be specifically enforced.<sup>4</sup> Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced.<sup>5</sup> As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver certain described working steam injectors within a specified time to the plaintiff, and also that, if the defendant shall make improvements in injectors for steam boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and on obtaining them will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and therefore that the defendant cannot be ordered to make and deliver the injectors contracted for. But

<sup>1</sup> Story Eq. Jur., § 717; *Clark v. Flint*, 22 Pick. 231.

<sup>2</sup> *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; *Treasurer v. Commercial Mining Co.*, 23 Cal. 390; *Poole v. Middleton*, 29 Beav. 646; *Doloret v. Rothschild*, 1 Sim. & Stu. 590. See *Chaffee v. Middlesex Railroad*, 146 Mass. 224.

<sup>3</sup> *Lloyd v. Loaring*, 6 Ves. 773; *Fells v. Read*, 3 Ves. Jr. 70; *Lowther v. Lowther*, 13 Ves. 95; *Williams v. Howard*, 3 Murphey 74.

<sup>4</sup> *Binney v. Annan*, 107 Mass. 94.

<sup>5</sup> *Hapgood v. Rosenstock*, 23 Fed. Rep. 86.

the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mould its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here.

The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. It does not appear from the bill that they were yet to be made when the contract was executed. But if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they are composed. The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that no difficulty such as has sometimes been experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court.

Agreements to make an archway under a railway, or to construct a siding at a particular point for the convenience of the landowner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do.<sup>1</sup> The case at bar is readily distinguishable from that of *Wollensak v. Briggs*,<sup>2</sup> on which the defendant much relies. In that case the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application

<sup>1</sup> *Storer v. Great Western Railway*, 2 *Yo. & Col. Ch.* 48; *Greene v. West Cheshire Railway*, *L. R.* 13 *Eq.* 44.

<sup>2</sup> 20 *Brad. (Ill.)* 50.

for letters patent in Canada and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced specifically, and the plaintiff compensated in damages for the breach of the other.

When a contract relates to but a single subject, and it is impossible for the defendant to perform it, except partially, the plaintiff is entitled to the benefit of such partial performance and to compensation if it be possible to compute what is just, so far as it is unperformed. It was therefore held in *Davis v. Parker*,<sup>1</sup> that where one had agreed to convey land with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase-money of the value of the wife's interest at the time of the conveyance.<sup>2</sup>

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada for the improvements which the defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court, takes cognizance of many things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record.<sup>3</sup>

There is nothing to show that the defendant, in making his application in Canada for the patent, is compelled to leave the State any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here the party would be ordered to make application. It was held in *Runstetler v. Atkinson*,<sup>4</sup> that where a formal assignment of an invention had not been made, but a valid agreement had been made to assign, equity would order the party to make the formal assignment, and also to make application for the patent which, in such case, would issue to the assignee. The laws of

<sup>1</sup> 14 Allen 94.

<sup>2</sup> See also *Milkman v. Ordway*, 106 Mass. 232, 253; *Curran v. Holyoke Water Power Co.*, 116 Mass. 90.

<sup>3</sup> *Pingree v. Coffin*, 12 Gray 288; *Dehon v. Foster*, 4 Allen 545; *Cunningham v. Butler*, 142 Mass. 47; *Newton v. Bronson*, 13 N. Y. 587; *Bailey v. Ryder*, 10 N. Y. 363.

<sup>4</sup> *MacArthur & Mackey* 382.

Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a formal application in writing by the inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it or place it in the hands of the plaintiff to be forwarded to the Canadian authorities.

In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill taken in connection with the terms of the agreement set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the Dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way encumbering any right he may have to letters patent from Canada, if the plaintiff should decide to seek his remedy in this form rather than in damages for breach of this part of the contract.

Demurrer overruled.

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FRANK S. PADDOCK ET AL v. R. W. DAVENPORT.

IN THE SUPREME COURT OF NORTH CAROLINA, SEPTEMBER TERM,  
1890.

[*Reported in 107 North Carolina Reports 710.*]

THIS was a civil action, tried before Philips, J., for specific performance at Fall Term, 1890, of Clay Superior Court, upon demurrer of defendant. Demurrer was sustained and plaintiffs appealed.

The plaintiffs alleged—

1. That, on or about the 23d day of October, A.D. 1889, the defendant, R. W. Davenport, contracted in writing, under seal, for a good and valuable consideration, with one T. S. Arthur, giving to him, the said T. S. Arthur, the exclusive privilege, for sixty days from the date of said contract, of buying all the merchantable poplar, ash, and cherry trees standing and growing on two certain tracts of land of said R. W. Davenport, at the price of fifty cents per tree for all merchantable poplar and ash trees, and one dollar per tree for all merchantable cherry trees, said contract being in the following words and figures, to wit :

“Know all men by these presents, that for and in consideration of fifty cents per tree, on the stump, I, R. W. Davenport, of Clay County, North Carolina, have this day given to T. S. Arthur the exclusive privilege for sixty days of buying all of the merchantable poplar and ash, and \$1 for cherry trees, that he, his agents or successors, may select

and mark on my two tracts of 300 acres of land, No. 13 and 2456, in district 18; on the waters of Shooting Creek, Towns and Clay County, Georgia, and North Carolina; the said timber to be paid for when it is marked up. I further give said T. S. Arthur or his successors the right-of-way, free of charge, over my lands by a practicable route to get their timber out, and the use of small timbers to build roads and load timber, and when the said timber is paid for, as provided for above, I, R. W. Davenport, herein bind myself, my heirs and lawful assigns to make said T. S. Arthur or his legal representatives a good and lawful deed to said timber. This October 23, 1889.

“(Signed) R. W. DAVENPORT. [Seal.]”

2. That tract No. 2456, mentioned in said contract, lies in Clay County.

3. That the said T. S. Arthur, for a good and valuable consideration, assigned and transferred to the plaintiffs all his interest in said contract and the trees described therein. That by the terms of said contract the trees were not to be paid for until they were marked up; that plaintiffs, their servants and their agents, before the expiration of sixty days from the date of said contract, went to the defendant, R. W. Davenport, and offered to select and mark all the merchantable poplar, ash, and cherry trees which were standing and growing on the lands described in said contract, and pay the said R. W. Davenport for same at the price named in said contract, but the said R. W. Davenport refused to permit the plaintiff or either of them or their agents or servants to enter upon said lands for the purpose of selecting and marking said trees, and refused to comply with any of the stipulations contained in said contract. That plaintiffs were then and have ever been ready, able, and willing to comply with their part of the contract, and are now ready, willing, and able to do so. That since the 23d day of October, 1889, merchantable poplar, ash, and cherry trees have greatly enhanced in value and are very scarce, and it is impossible for plaintiffs to buy such trees now at fifty cents per tree for poplar and ash trees, and one dollar per tree for cherry trees. That at the times herein above-mentioned there were standing and growing on the lands described in this complaint one thousand merchantable poplar trees, five hundred merchantable ash trees, and five hundred merchantable cherry trees which defendant R. W. Davenport, by his breach of said contract, deprived plaintiffs of taking, holding, and possessing, greatly to the damage of plaintiffs, to wit, in the sum of two thousand dollars.

4. That the defendant J. M. Thrash, with full knowledge of said contract, and with full knowledge of plaintiffs' rights to said timber and trees, has accepted a conveyance from the said R. W. Davenport for



said timber and trees, and taken possession of said timber and trees by marking and branding same, and refuses to acknowledge the right of plaintiffs to said trees, greatly to plaintiffs' damage, to wit, in the sum of two thousand dollars.

5. That plaintiffs are informed and believe the defendant R. W. Davenport is insolvent, and a judgment against him could not be collected by due process of law.

Wherefore plaintiffs demand judgment—

1. That defendant R. W. Davenport admit plaintiffs so that they may mark up said trees, and that he execute a good and sufficient deed or deeds to plaintiffs for same.

2. That defendant J. M. Thrash be declared a trustee for plaintiffs, and compelled to convey said trees by proper deed to plaintiffs.

3. For two thousand dollars damages.

4. For costs of action and such other and further relief as may be meet and proper.

3. That, as appears from the instrument therein set out, the contract is at most only a covenant, and not such as can be specifically enforced.

*Messrs. E. B. Norvell* (by brief) and *T. F. Davidson* for plaintiff.

*Mr. John Devereux, Jr.*, for defendant.

SHEPHERD, J. Two causes of action are set out in the complaint—one for damages for breach of the contract, and the other for its specific performance.<sup>1</sup> The court held, upon demurrer, that neither of the said causes of action could be maintained.

2. The second cause of action is for specific performance, both against Davenport, who executed the contract, and Thrash, who purchased of him with notice of the claim of the plaintiff.

The true principle upon which specific performance is decreed does not rest, in all cases, simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law assumes land to be of this character "simply because" (says Pearson, J., in *Kitchen v. Herring*<sup>2</sup>) "it is land, a favorite and favored subject in England and every country of Anglo-Saxon origin." The law also attaches a peculiar value to ancient family pictures, titles, deeds, valuable paintings, articles of unusual beauty, rarity, and distinction, such as objects of *vertu*. A horn, which time out of mind had gone along with

<sup>1</sup> Only so much of the case is given as relates to the action for specific performance.—ED.

<sup>2</sup> 7 Ired. Eq. 191.

an estate and an old silver *patera*, bearing a Greek inscription and dedicated to Hercules, were held to be proper subjects of specific performance. These, said Lord Eldon, turned upon the *pretium affectionis* which could not be estimated in damages. So for a faithful family slave, endeared by a long course of service or early association, Chief-Justice Taylor remarked that "no damages can compensate ; for there is no standard by which the price of the affections can be adjusted and no scale to graduate the feelings of the heart." <sup>1</sup>

The principle is also applied (2) where the damages at law are so uncertain and unascertainable, owing to the nature of the property or the circumstances of the case, that a specific performance is indispensable to justice.

Such was formerly held as to the shares in a railway company, which differ, it was said, from the funded debt of the government in not always being in the market and having a specific value. Also a patent <sup>2</sup> and a contract to insure <sup>3</sup> and like cases.

The general principle everywhere recognized, however, is that, except in cases falling within the foregoing principles, a court of equity will not decree the specific performance of contracts for personal property ; "for," remarks Pearson, J., in *Kitchen v. Herring*,<sup>4</sup> "if with money an article of the same description can be bought, . . . the remedy at law is adequate." <sup>5</sup>

Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the court. The trees were purchased with a view to their severance from the soil and thus being converted into personal property. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstances from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a water-course does not alter the case, for the conveniences of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstances that the plaintiff purchased a "few trees of like kind" in the vicinity sufficient to warrant the equitable intervention of the court. We can very easily conceive of cases in which contracts of this kind may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court as to this branch of the case is sustained.

<sup>1</sup> *Williams v. Howard*, 3 *Murphy* 74 (80).

<sup>2</sup> 34 *Conn.* 325.

<sup>3</sup> 4 *Sandf. Ch.* 408.

<sup>4</sup> *Supra*.

<sup>5</sup> See also *Pomeroy Spec. Perf.* 14.

GLOUCESTER ISINGLASS AND GLUE COMPANY v. RUSSIA CEMENT COMPANY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 25, 1891.

[*Reported in 154 Massachusetts Reports 92.*]

BILL IN EQUITY, for the specific performance of an agreement between the plaintiff and the defendant. Hearing before KNOWLTON, J., who reported the case for the consideration of the full court, such decree to be entered as law and equity might require. The facts appear in the opinion.

The case was argued at the bar in November, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges, except BARKER, J.

*C. Browne* for the plaintiff.

*P. E. Tucker* and *C. H. Drew* for the defendant.

KNOWLTON, J. The plaintiff and the defendant corporations, which had been engaged in litigation with each other as to the alleged infringement of a patent owned by the plaintiff, supposing the validity of the patent fully established, and believing that they would be able practically to control the profitable manufacture of fish glue, entered into a contract with each other by which the defendant was to pay a certain sum for damages, and one half of the costs of the suits, and was to be allowed the use of the patent. Each party was to conduct its own establishment, and they were to unite in the purchase of fish skins, an article of which the supply was limited and from which the fish glue is manufactured, so that there should be no competition between them. The plaintiff was to fix the price of all skins purchased, and the parties were to have certain places assigned to them by two persons named, of which they were respectively to have the product. From the proprietors of certain other places mentioned the defendant was to have the entire product, and to allow the plaintiff to receive from it one third thereof, and the two parties were to divide equally between them the skins which might be obtained from new producers. They were both to sell the glue at the same price, to be agreed upon from time to time, and the contract contained other stipulations the effect of which was to prevent competition between them. The contract was made in February, 1884. After they had conducted the business in this manner until early in 1887, it became evident to both that the patent was invalid, although no formal judgment was rendered declaring it so. Thereupon, Brooks, the manager of the defendant company, made a large number of what are known as the long term contracts, for the purchase of all skins to be produced

until the year 1900, with nearly all the producers of fish skins known to the parties. The plaintiff received its share of these skins, and no difficulty arose between the two companies until early in July, 1890, when the defendant notified the producers of skins by whom the plaintiff had been supplied up to that time not to deliver it any more skins, and also notified plaintiff of its abandonment of the contract. Until then the parties had gone along under the contract as modified by mutual consent, and no intimation had been given the plaintiff of any intention to abandon it. The object of the bill is to compel the defendant to permit the plaintiff to obtain directly from the producers, or through the defendant, what it deems its share of the fish skins. The defendant rests its defense on several grounds; . . . that, if it is binding, the plaintiff has a complete and adequate remedy at law.<sup>1</sup>

The next objection of the defendant is, that, even if it violates its contract, it is not shown that the plaintiff has not an adequate remedy at law. The only remedy which the plaintiff could have at law would be by a recovery of damages for the failure of the defendant to deliver, or to allow those to deliver with whom it had made contracts in its own name but for the benefit of both, the due proportion of fish skins to the plaintiff. It sufficiently appears that the principal market for them is in Gloucester, that most of the skin producers there are under contract with the defendant, and that fish skins are of very limited production. "If the plaintiff is unable to obtain skins produced by firms which have contracted with the defendant," it is found that "it will be very difficult, if not impossible, for it to carry on its business." This continuing injury, leading to difficulties in the management of the plaintiff's business, and possibly to its utter destruction, is one that could not be measured in damages. It would be practically impossible to estimate the amount of the injury, or to repair it. The plaintiff's property invested in the manufacture must lose a considerable, but uncertain, amount of its value. The injury thus threatened would be practically irreparable. *Florence Sewing Machine Co. v. Grover & Baker Sewing Machine Co.* 110 Mass. 1, 11.

But the relief to which the plaintiff is entitled, and all that it asks for, will be obtained by an order that the defendant deliver to the plaintiff on demand the fish skins received from the three firms named, on payment to it of what the skins cost the defendant, so long as these shall not exceed the proportion which the plaintiff is entitled to receive.

Decree accordingly.

<sup>1</sup> Only so much of the opinion is given as relates to this defense.—ED.

## TAYLOE v. MERCHANTS' FIRE INSURANCE COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM,  
1850.

[Reported in 9 Howard 390.]

THIS was an appeal from the Circuit Court of the United States for the District of Maryland.

A decree *pro forma* was entered upon the agreement of the parties dismissing a bill filed by Tayloe praying that the defendant be decreed to pay the plaintiff the amount of loss suffered by him in consequence of the destruction by fire of property which the defendant had agreed to insure. The property had been burned after the making of the contract for insurance, but before the company had had an opportunity to issue a policy. The company refused to issue a policy.

The bill also contained a prayer for general relief.<sup>1</sup>

It was argued by *Mr. Johnson* (Attorney-General) for the appellant, and by *Mr. Lloyd* and *Mr. Nelson* for the appellees.

Mr. Justice NELSON delivered the opinion of the court.

III. It has also been objected, that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted.<sup>2</sup>

But it by no means follows from this that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that court, to enforce a specific performance, and compel the company to issue a policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of *Motteux v. The London Assurance Company*,<sup>3</sup> and in *Perkins v. The Washington Insurance Company*.<sup>4</sup>

<sup>1</sup> The above statement of facts has been substituted for the Reporter's statement of facts.

<sup>2</sup> Only so much of the opinion is given as relates to this question and the prayer for relief.—ED.

<sup>3</sup> 1 Atk. 545.

<sup>4</sup> 4 Cow 646. See also 1 Duer 66, 110, and 2 Phillips 583.

As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law.

IV. It is further objected that, admitting the claim to be properly enforceable in equity, still the complainant is not entitled to the relief sought . . . . for want of a proper prayer.

The pleading is not very formal, nor very cautiously drawn, and, in the absence of the prayer for general relief, might have led to embarrassment in making the proper decree in the case. There is a specific prayer for a decree for the loss, but it would have been more formal and appropriate, regarding the ground of jurisdiction in these cases, to have added also a prayer for a specific performance of the agreement to insure.

But the particular relief permitted under a general prayer, where the statement in the body of the bill is sufficient to entitle the party to it, meets the difficulty suggested and well warrants the decree proposed to be entered.<sup>1</sup>

Upon the whole, without pursuing the examination further, we are of opinion that the decree of the court below should be reversed, and that the cause be remitted, with directions to the court to take such further proceedings therein as may be necessary to carry into effect the opinion of this court.<sup>2</sup>

#### *Order.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to take such proceedings therein as may be necessary to carry into effect the opinion of this court.

<sup>1</sup> Story Eq. Pl. §§ 41, 42, and cases.

<sup>2</sup> See the Appendix.

## SPORLE v. WHAYMAN.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JULY 20, 23,  
1855.

[*Reported in 20 Beavan 607.*]

IN August, 1854, the plaintiff, Sporle, signed a joint and several promissory note for payment on demand to a benefit society of £160 and of interest monthly.

This sum was borrowed for the benefit of Whayman and another, and Sporle was a mere surety. To indemnify Sporle, Whayman deposited with him the title deeds of his copyhold estate. There was no written memorandum of deposit, and the precise terms on which the deeds were deposited were disputed; but on the conflicting evidence the court came to the conclusion that the defendant had entered into no obligation to execute any formal mortgage until the plaintiff should be called on to pay the money for which he had become surety.

Installments of the principal sum borrowed were, according to the regulations of the benefit society, payable monthly, and such installments and the interest were regularly paid, and the plaintiff had not as yet been called on to pay anything. Notwithstanding this, however, the plaintiff insisted on the defendant's executing a formal legal mortgage of the copyholds. The defendant neglected to do so, and the plaintiff thereupon filed this bill, praying a specific performance by the defendant of the alleged agreement between him and the plaintiff to execute a mortgage of the copyhold hereditaments, with all proper covenants and provisions for the plaintiff's indemnity, pursuant (as the plaintiff alleged) to the agreement, and to do all things necessary and proper for the purpose of giving the plaintiff a valid and effectual mortgage.

*Mr. Eddis* for the plaintiff.

*Mr. Roupell* and *Mr. Hardy* for the defendant.

The Master of the Rolls reserved judgment.

THE MASTER OF THE ROLLS. After reading the affidavits, I think that the plaintiff has asked for more than he is entitled to, and that the defendant has refused that which he is bound to give.

The state of the case is this : Whayman and another person, wanting to borrow a sum of money from a benefit society, induced the plaintiff and another to give a joint and several promissory note to the secretary of the society to secure the repayment of the money. The mode of paying off the debt was this : They were to pay a sum for interest every month, and, in addition, they were to pay monthly

installments for six years, until the principle and interest had been fully paid off. The plaintiff, though he received no part of the money, consented to sign this joint and several promissory note, provided he should be indemnified by having a deposit of the title deeds of some copyholds to secure him. [His Honor here examined the conflicting testimony as to the terms on which they were to be deposited, and proceeded.]

The result seems to be this : There was an agreement that the title deeds of the copyholds should be an indemnity against anything the plaintiff should be called on to pay ; but I am satisfied, from the affidavits, that there was no intention that a formal deed should be executed, the effect of which would be to put the defendant to a great expense. This he never contemplated, but merely that the deeds should be simply deposited.

The plaintiff wants to preserve evidence of the terms of the deposit. I think he is entitled to have it in writing in order to make it effectual if he should ever be called on to pay the promissory note. His right is clear, for suppose, after the lapse of four or five years, the plaintiff should be called on to pay any part of the debt, if the defendant were dead, the terms of the agreement might then be contested. This court daily sees the great inconvenience which arises from depositing deeds without clear written evidence of what it is to secure.

Thinking that the plaintiff is entitled to have evidence in writing, I have then specifically to perform the agreement, and I am of opinion that the plaintiff is entitled to receive a memorandum signed by the defendant, specifying the terms on which the title deeds were deposited. I shall direct him to sign such memorandum, and the terms of it must be settled in Chambers if the parties disagree.

I give no costs.

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### HERMANN v. HODGES.

IN CHANCERY, BEFORE LORD SELBORNE, L.C., MAY 2, 1873.

[*Reported in Law Reports, 16 Equity Cases 18.*]

THIS was a suit for specific performance of an agreement (entered into on the occasion of an advance being made by the plaintiff to the defendant) to execute a mortgage "with an immediate power of sale."

*Mr. Townsend*, for the plaintiff, asked for a decree according to the form given in *Seton on Decrees*.<sup>1</sup> He referred to *Ashton v. Corrigan*,<sup>2</sup> in which a doubt was expressed by Vice-Chancellor Wickens

<sup>1</sup> Vol. I., p. 443.

<sup>2</sup> Law Rep., 13 Eq. 76.



whether the agreement was one of which the court would decree specific performance.

*Mr. Northmore Lawrence*, for the defendant, did not oppose.

LORD SELBORNE, L.C., said that he had no doubt of the propriety of making the decree asked for unless the defendant was prepared to pay off the advance at once.

Solicitors : *Mr. C. J. Orton; Messrs. Poole & Hughes.*

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JOHN HICKS ET AL. v. WILLIAM S. TURCK AND TOWNSEND A. ELY.

IN THE SUPREME COURT OF MICHIGAN, NOVEMBER 1, 1888.

[*Reported in 72 Michigan Reports 311.*]

APPEAL from Clinton. (Smith, J.) Argued June 28, 1888. Decided November 1, 1888.

Bill for specific performance. Defendants appeal. Decree overruling demurrer, with leave to answer affirmed. The facts are stated in the opinion.

*O. L. Spaulding* for complainants.

*James L. Clark* and *George P. Stone* for defendants.

SHERWOOD, C. J. The bill in this case is filed to obtain a decree for the specific performance of a contract reading as follows :

“RIVERTON, NEB., October 31, 1885.

“Due David S. French, attorney in fact for Hicks, Bennett & Co., eighteen thousand three hundred and sixty-six dollars (\$18,366.00), being the balance on consideration of one-half interest in personal property and lands this day sold Robert M. Steel, John Hicks, William S. Turck, and Townsend A. Ely; above sum to be paid by assignment of a certain mortgage on lands in Gratiot County, Michigan, to said David S. French, attorney, for \$2,000; and balance of sixteen thousand three hundred and sixty-six dollars (\$16,366.00) to be paid by promissory note due and payable on or before five years from date, with annual interest at seven per cent. per annum, said note secured by mortgage on the undivided one-half interest in said ranch property, as collateral security for payment of said sum of sixteen thousand three hundred and sixty-six dollars and interest as aforesaid.

“WM. S. TURCK.

“TOWNSEND A. ELY.”

The bill states that at the time the note was given the complainants

were a firm located and doing business under the name of Hicks, Bennett & Co., in Michigan, and were seized of a large quantity of lands in the county of Franklin, in the State of Nebraska, the particular description of which is fully set out in the bill; that on that day said firm, by David S. French, its attorney in fact, conveyed by full covenant warranty deed the lands described in the bill to John Hicks and Robert M. Steel, who resided at St. Johns, Mich., and the defendants, who resided at Alma, Mich., for the sum of \$32,732; that the purchasers upon said sale entered upon said premises, and ever since have had the actual possession thereof.

That on the same day Hicks, Bennett & Co. sold to the grantees in said deed all the cattle, stock, hay, grain, farming implements, tools, and other personal property on said land for the sum of \$10,000; that in consideration of the premises, and in payment to the complainants for the undivided one-half of the said real and personal property, Turck and Ely, who knew all about the lands, the title of complainants thereto, and the condition of the personal property, agreed to pay to complainants \$21,366, being one-half of the total purchase price of the land and personal property, the payments to be made as follows: \$3,000 in their promissory note due in two years, which they then gave, and that they would secure and pay the balance of the purchase price by assigning to the said French, who was attorney in fact of the complainants, a certain real-estate mortgage of \$2,000 on lands in Gratiot County, Mich., and for the remaining sum of \$16,366 would at once execute and deliver to French, for complainants, their promissory note for that amount, due on or before five years from the date thereof, with annual interest at 7 per cent., and secure the payment of the same by mortgage on the undivided half of the lands so deeded to them.

That the said \$2,000 mortgage was assigned, as promised, by the said defendant Turck, but the said defendants refused to, and have not made the note and mortgage to complainants for the \$16,366, as they agreed to do, and still refuse to comply with complainants' request for them so to do.

Complainants further say and aver in their bill that they have complied in all things with and fully kept their agreement with said defendants, and performed all its requirements on their part in the premises, and are now entitled to have said note and mortgage from said defendants as they promised to make them, in accordance with the written agreement hereinbefore referred to, and which was, after being made by defendants, duly given to said French, for the complainants, who now have the same.

The complainants ask the court, upon the foregoing facts, to decree

that defendants specifically perform their agreement with the complainants, and execute and deliver to them said note and mortgage. The defendants appeared in the case and demurred to complainant's bill, assigning two grounds of demurrer :

1. That the facts set up in the bill are not sufficient to entitle complainants to the relief prayed.

2. That complainants have a complete and adequate remedy at law touching all matters set up in the bill.

The cause was heard before Judge Smith in the Clinton Circuit, who made a decree overruling the demurrer, and allowing defendants twenty days in which to answer.

We are satisfied this decree was proper. The defendants had received the full consideration for what the complainants asked. The complainants might have had a remedy at law; but we are by no means sure it would be an adequate one. On the contrary, the remedy at law, when resorted to, is liable to a very great variety of perplexities and embarrassments arising from the want of the note promised, the refusal to give which is a gross violation of their contract, for which the demurrer concedes no excuse can be given. The note was liable to run five years, and complainants had the right to have the amount owing thereon during all the time it did run secured by the mortgage. The land was not within the jurisdiction of the courts in this State. It could be easily transferred to *bona fide* holders, and the perils of insolvency are not beyond the possibilities among business men, as all experience shows. All these are circumstances of more or less embarrassment when the remedy at law is resorted to. It is but equitable and just that this contract should be specifically performed upon the showing made in this bill.

This bill is not filed for an accounting, nor to enforce payment of a debt, but to compel a party to comply with his promise, after receiving the full consideration upon which it was made, to make and execute evidence of indebtedness, and give security for the payment thereof. There is no proceeding at law which can accomplish this. Equity alone can take cognizance of such a case and do justice between the parties. The bill furnishes a clear case for the exercise of that sound legal discretion which the court must always use in awarding specific performance, and the learned circuit judge was right in so holding.

The decree below will be affirmed, and the cause remanded, with instructions to the circuit judge to allow defendants twenty days in which to answer the bill after *remittitur* shall have been filed.

The complainants will recover their costs.

The other justices concurred.

## CUTTING v. DANA.

IN THE COURT OF CHANCERY OF NEW JERSEY, OCTOBER TERM,  
1874.

[*Reported in 25 New Jersey Equity Reports 265.*]

ON final hearing on pleadings and proofs.

*Mr. B. Gummere* for complainant.

*Mr. Henry Young* for defendant.

THE CHANCELLOR. This suit is for specific performance of an agreement made May 24, 1872, by the defendant with the complainant, by which the former agreed to assign to the latter a debt of \$2,959.12, payable in gold, due from the firm of U. H. Dudley & Co. to the defendant. The bill also prays an injunction to restrain the defendant from assigning or parting with the note, which is the evidence of the debt, or from delivering it to any other person than the complainant, and to restrain the defendant from further prosecuting a suit at law, instituted by him in the Supreme Court of this State, on the note against the debtors. The circumstances of the case are, that the firm of U. H. Dudley & Co., of the city of New York, failed in January, 1872. Their debts appear to have amounted to from \$260,000 to \$270,000. Among these was a debt of about \$32,000 due to the firm of Cutting & Co., of San Francisco, of which the complainant was a member. The complainant, on hearing of the failure, came from that city to New York to look after his claim. Dudley & Co. first proposed to pay fifty cents on the dollar of their debts and attempted to make such composition. Having failed therein, they, on the recommendation of the complainant, called a meeting of their creditors, which was held in or about March, 1872. At that meeting, the complainant, with two other creditors of the firm of U. H. Dudley & Co., were appointed a committee to examine the affairs of the concern. They did so, and at a meeting of the creditors, held on or about the 20th of the same month of March, reported that the assets would not pay over from thirty-eight to forty per cent. At that meeting several of the creditors present urged the complainant to take the assets and pay twenty-five cents on a dollar of the debts. To this he consented and endeavored to effect such settlement, but after trying for two months he abandoned the effort, finding it impossible to make the arrangement, because some of the creditors insisted on payment in full, and others on a percentage beyond the amount proposed. It was a substantive part of this arrangement that the composition was not to be binding on any of the creditors, unless all of them should accede to it. The complainant having announced to the other creditors, by means of a circular, his inability to effect this

settlement, another meeting of the creditors was held at the Astor House, in the city of New York, on the 24th of May, 1872. At that meeting the complainant stated, what he had communicated by the circular, his inability to effect the settlement and the reasons of his failure in his effort. Some of the creditors were desirous that he should resume the undertaking, to which it appears he, after some conversation on the subject, replied only by a proposition to buy the claims of such of the creditors as would sell them to him, at the rate of twenty-five per cent., and pay for them in the notes of U. H. Dudley & Co., to be endorsed by the complainant's firm, and payable in six and twelve months from that time. This was agreed to, and the following agreement was drawn up and signed by all the creditors present, including the defendant, except one: "The undersigned, creditors of U. H. Dudley & Co., of New York, in consideration of one dollar to each of us in hand paid, the receipt whereof is hereby acknowledged, hereby agree to assign and transfer to Francis Cutting their several claims against said U. H. Dudley & Co., on settlement therefor by said Cutting at the rate of twenty-five cents on the dollar, in six and twelve months, to be settled by notes of U. H. Dudley & Co., endorsed by Cutting & Co., of San Francisco; notes to be dated May 27th, 1872 (May twenty-seventh, 1872), provided the settlement is made and notes delivered on or before June 5th, 1872. Otherwise, this assignment to be null and void, not binding on said Cutting, unless signed by all the creditors."

On the 5th of June, the day fixed in the agreement, the complainant delivered notes to the creditors who had signed the agreement, according to the stipulation therein contained, and at the time presented to them, to be executed, an assignment of their claims to him. The defendant, two days afterwards, returned to U. H. Dudley & Co. the notes and assignment, which had been sent to him by the complainant, with the following letter addressed to them: "At the last meeting of your creditors at the Astor House, Messrs. Cutting & Co. said if they could not get all the creditors to sign that they reserved the right to reject the affair. I find on inquiry that quite a number have refused to sign off, therefore I return your papers." The complainant, on the same day, returned the notes and assignment to the defendant with the following letter:

"NEW YORK, June 7, 1872.

"MR. W. F. DANA.

"DEAR SIR: Yours of, to U. H. D. & Co., 7th, rec'd. The understanding was distinctly had that it was optional only with me, whether I made the settlement or not, that if I had the notes ready the agreement was binding on one creditor to assign his claim. Not a single creditor has been paid more than twenty-five cents, though it was mentioned at the meet-

ing and understood that I was to do the best I could, but make the settlement if possible. I do not intend to pay one cent over that to any one, preferring to let the matter go into bankruptcy, holding such claims as have been assigned to me, and so paying any who stand out just what the law allows, and as \$110 to \$115,000 extra claims would be proved in bankruptcy, the chance of any who stand out getting more than twenty cents legally, or even that, would be very small.

"I think, with this explanation, you will be perfectly satisfied, and send me the assignment as enclosed.

"Yours very truly,

"FRANCIS CUTTING,

"153 Chambers Street."

The defendant, on the same day, returned the notes and assignment to the complainant with the following letter :

"Yours of this date to hand. In reply, would say that I talked with the chairman of the meeting at the time, and understood from him the same thing that I wrote Messrs. D. & Co. this A.M."

On the 13th of November, 1872, the defendant commenced the suit above mentioned, against the Dudleys, on the note for \$2,959.12, in the Supreme Court of this State. On the filing of the bill an injunction was issued restraining the defendant from prosecuting that action. The defendant has answered. Replication was filed and testimony on both sides taken, and the cause is now before me on final hearing.

In the answer the defendant alleges that the proposition made at the meeting of the 24th of May was the same in substance as that discussed at the former meeting ; that nothing was said concerning a sale by the creditors of their respective claims to the complainant, to the defendant's recollection and belief ; that the understanding which he had of the agreement was, that it was mutual in its obligation and operation, and not binding on either party, unless signed by all the creditors of U. H. Dudley & Co. ; that the construction put upon the written agreement in the bill of complaint is not the construction which was put on it at the meeting ; that before he signed the agreement, the defendant asked the chairman of the meeting the following question : "Suppose all the creditors do not sign the paper ?" and that the chairman replied : "Then it is not binding." The answer further states that the defendant is informed and believes that the agreement was not signed by all the creditors of U. H. Dudley & Co., and that so far from the complainant, or his firm, endeavoring "to arrange a settlement for the best interests of all concerned," as represented in the complainant's letter of the 24th of May (the circular above referred to), the defendant is informed and

believes that U. H. Dudley & Co. paid to certain of their creditors more than twenty-five cents on the dollar of their claims, and particularly to Richard Oliva, who, at the time of such payment, had not signed the agreement nor assigned his claim to the complainant. The answer further alleges that the agreement was made without consideration, and is not sealed with the seal of the defendant, nor of the other creditors; that by reason of its intended operation, it is inequitable and unjust, and that, as it is understood by the complainant and construed in the bill of complaint, it is not the agreement of the defendant, but a trick and fraud upon him, whereby the complainant, to the defendant's surprise and injury, seeks to compel the defendant to do and act differently from what he, in good faith, intended.

The defendant's counsel insists that this suit cannot be maintained, because it is an action for the specific performance of an agreement for the sale of chattels—a contract for the sale of a debt. This objection is based on the proposition that a court of equity will not decree a specific performance of contracts, except for the purchase of lands or things that relate to the realty and are of a permanent nature; and that, where the contract is for chattels, and compensation can be made in damages, the complainant will be left to his remedy at law.<sup>1</sup> The rule on the subject, which may be extracted from Lord Hardwicke's decision in *Buxton v. Lister & Cooper*,<sup>2</sup> is that, though in general the Court of Chancery will not entertain a bill for specific performance of contracts for chattels relating to merchandise, but will leave the party to his remedy at law, yet, notwithstanding this general distinction between personal contracts for goods and contracts for lands, in some cases contracts for personal property are enforceable in equity, but the court will weigh such cases with greater nicety than those which relate to real property. This court, in *Furman v. Clark*,<sup>3</sup> entertained a suit for specific performance of a contract for sale of chattels—clay to be delivered on board the complainant's boats at Amboy. *Stevens v. Wilson*<sup>4</sup> was a suit in which the complainant filed his bill to compel the defendant to deliver to him certain shares of the stock of a plank road and ferry company, purchased by the defendant with money furnished by the complainant, on an agreement that the defendant would transfer the same to the complainant on request. There was a trust in that case, however. In *Wright v. Bell*,<sup>5</sup> and in *Adderley v. Dixon*,<sup>6</sup> a suit for specific performance of a contract to purchase a debt was maintained. In *Doloret v. Rothschild*<sup>7</sup> it was held that an action for specific performance of a contract for the purchase of government stock would lie. *Duncuft v. Al-*

<sup>1</sup> Only so much of the opinion is given as relates to this question.

<sup>2</sup> 3 Atk. 383.

<sup>3</sup> 3 Stockt. 306.

<sup>4</sup> 3 C. E. Green 447.

<sup>5</sup> 5 Price Exch. 325.

<sup>6</sup> 1 Sim. & Stu. 608.

<sup>7</sup> 1 S. & S. 590.

brecht,<sup>1</sup> and *Todd v. Taft*,<sup>2</sup> are cases in which suit was maintained for specific performance of contracts for the sale of railway stock ; and in *Clark v. Flint*<sup>3</sup> a bill for specific performance of a contract for the sale of the half of a brig was sustained. In *Adderley v. Dixon*, the court (Sir John Leach, V.C.) said : " Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personality, but because damages at law may not, in the particular case, afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quality of the like stock or goods." In that case, the bill being for the performance of a contract to buy a debt due from the estate of two bankrupts, and so, being an agreement for the sale of the uncertain dividends which might become payable from those estates, the court, upon the principle established by the cases of *Ball v. Coggs*,<sup>4</sup> and *Taylor v. Neville*, cited in *Buxton v. Lister*,<sup>5</sup> decreed specific performance, because damages at law could not accurately represent the value of the future dividends, and to compel the purchaser to take such damages would be to compel him to sell those dividends at a conjectural rate. Where the complainant has not a clear, complete, and adequate remedy at law, or where some other ingredient of equity jurisdiction is mixed up with the transaction, equity will interfere to decree a specific delivery of chattels.<sup>6</sup>

In the present case the complainant purchased of the defendant a debt due the latter from their common debtor, who had become insolvent. The evidence shows that the estate has proved insufficient to pay even twenty-five cents on a dollar, the price which the complainant agreed to pay for the debt in question. In a suit at law by complainant against the defendant on this contract, the damages must be uncertain ; they would depend on the present and prospective future ability of the debtors, into which many uncertain elements must, of necessity, enter. What the present pecuniary responsibility of the debtors is does not appear. The suit at law was commenced within a very few months

<sup>1</sup> 12 Sim. 162.

<sup>2</sup> 7 Allen 371.

<sup>3</sup> 22 Pick. 231.

<sup>4</sup> 1 Bro. P. C. 140.

<sup>5</sup> 3 Atk. 383.

<sup>6</sup> Story's Eq. Jur., § 710.



after their failure. If their responsibility is such that this debt could be recovered from them in full, it is easy to determine the amount of damages. It would be, in that case, a mere matter of arithmetical calculation. If, on the other hand, their responsibility is not such as that the whole amount of the note and interest could now probably be collected, then it would be impossible to estimate the damages. There is also another consideration. The complainant swears that it was his understanding with the creditors that he was to go into business with U. H. Dudley, when Dudley should have made a settlement, or when one should have been made, and that he had such an understanding with Dudley. It appears that he has since then entered into business with Dudley, becoming a special partner, and as such has contributed \$60,000 to the capital, \$20,000 of which were in the assets of the firm of U. H. Dudley & Co. He would be prejudiced in the business and his interest therein, if an execution against Uriah H. Dudley should be levied on the interest of the latter therein, and perhaps might himself be compelled to pay the execution to prevent disturbance or stoppage of the business. But however that may be, and as before stated there is no evidence before me as to the pecuniary responsibility of the Dudleys, if the contract is a valid one, one which can be enforced, the complainant is entitled to the claim and the advantages to be derived from it. Again, the objection made by the defendant's counsel in this connection, that the complainant has a complete and adequate remedy at law in the premises, comes too late. As before remarked, the defendant has answered. In his answer he makes no objection on this ground. The complainant has replied to the answer, and testimony has been taken on both sides. It is too late for the defendant to make this objection.<sup>1</sup>

Although the court may, of its own accord, dismiss the bill, where it appears on the hearing that the complainant has a complete and adequate remedy at law, notwithstanding the objection was not taken in the pleadings of the defendant, nor noticed in the argument, yet, under such circumstances, for very obvious reasons, it is the duty of the court to retain the cause, provided it be competent to grant relief and have jurisdiction of the subject matter.<sup>2</sup> This court has jurisdiction in the case and is quite competent to grant relief.

There will be a decree for the complainant.

<sup>1</sup> Attorney-General v. Purmort, 5 Paige 620, 626; Underhill v. Van Cortlandt 2 Johns. Ch. 339, 369; Flint v. Clark, *supra*; Story's Eq. Pl., § 488; 1 Daniell's Ch. Pr. (4th ed.) 550, note 3.

<sup>2</sup> Flint v. Clark, *supra*.

## ROGERS v. CHALLIS.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JULY 21, 22,  
1859.

[*Reported in 27 Beavan 175.*]

THIS bill, filed by Rogers against Challis, prayed that an agreement, concluded by two letters of the 17th and 18th of December, 1858, might be specifically performed; "or otherwise, that such compensation or damages might be awarded to the plaintiff as this court should deem just."

The agreement alleged and sought to be enforced was to this effect: The defendant Challis had agreed to borrow from the plaintiff a sum of £1,000, to be repaid by four equal installments, with interest at £10 per cent., to be retained out of the sum advanced.

The security to be given was: first, a bill of sale of certain furniture, plate, linen, etc.; secondly, a bill for the first installment; thirdly, a guarantee against the removal of the goods comprised in the bill of sale; and fourthly, by a deposit of the lease of Webb's Hotel, Piccadilly, and of the assignment of it, which had been made to Challis.

After this contract, the defendant entered into negotiations with a Mr. Reddish to borrow the £1,000 from him on better terms. The defendant refused to perform his agreement with the plaintiff, who filed this bill on the 14th of January, 1859, alleging that if the contract should not be performed he would suffer considerable damage, both by loss of interest on the money provided and set apart for the purpose of the loan, and also by reason of costs incurred in the course of the negotiations.

On the 25th of January, and after the institution of this suit, the defendant completed the loan from Mr. Reddish.

*Mr. Follett* and *Mr. Hobhouse* for the plaintiff.

*Mr. R. Palmer* and *Mr. Hingeston*, for the defendant, were not called on.

THE MASTER OF THE ROLLS. I am clear that the court has no jurisdiction in this case.

I must first consider how the matter stands, independently of Sir Hugh Cairn's act, and next the effect of that act.<sup>1</sup> The case cannot be put higher than this: that the defendant applies to the plaintiff for the loan of £1,000 upon a security which he specifies, and the plaintiff assents to the proposal, but on the next day the defend-

<sup>1</sup> So much of the opinion as relates to this act has been omitted.—ED.

ant says, "I have changed my mind; I do not require your £1,000; I can get it upon better terms elsewhere." Is that a case in which a person can come to this court for a specific performance, and say, "You, the defendant, are bound to let me advance the £1,000 to you—it is true your circumstances may be altered, but you are bound to let me advance the money to you?" It is very justly said that the Statute of Frauds does not apply to such a case; therefore, if the court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance; thus if two friends are walking together, and one says, "Will you lend me £100 at £5 per cent. for a year upon good security?" and the other says, "I will," that conversation might be made the subject of a suit for specific performance in this court, if on the next day one friend should say, "I do not want the money," or the other should say, "I will not lend it." Nothing would be more difficult and more dangerous than the task which this court would have to perform, if it were to investigate cases of that description. This is not an agreement to purchase or sell anything, it is not the case of a contract to buy a particular debt upon certain terms, or a contract for the purchase of a certain quantity of goods, to be paid for by installments and in a particular manner, in which case the court has held that these were circumstances which took the transaction out of the rule of this court, that an ordinary contract for the sale or purchase of goods is not the proper subject of a suit for specific performance in this court. It is nothing more than this: a proposal to borrow a certain sum of money, upon certain terms, for a certain time, which is accepted, and the borrower says two or three days afterwards, "I do not want the money, and I have got it elsewhere, upon better terms." It certainly is new to me, that this court has ever entertained jurisdiction in a case where the only personal obligation created is, that one person says, "If you will lend me the money, I will repay it and give you good security," and the terms are settled between them. The court has said that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, "I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me." This is a mere matter of calculation, and the jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action would, or would not, lie in such a case as this; but I am satisfied that before Sir Hugh Cairn's act this court would not have entertained jurisdiction in such cases. If I

recollect right, there is a case in the books<sup>1</sup> which decides that an agreement to fill up a gravel-pit is not one of which this court will decree the specific performance. I apprehend it would have startled some of the judges of this court to hear that its jurisdiction in specific performance extended to the case of agreements to lend moneys. How could it be? The case of a contract for the purchase of stock in the funds, at a particular price, is a much stronger case; for the injury arising from its non-performance might be much greater and more uncertain than in the case of an agreement to borrow a sum of money on particular terms, nevertheless specific performance in a case of stock has repeatedly been refused.<sup>2</sup> It appears to me, therefore, to be contrary to every principle on which this court has acted to say that this is a case in which, independent of Sir Hugh Cairn's act, this court has jurisdiction to decree a specific performance, always bearing in mind that the court grants specific performance only in cases where the remedy at law is inadequate and defective, and also the observations made by Lord Eldon,<sup>3</sup> that though the court exercises a discretion in cases of specific performance, yet that it is to be exercised according to fixed rules and principles, and not arbitrarily.

I am of opinion that the bill must be dismissed with costs.

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### ENGLAND v. CURLING.

IN CHANCERY, BEFORE LORD LANGDALE, M.R., JULY 12, 13, 15,  
20, 1844.

[*Reported in 8 Beavan 129.*]

IN 1831, Curling, Hodges, and England agreed to become partners in the business of ship agents, to be carried on at Deal, Ramsgate, and in London, and on the 6th of July, 1831, they signed, in initials, an agreement for a partnership for seven, ten, or fourteen years. A deed was prepared for carrying into effect the terms of the agreement, which underwent some alterations, but was never executed.

The parties, however, commenced and continued to carry on the business under the name of Goodwin, Curling & Co. In 1842 differences arose in consequence of an attempt by the defendant Curling to

<sup>1</sup> Flint v. Brandon, 8 Ves. 159.

<sup>2</sup> Cud v. Rutter, 1 Peere W. 570; Nutbrown v. Thornton, 10 Ves. 161; Mason v. Armitage, 13 Ves. 37; Doreson v. Westbrook, 5 Vin. Ab. 540.

<sup>3</sup> White v. Damon, 7 Ves. 35.

introduce some near relatives as partners into the concern without the concurrence of the plaintiff. After a long discussion, Curling, in April, 1843, gave notice to the plaintiff to determine the partnership as at mid-summer next. He insisted on the dissolution, retired from the partnership, and formed a new partnership with the defendants Edward Spencer Curling the younger and Geo. Hammond. The new firm commenced carrying on the business of ship agents at Deal on the premises of the old firm, under the name of Goodwin, Curling & Co. They opened the correspondence addressed to the old firm, and largely circulated notices of the dissolution of the old firm.

On the 12th of July, 1843, the plaintiff filed his bill against Curling, Hodges, and the partners in the new firm, praying that the agreement of the 6th of July, 1831, might be specifically performed; for an injunction to restrain Curling and Hodges from engaging in the business of shipping agents, alone or with other persons, before the expiration of the fourteen years mentioned in the agreement; for an injunction to restrain Curling and the new partners from carrying on the business of shipping agents in the name or style of Messrs. Goodwin, Curling & Co., and from using such name or style; from interfering with the correspondence or property of the old firm, and from circulating notices of the dissolution of the old partnership before the expiration of the fourteen years.

A motion was made for an injunction.

*Mr. Pemberton Leigh* and *Mr. Bates* for the plaintiff.

*Mr. G. Turner* and *Mr. Bacon*, *contra*.

THE MASTER OF THE ROLLS granted an injunction in the following terms :

Injunction awarded to restrain the defendant Edward Spencer Curling from carrying on the business of shipping agent, in partnership with the defendant Henry Curling Tryon, Edward Spencer Curling the younger, and George Hammond, or any other person other than the plaintiff and the defendant E. Hodges, until the expiration of the term of fourteen years mentioned in the memorandum of the 6th day of July, 1831, or further order; and also to restrain the defendant, Henry Curling Tryon, Edward Spencer Curling the younger, and George Hammond, from carrying on or engaging in the business of shipping agents in partnership with the defendant Edward Spencer Curling, or otherwise in the name or style of Messrs. Goodwin, Curling & Co., at Deal, Ramsgate, and London, or in any other such place, and from using the name or style of Messrs. Goodwin, Curling & Co., and from receiving or possessing and also from opening any letters or other communication addressed to or intended for the firm of Goodwin, Curling & Co., and from taking possession of, or receiving or interfering with, any of

the property or effects of the firm of Messrs. Goodwin, Curling & Co., and also to restrain the defendant, Edward Spencer Curling, from publishing or circulating any notice of the dissolution of the partnership between Edward Spencer Curling, Edward Hodges, and the plaintiff, before the expiration of the aforesaid term of fourteen years, or until further order.

The parties proceeded in the cause ; Curling put in an answer denying any agreement in writing, and insisting that there was a verbal agreement only. He also alleged certain acts of misconduct on the part of Hodges, which he insisted would entitle him to a dissolution of the partnership, if any existed.

The cause now came on for hearing.

*Mr. Purvis, Mr. Lloyd, and Mr. Bates* for the plaintiff.

*Mr. Kindersley and Mr. Bacon* for the defendant Curling.

*Mr. Turner and Mr. Rolt* for Hodges.

*Mr. Whitbread* for other defendants.

*Mr. Purvis* in reply.

This business has been carried on for one year since the injunction was granted, but under circumstances which cannot render it beneficial to any one. This is a difficulty that always arises when partnership contracts come under the consideration of this court. It is impossible to make persons who will not concur carry on a business, jointly, for their own common advantage. It is that which makes everything of this kind exceedingly uncertain. It is that which makes the court, on all such occasions, exceedingly anxious (an anxiety, I believe, that has been felt by every judge who has ever sat in a court of equity) that when these disputes do arise the parties should, if possible, come to some arrangement between themselves, to do that for their common benefit, which the court cannot do otherwise than at the common expense. But if the parties insist on having a declaration of their rights, the court has, over and over again, entertained the jurisdiction, and must entertain the jurisdiction, unless some one or two of several partners are to be permitted to do just as they like with the partnership rights and interest.

The question, therefore, upon this occasion is, first, whether I am to say that the plaintiff is entitled to the benefit of the agreement of 1831 or not, and next to consider how I can do what is required, for the purpose of preventing those, who have shown themselves disposed to do so, from depriving the plaintiff of that benefit. Whether it would be useful for the parties, or whether they desire to go farther, is quite another matter. If it is desired, I must first of all declare there was a binding partnership agreement. There may or may not, in the course of the last twelve or thirteen years, have been variations in the agreement,

evidenced by the conduct of the parties, and I think, if it is required, I must direct an inquiry what, if any, variations have been agreed upon between the parties ; next, if desired, I must refer it to the Master to settle a partnership deed according to the terms of the agreement, having regard to such variations as have been afterwards made, by common consent of all the parties. It may be proper to vary the terms of the injunction. If not desired to be varied, I shall continue it.

With respect to the other defendants, it is stated to me that they entirely give up their supposed right to carry on this business in the way complained of. By their answer they say that their intended partnership was dissolved, and they desire to be relieved from the matter. The plaintiff was willing to dismiss the bill as against them without costs, proposing, at the same time, that his own costs against those defendants should be costs in the cause. These defendants were willing to have the bill dismissed, but required that the costs should be dealt with as the court might direct, which could not be done until the matter came on in its regular course. The consequence was, that the suit has been prosecuted against those defendants up to this time. It appears that they had unwarily been drawn into a concern from which they were glad to retire. There is no wrong imputed to them from the time they seem to have been aware of the nature of the suit. The plaintiff was not wrong in bringing them here in the first instance, for they were engaged in a course of proceeding materially violating his interest. Was the plaintiff wrong in retaining them ? He offered to dismiss them without costs ; they did not accept that, and how the costs could be arranged, otherwise than at the hearing, it is difficult to imagine. I shall dismiss the bill as against them without costs.

With respect to the other costs of the suit, I have really no doubt about it. I think that Mr. Curling must pay them. He has made the suit absolutely necessary by his improper attempt to get rid of Mr. England, and he has, besides, founded his defense on principles so entirely without proper, just, and legal foundation that this alone would make it necessary to charge him with the costs of this suit as far as the plaintiff is concerned.

I shall give no costs to Hodges.<sup>1</sup>

#### ABSTRACT OF DECREE.

The court doth declare, that the agreement for a copartnership dated, etc., "is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly." Refer it to the Master to inquire, etc., "whether any and what variations have been made in the said agreement, by and with the assent of the

<sup>1</sup> A portion of the opinion has been omitted.—ED.

several parties thereto since the date thereof." Let the Master settle and approve "of a proper deed of copartnership between the said parties, in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement, as hereinbefore directed," and let the parties execute it. Continue the injunction against the defendant Curling. Liberty to apply.

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## SICHEL v. MOSENTHAL.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JANUARY 13, 14,  
1862.

[*Reported in 30 Beavan 371.*]

THIS cause came on upon demurrer. The case stated by the bill was as follows :

The three plaintiffs carried on business in partnership as commission merchants at Manchester and Bradford. In July, 1861, the plaintiffs agreed with the defendant Mosenthal that he should join their firm as a partner therein, and accordingly, with the view of forming a new partnership between the plaintiffs and the defendant, articles of agreement were drawn up and signed by the plaintiffs and defendant. These articles were dated the 8th of July, 1861, and were to the following effect :

"Agreement for partnership between Julius Mosenthal, now of Paris, late of the Cape of Good Hope, and Sichel, Alexander & Co., of Manchester and Bradford, in England, represented by Julius Sichel.

"Julius Mosenthal joins the present partners of Sichel, Alexander & Co. on the first of September next. The firm, from the day of Mr. Julius Mosenthal joining it, to be styled, 'Sichel, Mosenthal & Co.,' at Manchester and Bradford.

"The partnership to be for the term of five or seven years, as may be decided when Mr. Mosenthal comes to Manchester.

"Proper partnership deeds to be drawn up and to provide for the following clauses : An arbitration clause ; an accommodation bill clause ; usual death clause ; clause against any of the partners speculating in shares or pledging the firm's credit, except for the legitimate business of the firm ; clause as to partners' drawings ; and such other clauses as the solicitors may consider advisable."

"Julius Mosenthal to pay into the business on joining it the sum of £5,000, and will cause a further sum of £10,000 to be paid in by his wife's trustees at such dates as may be agreed upon."

After some other provisions the articles proceeded as follows :

"On the first of September of this year the present partners of the



firm of Sichel, Alexander & Co. are to be prepared and to have completed all the conditions which they have, by this agreement, undertaken, or should they fail in so doing, they hereby agree to pay to Julius Mosenthal the sum of £1,500, as computed and assessed damages, by their acceptances, half at three and half at six months from that date.

"Should, on the other hand, Julius Mosenthal fail on that day (the 1st of September, 1861) to carry out his part of the agreement, he is bound, and hereby agrees to do so, to pay, on the request of Julius Sichel, to the firm of Sichel, Alexander & Co. the sum of £5,000, to remain with them as a fixed loan and credit to that firm for the space of two years, receiving from Sichel, Alexander & Co. interest at the rate of five per cent. per annum, and a commission of two and a half per cent. for every twelve months, taking Sichel, Alexander & Co.'s acceptances or promissory notes for the amount."

The defendant, on account of ill health, expressed a reluctance to perform his engagement, and on the 16th of September, 1861, he had neither joined the firm nor advanced the £5,000. Applications were made to him for the £5,000, a correspondence ensued, which it is unnecessary to set out, and the firm drew on him for the amount. The bill then alleged as follows :

"The defendant has not answered either of the last-mentioned letters, and has not accepted the draft for £5,000, and he refuses to advance the £5,000, and to permit the same to remain with the plaintiffs' firm as a fixed loan for the space of two years from the 1st September, 1861. The plaintiffs were fully prepared, on the 1st of September, 1861, to have completed all the conditions which they had, by the agreement of 8th July, 1861, undertaken.

"The defendant is a man of very considerable means, and it is essential to the plaintiffs and to the success of their firm that the defendant should not withdraw from the agreement, and it is impossible to estimate, at law, the damages which the plaintiffs would incur by the defendant refusing to become a partner in their firm and to make the advance of £5,000 according to the agreement."

The bill prayed as follows :

"That the defendant may be decreed specifically to perform the agreement of the 8th of July, 1861, so far as regards the sum of £5,000, the plaintiffs being willing and hereby offering to perform the same on their part.

"That the defendant may be decreed to pay to the plaintiffs, on a short day to be named by this honorable court, the sum of £5,000, and that it may be declared that the plaintiffs are entitled to retain the same for the period of two years from the time of such payment, on their paying interest for the same to the defendant at the rate of £5 per cent.

per annum, and a commission of  $2\frac{1}{2}$  per cent. for every twelve months, the plaintiffs being willing and hereby offering to give their acceptances or promissory notes for the amount to the defendant."

To this bill the defendant filed a general demurrer for want of equity, and on the ground that the court had no jurisdiction.

*Mr. Selwyn* and *Mr. F. O. Haynes* in support of the demurrer.

*Mr. W. F. Robinson* in support of the bill.

THE MASTER OF THE ROLLS. I am of opinion that this demurrer must be allowed. I do not think the question arises here whether this court would specifically enforce this contract if the two last clauses had been omitted; but I entertain considerable doubts whether it would have done so.

*England v. Curling*<sup>1</sup> was a case of this description: Three persons entered into an agreement for a partnership for seven, ten, or fourteen years, and had carried it on for eleven years; one of them thought he was at liberty to turn another out; but the court considered that the question was, not what the terms were on which the partnership had been originally founded, but the terms by which the parties had bound themselves by acting together as partners. The case would have been very different if it had been a bill for the specific performance of an agreement for a partnership which had never been acted on.

If the plaintiffs were to say, this partnership shall last only five years, but the defendant, thinking the nature of the business to be such that it could not be worked at a profit for so short a period, insisted on the duration of the partnership being not less than seven years, which of the periods is the court to take? It would find itself in very great difficulty on settling the articles under a decree for specific performance. Again, how would the court deal with the clause by which the defendant says "he will cause a further sum of £10,000 to be paid in by his wife's trustees at such dates as may be agreed upon." What dates is the court to insert? One side may say it shall be paid immediately, the other may say it shall be paid at the end of five years, or by annual installments of a thousand pounds. How can the court determine this question? And yet it would be impossible to omit this stipulation, and equally impossible for the plaintiffs to enforce the contract without producing the £10,000, because the defendant might reasonably say, "I entered into this agreement on the faith of your bringing this £10,000 as capital into the partnership."

Assuming the first part of the agreement could be specifically enforced, still there is this clause, that if the defendant fails to carry out his part of the agreement he will lend the firm £5,000. He has failed to do so, and the remaining question is whether this clause can be enforced.

<sup>1</sup> 8 Beav. 129.

The agreement is to this effect : A says, " I agree to join B in partnership, and if I fail in that I agree to lend him £5,000 at five per cent." What mutuality is there in this ? The defendant might say, " I am ready to lend you the money at five per cent., by which I may derive considerable profit"; while the plaintiffs might say, " You would not join our firm, and we will not take your money." Could the defendant file a bill to compel the plaintiffs to take the money ? I am of opinion he could not ; if so, this is an agreement without any consideration for it.

It is true that great loss may have been sustained by the plaintiffs by the refusal of the defendant to perform his agreement. They may have taken offices, engaged clerks, and purchased goods for carrying on the business upon the faith of the defendant's promise to join, or lend £10,000 to them, but if so, an action at law and a jury must ascertain the amount of damage.

It would be quite new to me to hear that this court could specifically enforce a contract to lend money, and as to compelling a person to borrow money according to his agreement, that was the point which I decided in *Rogers v. Challis*.<sup>1</sup> If this were a case for recovering liquidated damages, the plaintiffs could not come to this court for that purpose, because they might recover the amount by an action at law. It may be true that it is not a very easy matter to ascertain the amount of damage sustained by the plaintiffs in this case, but that is the proper duty of the jury.

I approve of the mode of raising the question by demurrer, instead of allowing the case to come to a hearing, but the plaintiff fails, and I think the demurrer must be allowed on the usual terms.

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SCOTT v. RAYMENT.

IN CHANCERY, BEFORE SIR G. M. GIFFARD, V.C., NOVEMBER 5,  
1868.

[*Reported in Law Reports, 7 Equity Cases 112.*]

DEMURRER.

The bill was filed by Gabriel Scott, stating as follows :

The plaintiff, a manufacturer of chemical manures at Redbridge, in Hampshire, being desirous of finding a partner in business, in February, 1868, received a letter from Thomas Horsey, of the firm of Fuller & Horsey, auctioneers and estate agents, recommending the defendant, Edward Drury Rayment, to him as a partner. A correspondence took place, and the defendant visited and inspected the plaintiff's manufactory.

<sup>1</sup> 27 Beav. 175.

On the 9th of March, 1868, the plaintiff handed to Thomas Horsey, on behalf of the defendant, a paper entitled "G. Scott's Propositions," embodying the terms on which he was disposed to accept the defendant as a partner; and on the 14th the defendant wrote to the plaintiff, stating that Horsey had handed to him the proposals, and making some objections thereto in points of detail.

Further correspondence followed, and ultimately, on the 23d of March, 1868, the plaintiff and defendant met and discussed the proposals. The defendant required some alterations to be made, to which the plaintiff assented, and the paper of proposals was altered in accordance with the agreement, and as so altered was signed by the plaintiff and handed to the defendant, and a duplicate copy at the same time signed by the defendant and handed to the plaintiff.

This document was headed "Propositions for partnership between Mr. G. Scott and Mr. E. D. Rayment, discussed March 23, 1868." It proceeded as follows: "The partnership to commence 1st of August, 1868, and to be carried on under the style or firm of G. Scott & Co., Mr. Rayment paying down at once a deposit of £2,000 against the amount to be shown by G. Scott on 1st August, 1868, on which day Mr. Rayment to pay into the partnership the balance (after deducting the £2,000 advanced), equal to the sum then shown by G. Scott in buildings, plant, implements, and stock-in-trade; G. Scott agreeing to take to his own book-debts and pay off all his liabilities up to the day of the partnership, August 1, 1868. Mr. Rayment to pay G. Scott the sum of £500 as good-will for a moiety of the profits of business during a partnership of ten or twelve years, to be paid as follows" (specifying installments of £100 a year): "G. Scott to be allowed out of the business as a charge against trading account by the partnership the sum of £300 per annum for his extra services and management, after which each partner to be credited with 5 per cent. interest for his capital, and the profits to be then divided in equal proportions. Mr. Rayment covenanting to put into the business further sums up to £5,000 (beyond the amount invested August 1, 1868, equal to G. Scott's capital), to be advanced at the rate of not less than £2,000 per annum"; on which extra capital he was to receive £6 per cent. interest before division of profits, with other minor provisions.

On the 2d of June, 1868, the defendant wrote to the plaintiff to say he had sustained some heavy losses, and at a meeting with the plaintiff on the 4th of June he refused to perform the contract.

The bill prayed that the defendant might be decreed specifically to perform the contract; for a declaration that the plaintiff was entitled to damages; for an inquiry as to the amount; and that the defendant might be decreed to pay the amount found due.

The defendant demurred.

*Mr. Kay*, Q.C., and *Mr. Martineau* for the demurrer.

*Mr. W. M. James*, Q.C., and *Mr. A. E. Miller* for the bill.

Sir G. M. GIFFARD, V.C. I think this demurrer must be allowed.

In the first place, I do not hesitate to say, that as a general rule the court will not decree specific performance of an agreement to perform and carry on a partnership. There may be exceptions, but very limited exceptions, to that rule, such, for instance, as the court going the length of decreeing the execution of a deed.

Three cases have been cited. I think the one quoted from Vesey,<sup>1</sup> the anonymous one, we may pass over, for I cannot take that to be an authority for saying that this court will decree the carrying into effect of a partnership; and we will go to *England v. Curling*<sup>2</sup> and *Hibbert v. Hibbert*.<sup>3</sup> In both those cases there have been part performance, and I do not at all hesitate to say that in both it was essential to the ends of justice that the *status* of the parties should be ascertained, determined, and fixed; and especially in *England v. Curling* is that manifest, when one finds that there was a direction to ascertain, in substance, what the agreement between the parties was.

What we have here is an agreement which, I admit, upon the allegations in this bill must be taken as a binding agreement. I do not think it necessary for me to say whether the agreement is uncertain or not, or whether Mr. James' is or is not a correct interpretation of the stipulation as to ten or twelve years. But this is clear, that it is an agreement to form a partnership, and if so, it is an agreement on which the plaintiff may maintain an action at law for damages, and that is an appropriate remedy. Nothing has happened to throw any legal difficulties in the plaintiff's way which this court could remove, such, for instance, as occurs in those cases where there has been an agreement for a lease and possession; and where if a lease is executed it requires to be antedated, in order to do justice between the parties.

This is a case in which, before Lord Cairns' act, this court would not have interfered. If this court would not have interfered antecedently to Lord Cairns' act, it will not interfere now, on the mere possibility that the plaintiff may be entitled to some damages, which by bringing the action he may be able to recover in a court of law.

Therefore, on these grounds the demurrer must be allowed, and the bill must be dismissed; but as the plaintiff desires it, though I believe it is not necessary, the order will be without prejudice to his legal right. The costs will follow the result.

Solicitor for the plaintiff, *Mr. John Henry Jones*.

Solicitors for the defendant, *Messrs. Cunliffe & Beaumont*.

<sup>1</sup> 2 Ves. Sen. 630.

<sup>2</sup> 8 Beav. 129.

<sup>3</sup> Coll on Partnership, p. 133.

## JOHN P. SOMERBY AND ANOTHER v. GEORGE BUNTIN.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER  
6, 1875.

[*Reported in 118 Massachusetts Reports 279.*]

BILL in equity filed January 9, 1872, by John P. Somerby and Jeremiah Prescott, alleging the following facts :

The defendant in the year 1865, and the early part of the year 1866, invented a new and useful improvement in seats for railroad passenger cars, and, being desirous to obtain letters patent therefor from the government of the United States, or otherwise to so use or dispose of his invention as to realize money therefrom, but not having the pecuniary means to pay the expenses of obtaining said letters patent, or otherwise putting his invention favorably upon the market, applied to the plaintiffs for assistance in both of these respects, and offered the plaintiffs each one-third part of the property in the invention, and of all moneys and emoluments which should result therefrom, as compensation for affording him the solicited assistance. The plaintiffs believing the said invention to be useful, and that, with the expenditure of the necessary amount of money, and the devotion of time, skill, care, and labor, it could be made remunerative, accepted the said offer of the defendant; and an oral agreement was made between the parties that the invention, by which all letters patent which should be granted therefor, should be the joint property of the plaintiffs and the defendant, each to be the owner of one-third part thereof, and that each and all of the parties should use his best efforts to make said invention available and remunerative for the common benefit of all the parties. In pursuance of this agreement, application was made in the name of Buntin for letters patent of the United States, and the expenses of making and prosecuting the application were paid by Somerby, and sales of the right to use the invention were made principally through the agency of Prescott, from which sales divers sums of money were received, which were divided between Buntin and the plaintiffs in the proportion of one-third part to each, in pursuance of the agreement. The invention was rapidly advancing in public favor, chiefly through the labor, expenditures, and exertions of the plaintiffs, and the sales of rights to use the same were increasing in a similar ratio, so that the proceeds of the sales had become large and were steadily augmenting, and would have yielded to the plaintiffs a large income for their time, labor, and expenditures in the premises, but that the defendant early in the year 1867, while the aforesaid application to the United States for letters patent was pending,

and without the knowledge or consent of the plaintiffs, or either of them, made application to the United States for letters patent in his name, and in another form, for the said invention, on which application letters patent were granted to him, on or about April 2, 1867, for a "design for end frame of a car seat," which was the invention of the defendant that had become the property of the defendant and the plaintiffs. Upon the receipt of the said letters patent by the defendant, he refused to assign any part thereof to the plaintiffs, and denied that they had any right therein or in the invention, or in the proceeds thereof, and proceeded to make large sales of rights to use the invention under the letters patent, and has received therefrom divers large sums of money for which he refuses to render any account to the plaintiffs, or to make any division thereof with them, and pretends that all said sums of money belong to him, and that the plaintiffs, or either of them, have no property or right therein.

The prayer of the bill was that the defendant might be restrained from making any sale or assignment of the said letters patent, or of the invention, to any person or persons other than the plaintiffs without their consent; that he be compelled to assign and transfer to each of the plaintiffs one-third part of said letters patent and invention; for an account of all sums of money and of all other considerations received by him for sales under said letters patent or for licenses to use the invention; and the payment to each of the plaintiffs of such sums of money and other considerations as should be found to be due to them respectively; and for general relief.

The defendant demurred to the bill upon the grounds which appear in the opinion. The case was heard by Gray, C. J., upon the bill and demurrer, and reserved, at the request of the parties, for the consideration and determination of the full court.

*T. L. Livermore* for the defendant.

*J. P. Healy* for the plaintiffs.

GRAY, C. J. The causes assigned in the demurrer are, 1st, that the contract sought to be enforced is not in writing; 2d, that it is against the course and practice, and not within the jurisdiction of this court, to entertain suits for the specific performance of oral contracts; 3d, that the plaintiffs have not stated such a case as entitles them to any discovery or relief in equity.<sup>1</sup>

The oral agreement of the parties, alleged in the bill, that the invention and all letters patent which should be granted therefor should be their joint property, in proportions specified, stands upon the same ground as if it had been in writing. Such an agreement, though made

<sup>1</sup> Only so much of the opinion is given as relates to the third cause of demurrer.—ED.

before the issue of a patent, is valid, and capable of being enforced in equity by compelling an assignment, an account, and such other relief as the circumstances of the case may require.<sup>1</sup> Although a court of equity will not ordinarily decree specific performance of an agreement to form a partnership, which may be immediately dissolved by either party, it will secure to a partner the interests in property to which by the partnership agreement he is entitled.<sup>2</sup>

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KENNEY v. WEXHAM.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., APRIL 29, 30; MAY 14, 1822.

[*Reported in Maddock and Geldart 355.*]

THE plaintiff being in right of his wife entitled to an annuity for the life of a Mr. McDonald, issuing out of the estate of the defendant, entered into a written agreement, dated the 18th April, 1818, which was signed by the plaintiff and defendant, to sell the said annuity to the defendant for the sum of £280, which was to be paid on or before the 1st January, 1819; a first installment of £200 was to be paid in the October preceding; there was no express stipulation as to the time when the purchaser was to become entitled to the annuity.

The Vice-Chancellor held the purchaser entitled to the annuity from the time of payment of the last, and not from that of the first, installment of the price.

It appeared that a difference having arisen upon the point, as to the time when the purchaser would be entitled to the annuity, the performance of the contract was delayed. And in the month of October, 1820, the purchaser wrote a letter to the plaintiff, stating his claim to the arrears from the time of the agreement, and expressing his readiness immediately to complete upon those terms. Mr. McDonald, the annuitant, died a few days after the date of this letter.

The Vice-Chancellor held this letter conclusive evidence of a contract depending, and not abandoned.

It was next urged for the defendant, that there could in this case be no decree for the specific performance of the contract, because the subject of the contract was gone; that the plaintiff's claim was for the price only, and that he might have recovered this at law; and therefore no bill in equity would lie for it. And it was said, that the court had refused to make a decree in a bill for the specific performance of an

<sup>1</sup> *Herbert v. Adams*, 4 Mason 15; *Nesmith v. Calvert*, 1 Woodb. & Min. 34; *Clum v. Brewer*, 2 Curtis 506; *Binney v. Annan*, 107 Mass. 94.

<sup>2</sup> *Buxton v. Lister*, 3 Atk. 383; *Story Part. § 189*; 1 *Story Eq. Jur.*, § 666.



agreement for a lease, where the extended term had expired before the cause came to a hearing.

*Mr. Sugden and Mr. Temple* for the plaintiff.

*Mr. Bell and Mr. Simpkinson* for the defendant.

THE VICE-CHANCELLOR. It may now be considered as the settled law of the court, by the cases of *Mortimer v. Capper*, and *Jackson v. Lever*, and the reported *dicta* of Lord Eldon, especially in the case of *Cole v. Trecothick*, that if the price of property be an annuity for the life of the vendor, his death before the conveyance will form no objection to the specific performance of the contract. The vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavorably. The same principle necessarily applies to a case where the life annuity is not the price, but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance of the contract. The purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavorable to him. But it is said, that by the death of the annuitant a legal transfer of the annuity is no longer necessary to the defendant; and the only act to be done is the payment of a sum of money by the defendant to the plaintiff; and that the plaintiff ought therefore to have proceeded at law, and not in equity.

A court of equity entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract. And although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. If the death of a life annuitant were to happen at such a time that a purchaser in effect took no benefit under his contract, which might well happen, where his title was to commence at a future time; there it might be made a question, whether, as at the time of the bill filed a purchaser could file no bill in equity, the principle of mutual remedy could enable the vendor to file such a bill. But that is not this case. Here the purchaser has an equitable title to the arrears of the annuity between the time of his purchase and the death of the annuitant, which would, in principle, now support a bill on his part for specific performance, although the facts of the case would not make such a bill advantageous to him. I consider this case, therefore, strictly a case of mutual remedy so as to entitle the vendor to a bill for specific performance. And it appears to me to make no difference in principle, that the annuity being charged upon the estate of the purchaser himself, he could practically satisfy his demand for arrears, by retainer, without the necessity of a legal grant.

## WALKER v. EASTERN COUNTIES RAILWAY COMPANY.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V.C., JUNE 3, 5, 6, 7,  
AND 14, 1848.

[*Reported in 6 Hare 594.*]

THE plaintiff was the owner of some leasehold houses in Phoenix Place and Wheler Street, Spitalfields, where he carried on the business of a tobacco-pipe manufacturer; and on the 4th of September, 1846, he was served with the following notice, signed by the secretary of the Eastern Counties Railway Company :

“EASTERN COUNTIES RAILWAY STATIONS ENLARGEMENT.

“TO W. G. WALKER, lessee or reputed lessee, and to every other person having any estate or interest in the land and hereditaments hereinafter referred to :

“As secretary, and on behalf of the Eastern Counties Railway Company, and in pursuance of the powers and directions of an act passed in the ninth year of the reign of her Majesty the Queen, intituled ‘An Act to enable the Eastern Counties Railway Company to enlarge their stations in London and at Stratford, and for other purposes,’ I hereby give you and each of you notice that the said company require to purchase the messuage or tenement, land and hereditaments, described or referred to in the schedule hereto, and which they are authorized to purchase or take under the provisions and for the purposes of the said last-mentioned act. And, in further pursuance of the powers and directions of the said last-mentioned act, the said company hereby demand from you and each of you the particulars of your estate and interest in such land and hereditaments, and of the claims made by you and each of you in respect thereof, and which particulars and claims may be delivered at or sent to the office of Mr. John Duncan, No. 72 Lombard Street, London, solicitor of the said company. And, in further pursuance of the powers and directions aforesaid, the said company hereby state, that they are willing to treat for the purchase of your and each of your estate and interest in such messuage or tenement, land or hereditaments, and as to the compensation to be made for the damage that may be sustained by you and each of you by reason of the execution of the works connected with the undertaking. And I also give you notice, that by the last-mentioned act it is provided, that, if, for twenty-one days after the service of such notice as above written, any party shall fail to state the particulars of his claim in respect of the lands and hereditaments required by the said company, or to treat with the promoters of the undertaking in respect to his interest therein, or if such party and the promoters of the undertaking shall not agree as to the

amount of compensation to be paid to such party for any such interest or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in manner therein provided for settling cases of disputed compensation.

“ C. P. RONEY,

“ Secretary to the said Eastern Counties Railway Company.

“ Dated this 2d day of September, 1846.”

The schedule to the notice contained a description of the property.

On the 3d of October, the solicitor of the company wrote to the plaintiff, informing him that unless the particulars of his claim for the property should be forthwith delivered, the company would be obliged to serve the plaintiff with another notice, preparatory to getting a jury summoned to award compensation. On the 27th of October the plaintiff delivered his claim for purchase-money and compensation for the loss of his trade. The solicitor of the company, on the 14th of November, wrote to the plaintiff and others, inviting them to meet the deputy chairman, in order to agree upon sums to be paid to them. The plaintiff attended accordingly, but his claim was not then discussed. On the 17th of December a meeting took place between the solicitor and the surveyor of the company, and the plaintiff and his solicitor, at which the claim was discussed, but no agreement was come to.

In reply to a letter of complaint of the delay either in settling, or summoning a jury, the plaintiff's solicitor, on the 30th of August, 1847, received a letter from the company's solicitor, in which the latter said : “ I was not aware, until to-day, that your client required the company to proceed under the notice, by getting the amount of his compensation ascertained. They do not, at present, require the property of which he is lessee, although they have settled with and paid one of the tenants for the purchase of his interest, and taken possession of the house, and thereby become tenants to your client in respect of that house. I will, however, at once see the company's surveyor, and make your client an offer, and forthwith take every necessary step under the railway act to get the amount of your client's compensation settled and paid.” No further step having been taken, the plaintiff filed his bill on the 6th of October, 1847. The bill alleged that possession of one of the houses had been delivered to the company by an under-tenant of the plaintiff, holding by a tenancy from year to year ; and the bill charged that the company threatened to pull down such house.

The bill prayed that the company might be decreed to complete the purchase of the premises comprised in the schedule to the notice of the 2d of September, 1849, by paying to the plaintiff the amount of his said claim, or that the amount of the purchase-moneys and compensation

might be ascertained and determined in the manner provided by the Eastern Counties Railway Stations Enlargement Act, 1846; and that the company might be decreed forthwith to take all proper and necessary measures to ascertain and determine the same, pursuant to the provisions of the said act, and in the manner directed therein, or in the "Lands Clauses Consolidation Act, 1845." The bill prayed an injunction to restrain the company from pulling down the house in their possession, and that they might be decreed to pay an occupation-rent, to be set upon it by the court.

The company by their answer set forth a correspondence, in which they had required an inspection of the plaintiff's books, either by their surveyor or by an accountant, to be approved of by both parties, in order to ascertain the amount of compensation he was entitled to for the loss of his trade, but which inspection the plaintiff had not consented to give; and the company insisted that a settlement of the amount to be paid had not been come to, owing to the default of the plaintiff. The company submitted, that, under the Lands Clauses Consolidation Act, 1845, as well as by their said special act, the plaintiff was bound to require and give notice to the defendants to proceed to ascertain the amount of compensation, either by summoning a jury or proceeding to arbitration; but he had given no such notice. The company denied that they had entered into possession of the house referred to, or that they had any intention of pulling it down.

The *Solicitor-General* and *Mr. J. H. Law* for the plaintiff.

*Mr. Wood* and *Mr. Grove* for the company.

VICE-CHANCELLOR. The plaintiff is the owner of houses required by the defendants for the purposes of their railway, and has filed his bill as a vendor, praying the specific performance of an agreement by the defendants to purchase the houses, and an injunction to restrain them from converting a portion of the property, until the price shall be paid and the contract completed.

The first point made by the defendants, who admit their liability to take the houses, is, that at the time the bill was filed no such contract as the bill supposes existed. I think that point is not sustainable. The cases cited for the plaintiff clearly establish that the notice of the 2d of September, served by the company upon the plaintiff on the 4th of September, had the effect of making a contract between them for the purchase by the defendants of the plaintiff's houses. It is clear that the company could not, after that notice, have retired from it. After that notice, the only thing to be ascertained was the amount of the purchase-money; and as the mode of ascertaining that is prescribed by the statute, it is in contemplation of law certain, although it remains to be ascertained.

Admitting that a contract existed at the time the bill was filed, the case was likened to those cases in which a contract having been made to sell land at a price to be fixed by an individual named, it has been holden that, until the price is fixed, a bill will not lie to enforce the agreement. It appears to me that there is no analogy between the cases referred to and the principal case. In the cases cited, the court had no means of ascertaining the price to be paid. That is not so in the principal case. The contract is a contract to purchase on the terms prescribed by the act of Parliament, and those terms the court has the means of applying so as to get at the price.

It was said, in the next place, that no instance existed of a bill filed for such a purpose as this, and that a mandamus to compel the defendants to issue their warrant to the sheriff to summon a jury to determine the price to be paid for the houses was the proper remedy. I certainly do not recollect any case in which a bill has been filed for the simple purpose of effecting that which might be done by mandamus. But, without relying upon the circumstances that the company, by their arrangement with the tenant of one of the houses, are in a position which enables them to take possession of and convert that part of the plaintiff's property at their will, and that the bill prays an injunction to restrain the company from converting it, I cannot, as matter of principle, deny the jurisdiction of the court to entertain this bill. If, after notice by the company to take the land, and tender of the price, the owner should attempt to deal with the property in a manner injurious to the company, or simply refuse to execute a conveyance, I cannot think that the jurisdiction of this court would be doubtful; and if that be so, the jurisdiction cannot be denied in the converse case, in which the vendor is plaintiff.<sup>1</sup> The remedy by mandamus is not specified in the act, and there is nothing, therefore, in the act to deprive the party of any remedy which law or equity furnish for breaches of contract. This is a vendor's bill for the specific performance of an agreement for the sale of houses; and the circumstance that the act of Parliament entitles the purchaser to have the price determined by a jury cannot oust the court of its jurisdiction in a case otherwise within that jurisdiction.

I say this, however, without prejudice to the question by whom the costs of the suit should be paid, if extra costs have thereby been occasioned, or if the necessity of litigation shall appear to have been occasioned by the refusal of the plaintiff to give the company reasonable information and evidence as to the amount of his claim. I observe that the company admit their liability to take the houses—say they have no occasion for them at present, and insist that the plaintiff should pay

<sup>1</sup> Withy v. Cottle, 1 S. & S. 174; s.c., T. & R. 78; Adderley v. Dixon, 1 S. & S. 607.

the costs of the suit; but the answer does not, although the argument at the bar did, dispute the jurisdiction of the court.

The case appears to me not to be one in which, admitting in the abstract the jurisdiction of the court, and reserving the question by whom the costs should be borne in case a decree for the plaintiff is to be made, there is in the circumstances any special ground for refusing to entertain the suit. Guarding the company with respect to costs, there is not, I think, any reason why I should refuse the plaintiff a decree.

An argument was founded upon the 68th section of stat. 8 & 9 Vict. c. 18, which in certain cases would enable the plaintiff peremptorily to require the company to issue their warrant to the sheriff, and on their default recover the amount of his claim. It was said that the power arose here, and I was referred to an allegation in the bill, that the defendants had taken possession of the house No. 40. I find, however, that this allegation is denied by the answer.

DECREED the defendants to issue their warrant to the sheriff for summoning a jury to settle the compensation for the premises comprised in the notice of the 2d of September, 1846, within twenty-one days from the date of the decree. Reserve further directions and costs.

The company petitioned for a re-hearing before the Lord Chancellor, and did not issue their warrant to the sheriff.

The Solicitor-General and Mr. J. H. Law moved for the four-day order to enforce the decree.

Mr. Wood and Mr. Grove opposed the motion, on the ground of the pendency of the appeal.

The Vice-Chancellor said that the company should have applied to stay the proceedings, if they had desired to delay the execution of the decree.

Order made.

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### COGENT v. GIBSON.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., MAY 30, 1864.

[*Reported in 33 Beavan 557.*]

THE plaintiff Cogent was entitled to a French patent for improvements in the manufacture of saddles. In 1863 the defendant agreed to purchase from the plaintiff the patent right to manufacture and sell these saddles in England for £125, and Cogent was, at the expense of the defendant, to obtain the English patent.

The patent was obtained, and this was a bill by the vendor against the purchaser for the specific performance of the agreement.

*Mr. Selwyn* and *Mr. C. H. Blake* for the plaintiff.

*Mr. T. H. Terrell*, for the defendant, argued that this was not a proper case for the interference of this court, for all the plaintiff required was the purchase-money, which he might obtain by action at law. He argued, secondly, that the patent right was of no value.

THE MASTER OF THE ROLLS. I think the plaintiff is entitled to a decree for specific performance.

I am of opinion that in all these cases the rights of the vendor and purchaser are mutual and correlative. I had to consider the point lately, in a case where the plaintiff, the vendor of land at Harrogate, had nothing to do but to receive a sum of money, and I held that he could come to this court for specific performance.

It is true that the vendor may bring an action to recover the damages, but he is also entitled to come here for a specific performance.

I am of opinion that where there is a valid contract for the sale of a patent, this court will specifically enforce it in a suit by the purchaser against the vendor, and will make the latter execute a conveyance. I am also of opinion that the opposite is equally true, and that the vendor may come into equity for the purchase-money.

The plaintiff is entitled to the usual decree for specific performance.

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### LEONARD S. JONES v. BENJAMIN B. NEWHALL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 20, 1874.

[Reported in 115 *Massachusetts Reports* 244.]

BILL in equity to enforce specific performance of the following agreement signed and sealed by the parties thereto :

"This indenture, made this fourth day of December, A.D. 1872, by and between Leonard S. Jones, of Cambridge in the Commonwealth of Massachusetts, and Benjamin B. Newhall, of Boston in said Commonwealth, witnesseth,

"That said Jones agrees to sell, and said Newhall to purchase, first, all the right, title, share and interest of the said Jones to and in any and all property belonging to the Worthington Land Associates, together with one promissory note for \$10,000, dated April 18, 1872, belonging to said Jones, and being one of five of even amount and date given by Samuel A. Wheelock and secured by mortgage on land conveyed by said associates to R. A. Ballou and others ; second, all the right, title, share and inter-

est of said Jones to and in any and all property belonging to the Dorchester Land Association, the share of said Jones consisting of fourteen shares of the stock of said Dorchester Land Association, together with two mortgage notes of \$3,467.95 and \$4,743.36, respectively, given by Samuel A. Wheelock to said Benjamin B. Newhall.

“ For which said property, said Newhall agrees to pay to said Jones the amount of all moneys invested by said Jones in said associations, interest on the same at seven per cent. per annum from the time of investment to the date hereof, and the additional sum of \$5,000 as bonus. Said investments, interest, and bonus, amounting in all to \$34,196.33, payable as follows : viz., ten per cent. of said sum, viz., \$3,419.63 in cash, on the delivery of this agreement, and the balance in nine monthly payments, the first five of such payments to be \$3,755.34 each, and to be made one in each of the first months of the year A.D. 1873, and the remaining four of said nine payments to be of \$3,000 each, and to be made one in each of the months of June, July, August and September of said year 1873, with interest on said payments at the rate of seven per cent. per annum. It is agreed, nevertheless, that if said Newhall shall elect to anticipate any of said payments, said Jones shall receive the same when offered.

“ And it is further agreed, that of said first payment of ten per cent. of said whole amount, \$2,000 shall be applied to the payment of the property second above described, and \$1,419.63 shall be applied to the payment of said property first above described ; that the five of said monthly payments next ensuing shall be applied to the payment of said property first above described, and, together with said \$1,419.63, shall be deemed full payment therefor ; and when made, said Jones agrees to transfer, convey, and deliver to said Newhall or his heirs or assigns, all the property first above described, and execute and deliver to him or them all instruments of conveyance necessary or proper for the conveyance of said property ; that after the said transfer or delivery, the property second above described shall be transferred, conveyed, and delivered to said Newhall or his heirs or assigns, in amounts of \$1,000 or multiples thereof, as payments of like amounts shall then be made by said Newhall ; an amount of said property equal to said \$2,000 of said first payment of ten per cent. being retained by said Jones until the final transfer ; and that all proper instruments of conveyance of the same shall be executed and delivered as is above provided in the case of the property first described.

“ All increase arising in the meantime from the sale of either of said properties above described or otherwise, whether in cash, mortgages, notes, or other securities, shall be held in trust by said Jones for said Newhall, and delivered, transferred and conveyed to said Newhall, his



heirs or assigns, at the times above provided for the final transfer of either of said properties respectively. And it is further agreed, that said Newhall shall hold said Jones harmless from all taxes or assessments of whatever kind or by whomsoever levied or assessed upon said property above described, whether now existing or hereafter created.

“ Said Newhall is hereby empowered to appear at all meetings of the associations above named, vote, and otherwise take part in the transaction of business at said meetings, in the place and stead of said Jones, as fully as said Jones could do ; and is hereby nominated and appointed the attorney of said Jones to that extent.”

The bill alleged the execution of the above agreement, the transfer of the plaintiff's interest in the Worthington Land Association, and payment therefor ; that there remained due to the plaintiff from the defendant four of the monthly payments of \$3,000 each mentioned in the agreement, with interest at seven per cent., together with the assessments that may be made on the Dorchester Land Association.

The bill also alleged readiness on the part of the plaintiff to perform his part of the contract and tender of performance, and refusal on the part of the defendant.

To this bill the defendant demurred on the ground that the plaintiff had a plain, adequate, and complete remedy at law. The demurrer was overruled, and the defendant appealed.

The case was then heard before Ames, J., who reported it to the full court in substance as follows : The defendant executed the contract set up in the bill. The interest of the plaintiff in the Worthington Land Association has been conveyed to the defendant and paid for by him. In regard to the Dorchester Land Association, one installment of \$3,000 became due to the plaintiff under the contract, which the defendant refused to pay on demand, and also refused to pay an assessment then due or about to become due.

The plaintiff was permitted to testify, against the defendant's objection and exception, that his purpose in making said contract with the defendant was to effect a sale of his interest in the Dorchester Association property, and that the \$5,000 bonus or profit was entirely on account of the Worthington property.

It appeared also that the defendant had made payments on the Dorchester Land Association property, amounting to the sum of \$4,800, before the above mentioned installment had become due.

It further appeared that the legal title to the land belonging to said association was in trustees, and that the plaintiff's interest therein was the right to receive a certain portion of the net proceeds of the sale of said land.

Upon these facts, the defendant insisted that the plaintiff was not en-

titled to relief in equity, on the ground that he had a full, adequate and complete remedy at common law.

The judge decided that the plaintiff was entitled to a decree according to the terms of his bill, and that a decree should be entered accordingly. From this decision the defendant appealed ; and the case is accordingly reported for the consideration of the full court, on said demurrer, and all the above questions of law and fact.

*R. D. Smith* and *A. E. Jones* for the plaintiff.

*A. C. Clark* for the defendant.

WELLS, J. Jurisdiction in equity is conferred upon this court by the Gen. Sts.,<sup>1</sup> to hear and determine "suits for the specific performance of written contracts, by and against either party to the contract, and his heirs, devisees, executors, administrators and assigns." The power extends alike to written contracts of all descriptions ; but its exercise is restricted by the proviso, "when the parties have not a plain, adequate and complete remedy at the common law." This proviso has always been so construed and applied as to make it a test, in each particular case, by which to determine whether jurisdiction in equity shall be entertained. If the only relief to which the plaintiff would be entitled in equity is the same in measure and kind as that which he might obtain in a suit at law, he can have no standing upon the equity side of the court ; unless his remedy at law is doubtful, circuitous, or complicated by multiplicity of parties having different interests.<sup>2</sup>

In contracts for the sale of personal property jurisdiction in equity is rarely entertained, although the only remedy at law may be the recovery of damages, the measure of which is the difference between the market value of the property at the time of the breach, and the price as fixed by the contract. The reason is, that, in regard to most articles of personal property, the commodity and its market value are supposed to be substantially equivalent, each to the other, so that they may be readily interchanged. The seller may convert his rejected goods into money ; the purchaser, with his money, may obtain similar goods ; each presumably at the market price ; and the difference between that and the contract price, recoverable at law, will be full indemnity.<sup>3</sup>

It is otherwise with fixed property like real estate. Compensation in damages, measured by the difference in price as ascertained by the mar-

<sup>1</sup> c. 113, § 2.

<sup>2</sup> *Charles River Bridge v. Warren Bridge*, 6 Pick. 376, 396 ; *Sears v. Boston*, 16 Pick. 357 ; *Wilson v. Leishman*, 12 Met. 316, 321 ; *Hilliard v. Allen*, 4 Cush. 532, 535 ; *Pratt v. Pond*, 5 Allen 59 ; *Glass v. Hulbert*, 102 Mass. 24, 27 ; *Ward v. Peck*, 114 Mass.

<sup>3</sup> *Jones v. Boston Mill Corporation*, 4 Pick. 507, 511 ; *Adderley v. Dixon*, 1 Sim. & Stu. 607 ; *Harnett v. Yeilding*, 2 Sch. & Lef. 548, 553 ; *Adams Eq.* 83 ; *Fry Spec. Perf.* §§ 12, 29.

ket value, and by the contract, has never been regarded in equity as such adequate indemnity for non-fulfilment of a contract for the sale or purchase of land, as to justify the refusal of relief in equity. When that is the extent of the right to recover at law, a bill in equity is maintainable, even in favor of the vendor, to enforce fulfilment of the contract and payment of the full amount of the price agreed on.<sup>1</sup>

Although the general subject is within the chancery jurisdiction of the court, yet inadequacy of the damages recoverable at law is essential to the right to invoke its action as a court of chancery in any particular case. The rule is the same whether applied to contracts for the sale of real or of personal estate. The difference in the application arises from the difference in the character of the subject matter of the contracts in respect to the question whether damages at law will afford full and adequate indemnity to the party seeking relief. If the character of the property be such that the loss of the contract will not be fairly compensated in damages based upon an estimate of its market value, relief may be had in equity, whether it relates to real or personal estate.<sup>2</sup>

The property in question in this case appears to be of such a character. It is not material, therefore, whether the interest of the plaintiff is in the nature of realty or personalty. But the relief he seeks is not such as to require the aid of a court of equity. At the time this bill was filed the only obligation, on the part of the defendant, to be enforced either at law or in equity, was his express promise to pay a definite sum of money as an installment towards the purchase of certain property from the plaintiff. That promise is supported by the executory agreement of the plaintiff to convey the property, contained in the same instrument, as its consideration; but in respect of performance the several promises of the defendant are separable from the entirety of the contract, and each one may be enforced by itself as an *assumpsit*. The plaintiff is not obliged to sue in damages upon his contract as for a general breach. He may recover at law the full amount of the installment due. In equity he can have no decree beyond that. He cannot come into equity to obtain precisely what he can have at law.<sup>3</sup>

The plaintiff has no occasion for any order of the court in regard to performance by himself. At most, all that is necessary for him to do in order to recover his judgment at law, is to offer a convey-

<sup>1</sup> *Old Colony Railroad v. Evans*, 6 Gray 25.

<sup>2</sup> *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Duncuft v. Albrecht*, 12 Sim. 189, 199; *Clark v. Flint*, 22 Pick. 231; *Story Eq. Jur.* § 717; *Adams Eq.* 83; *Fry Spec. Perf.* §§ 11, 23, 30, 37.

<sup>3</sup> *Howe v. Nickerson*, 14 Allen 400, 406; *Jacobs v. Peterborough & Shirley Railroad*, 8 Cush. 223; *Gill v. Bicknell*, 2 Cush. 355; *Russell v. Clark*, 7 Cranch 69.

ance of a portion of his interest corresponding to the amount of the installment due.

We do not regard the fact, stated in the report, that the defendant "also refused to pay an assessment then due, or about to become due," for which he was bound by the contract to provide, and hold the plaintiff harmless; because that is immaterial upon demurrer, there being no allegation in the bill in reference to it. And besides, there would be sufficient remedy at law for such a breach, if it were sufficiently alleged and proved.

If the plaintiff will be compelled to bring several actions for his full remedy at law, it is because he has a contract payable in installments; that is, he may have several causes of action. But he may sue them severally, or he may join them all in one suit, when all shall have fallen due, at his own election. He is not driven into equity to escape the necessity of many suits at law.

It is true, as the plaintiff insists, that a different rule exists in the English courts of chancery; and that in numerous cases, not unlike the present, relief in equity has there been granted by decree for payment of a sum of money due by contract, although equally recoverable at law. The maxim which, as we apply it, makes the want of adequate remedy at law essential to the right to have relief in equity in each case, has always been attached to chancery jurisdiction. But in the English courts it has been rather by way of indicating the nature and origin of the jurisdiction, and defining the class of rights or subjects to which it attaches, than as a constant limit upon its exercise. Courts of chancery were created to supply defects in proceedings at common law.<sup>1</sup> Their jurisdiction grew out of the exigencies of the earlier periods in the judicial history of the country, and was from time to time enlarged to meet those exigencies. Its limits, having become defined and fixed by usage, have not contracted as the jurisdiction of the common law courts was extended. It has always been held that jurisdiction once acquired in chancery, over any subject or class of rights, is not taken away by any subsequent enlargement of the powers of the courts of common law, nor by reason of any new modes of remedy that may be afforded by those courts.<sup>2</sup>

Hence arose a wide range of concurrent jurisdiction, within which chancery proceeded to administer appropriate remedies, without regard to the question whether a like remedy could be had in the courts of law.<sup>3</sup> One of its maxims was that there must be mutuality of right to

<sup>1</sup> Story Eq. Jur. §§ 49, 54.

<sup>2</sup> Story Eq. Jur. § 64 *i*; Snell Eq. 355; *Slim v. Croucher*, 1 De G., F. & J. 518.

<sup>3</sup> *Colt v. Woollaston*, 2 P. Wms. 154; *Green v. Barrett*, 1 Sim. 45; *Blain v. Agar*, 2 Sim. 289; *Cridland v. De Mauley*, 1 De G. & S. 459; *Evans v. Bicknell*, 6 Ves. 174; *Burrowes v. Lock*, 10 Ves. 470.

avail of that jurisdiction. Accordingly, if the contract or cause of complaint was such that one of the parties might require the peculiar relief which chancery alone could afford, it was frequently held that the principle of mutuality required that jurisdiction should be equally maintained in favor of the other party, who sought and could have no other relief than recovery of the same amount of money due or measure of damages as would have been awarded by judgment in a court of law.<sup>1</sup>

In contracts respecting land there is an additional consideration for maintaining jurisdiction in equity in favor of the vendor as well as the vendee, which is doubtless much more influential with the English courts than it can be here; and that is the doctrine of equitable conversion. It is referred to as a reason for the exercise of jurisdiction at the suit of the vendor, in *Cave v. Cave*.<sup>2</sup>

In Massachusetts, instead of a distinct and independent court of chancery, with a jurisdiction derived from, and defined and fixed by long usage, we have certain chancery powers conferred upon a court of common law, whose jurisdiction and modes of remedy, as a court of law, had already become extended much beyond those of the English courts of common law, partly by statutes and partly by its own adaptation of its remedies to the necessities which arose from the absence of a court of chancery. This difference in the relations of the two jurisdictions would alone give occasion for different rules governing their exercise.<sup>3</sup>

The successive statutes by which the equity powers of this court have been conferred or enlarged have always affixed to their exercise the condition that "the parties have not a plain, adequate and complete remedy at the common law." This has been construed as referring "to remedies at law as they exist under our statutes and according to our course of practice."<sup>4</sup> It has also been repeatedly held that, in reference to the range of jurisdiction conferred, the several statutes were to be construed strictly.<sup>5</sup>

No reason or necessity remains for the maintenance of concurrent jurisdiction, except for the sake of a more perfect remedy in equity when the plaintiff shall establish his right to it. And such we understand to be the purport and intent of our statutes upon the subject.<sup>6</sup>

<sup>1</sup> *Hall v. Warren*, 9 Ves. 605; *Walker v. Eastern Counties Railway*, 6 Hare 594; *Kenney v. Wexham*, 6 Mad. 355.

<sup>2</sup> 2 Edén 139; *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 331; *Fry Spec. Perf.* § 23.

<sup>3</sup> *Black v. Black*, 4 Pick. 234, 238; *Tirrell v. Merrill*, 17 Mass. 117, 121; *Baker v. Biddle*, Baldw. 394.

<sup>4</sup> *Pratt v. Pond*, 5 Allen 59.

<sup>5</sup> *Black v. Black*, and *Charles River Bridge v. Warren Bridge*, *ubi supra*.

<sup>6</sup> *Milkman v. Ordway*, 106 Mass. 232; *Angell v. Stone*, 110 Mass. 54.

A similar restriction upon the equity jurisdiction of the federal courts is so construed with great strictness.<sup>1</sup>

Even in courts of general chancery powers and of independent organization, while the power to entertain bills relating to all matters which, in their nature, are within their concurrent jurisdiction, is maintained, yet the usual course of practice is to remit parties to their remedy at law, provided that be plain and adequate, unless for some reason of peculiar advantage which equity is supposed to possess, or some other cause influencing the discretion of the court.<sup>2</sup>

The doctrine of *Colt v. Woollaston*,<sup>3</sup> and *Green v. Barrett*,<sup>4</sup> though not expressly overruled, has been questioned (*Thompson v. Barclay*),<sup>5</sup> and does not seem to govern the usual practice of the courts. See cases above cited, and *Newham v. May*.<sup>6</sup>

But, independently of statute restrictions, the objection that the plaintiff may have a sufficient remedy or defence at law in the particular case is a matter of equitable discretion rather than of jurisdictional right; and is therefore not always available on demurrer.<sup>7</sup>

According to the practice in this commonwealth, on the other hand, under the statutes relating to the exercise of jurisdiction in equity, a bill is demurrable, not only if it show that the plaintiff has a remedy at law, equally sufficient and available, but also if it fail to show that he is without such remedy.<sup>8</sup>

The demurrer therefore must be sustained, and the bill dismissed.

<sup>1</sup> *Oelrichs v. Spain*, 15 Wall. 211, 228; *Grand Chute v. Winegar*, Ib. 373; *Insurance Co. v. Bailey*, 13 Ib. 616; *Parker v. Winnipiseogee Lake Cotton and Woollen Co.*, 2 Black 545; *Baker v. Biddle*, Baldw. 394; see also *Woodman v. Freeman*, 25 Maine, 531; *Piscataqua Ins. Co. v. Hill*, 60 Maine 178.

<sup>2</sup> *Kerr on Fraud and Mistake*, 45; *Bispham Eq.* § 200; also § 37; *Snell Eq.* 334; *Clifford v. Brooke*, 13 Ves. 131; *Whitmore v. Mackeson*, 16 Beav. 126; *Hammond v. Messenger*, 9 Sim. 327; *Hoare v. Bremridge*, L. R. 14 Eq. 522; *S. C. L. R.*, 8 Ch. 22.

<sup>3</sup> 2 P. Wms. 154.

<sup>4</sup> 1 Sim. 45.

<sup>5</sup> 9 Law J. Ch. 215, 219.

<sup>6</sup> 13 Price 749.

<sup>7</sup> *Colt v. Nettervill*, 2 P. Wms. 304; *Ramshire v. Bolton*, L. R. 8 Eq. 294; *Hill v. Lane*, L. R. 11 Eq. 215; *Barry v. Croskey*, 2 Johns. & Hem 1.

<sup>8</sup> *Pool v. Lloyd*, 5 Met. 529; *Woodman v. Saltonstall*, 7 Cush. 181; *Pratt v. Pond*, 5 Allen 59; *Clark v. Jones*, 5 Allen 379; *Metcalf v. Cady*, 8 Allen 587; *Mill River Loan Fund Association v. Clafin*, 9 Allen 101; *Commonwealth v. Smith*, 10 Allen 448; *Bassett v. Brown*, 100 Mass. 355; *Same v. Same*, 105 Mass. 551, 560.

## PRESTON H. HODGES v. EDWARD W. KOWING AND WIFE.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, APRIL 15,  
1889.

[Reported in 58 Connecticut Reports 12.]

SUIT for the specific performance of a contract for the purchase of real estate; brought to the Superior Court in Fairfield County, and heard before Fenn, J. Facts found and decree for plaintiff passed, and appeal by the defendants. The case is sufficiently stated in the opinion.

*D. B. Lockwood* and *E. W. Seymour* for the appellants.

*G. W. Wheeler* and *H. J. Curtis* for the appellee.

BEARDSLEY, J. On the 17th day of August, 1887, the defendants entered into the following contract with the plaintiff:

“STRATFORD, August 17th, 1887.

“We agree to purchase of P. H. Hodges his place in Stratford, Conn., containing fifteen acres, more or less, for the sum of nine thousand five hundred dollars; to pay six thousand cash and three thousand five hundred on bond and mortgage for one year; to take title immediately, and possession on the first of January, 1888; and have paid him one hundred dollars on account.

“EDWIN W. KOWING.

“ELIZA KOWING.”

No writing relating to the contract was signed by the plaintiff. The court below, upon the petition of the plaintiff, decreed that the defendants should specifically perform the contract, from which decree they appeal to this court.

The remaining reason of appeal is that the plaintiff had adequate remedy at law.<sup>1</sup> The defendants claim that the equitable jurisdiction of the courts in this State was restricted by the provision in the old statute last found in the revision of 1875, p. 413, sec. 5, that “courts of equity shall take cognizance only of matters in which relief cannot be had in the ordinary course of law”; and that that provision is still in force.

It is unnecessary to inquire whether that provision has not, as the plaintiff claims, been since repealed by the practice act passed in 1879, because, in our view, it did not have the restrictive effect claimed for it. A similar claim was made by the defendant in the case of *Munson v. Munson*,<sup>2</sup> and the court say the provision referred to “is simply an

<sup>1</sup> Only so much of the opinion is given as relates to this question.—Ed.

<sup>2</sup> 30 Conn. 425.

affirmance of a well-settled rule of equity." The rule of equity is thus stated by Judge Swift : " It is a leading principle that equity will not interpose where there is an adequate remedy at law. It is not sufficient that there is a remedy, but it must be as complete and beneficial as the relief in equity."<sup>1</sup>

In the action at law for the breach of the contract the plaintiff could only recover the excess, if any, of the sum agreed to be paid for the land above its market value when the contract was to be performed. Such a remedy is manifestly inadequate, and courts of equity therefore hold, as a general rule, that when a contract for the sale of real estate has been fairly entered into, the party contracting to sell, as well as the party contracting to buy, is entitled to have it specifically performed.

In the present case the contract appears to have been fairly made, and is subject to the general rule of equity.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

## MARGARETTA B. PORTER v. FRENCHMAN'S BAY AND MT. DESERT LAND AND WATER COMPANY.

IN THE SUPREME JUDICIAL COURT OF MAINE, JANUARY 15, 1892.

[*Reported in 84 Maine 195.*]

### ON REPORT.

Bill in equity, heard on bill and demurrer, by a vendor seeking to enforce specific performance, against his vendee, of a written contract for the purchase of real estate. The bill alleged a tender of the deed, and all other acts required of the vendor, under the contract, and concludes thus : " But the said defendant then and there refused to accept a conveyance of said premises, or to pay to the plaintiff said \$1,000 according to the terms and conditions of said [written] instrument."

" The said plaintiff is still seized in fee of said premises and is still in possession as owner thereof, and is ready, as she has been at all times since said fourth day of April, and will continue to be, to transfer said premises to said defendant and to receive therefor said \$1,000."

" Wherefore, the plaintiff prays specific performance of the said agreement hereinbefore referred to in Par. 1., and that the defendant may be decreed to do and to perform all necessary acts for enabling it to perform its part of said agreement by paying to said plaintiff the said

<sup>1</sup> 2 Swift's Dig., chap. 1, sec. 1.



sum of \$1,000 upon tender by the plaintiff of a good and sufficient deed of said premises which the plaintiff will always be ready to make."

The following causes of demurrer were assigned: "Said bill of complaint contains no allegation that said defendant corporation is capable and has the ability of being made to comply with the requirements of a decree granting such relief as is therein asked for, . . . it doth not appear by said bill of complaint that a full and adequate remedy doth not exist through ordinary courts of law."

*Deasy and Higgins* for plaintiff.

*Hale and Hamlin* for defendant.

LIBBEY, J. Bill in equity, praying for decree for a specific performance of a contract in writing, made by the defendant with the plaintiff for the purchase of a lot of land in the village of Sorrento.

It comes before this court on a demurrer to the bill by the defendant, and the question to be determined is whether, upon the allegations in the bill, this court has jurisdiction in equity to decree a specific performance. We think it clear that in a proper case the court has jurisdiction to decree specific performance of a contract in writing for the conveyance of land, in a bill brought by the vendor or by the vendee.<sup>1</sup> But the court in this State does not take jurisdiction in equity when the plaintiff has a plain, adequate and complete remedy in an action at law.<sup>2</sup>

And we think it must appear by the allegations in the bill, where an action at law may be maintained, that the remedy by it is not plain, adequate and complete; for it is a well-established rule of equity pleading that the bill must contain allegations showing that the court has equity jurisdiction.<sup>3</sup>

In this case we think it perfectly clear that the plaintiff has a right to maintain an action at law for a breach of the contract. That being so, to show jurisdiction in equity, there should be some allegations in the bill showing that the remedy at law would not be adequate and complete. There is nothing of the kind in this bill. After setting out the contract, it alleges that the plaintiff was in possession of the land and has continued to be in possession of the land to the time of the filing of the bill; no allegation that her action in regard to the land was in any way changed by the making of the contract; no allegation that anything had been done by either party in consequence of the making of

<sup>1</sup> R. S., § 6, c. 77, Clause III.

<sup>2</sup> *Milliken v. Dockray*, 80 Maine 82; *Bachelder v. Bean*, 76 Maine 370; *Alley v. Chase*, 83 Maine 537.

<sup>3</sup> *Story's Equity Pleadings*, §§ 10 and 34; *Jones v. Newhall*, 115 Mass. 244, pp. 252, 253.

the contract which could not be taken into consideration in the assessment of the plaintiff's damages.

Demurrer sustained. Bill dismissed with costs.

PETERS, C.J., WALTON, VIRGIN, EMERY and WHITEHOUSE, JJ., concurred.<sup>1</sup>

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PHILLIPS v. BERGER.

IN THE SUPREME COURT OF NEW YORK, SPECIAL TERM, APRIL, 1848.

[*Reported in 2 Barbour 608.*]

IN EQUITY. Bill for specific performance. The plaintiff was the owner of a judgment recovered in the Superior Court of New York, for \$9,837.66, against John C. and Christian B. Morrison, on which a creditor's bill had been filed. During the pendency of that suit, the defendant entered into a contract with the plaintiff, whereby the plaintiff agreed that for \$4,500 and the costs he would compromise the claim. The agreement, as set out in the pleadings, was in the form of instructions from the plaintiff to his agent, with a memorandum signed by the defendant, in the following words :

“SALEM, April 20, 1842.

“Messrs. TH'S F. YOUNGS & Co.

“DEAR SIRs : I have agreed with Mr. Berger to compromise my claim against Messrs. J. C. Morrison & Son, by accepting Mr. Berger's note, (to be indorsed to your satisfaction at 6 months, with interest), for \$4,500 (say forty-five hundred dollars), it being further understood that Mr. Berger is to settle with you for all expenses which you have incurred, or for which you are liable on account of prosecuting the claim.

“You will therefore please do the needful to carry this agreement into effect.

“Yours truly,

“(Signed)

S. C. PHILLIPS.”

<sup>1</sup> As early as 1835 it was said by Chancellor Walworth that a suit in equity against the vendee to compel a specific performance of a contract to purchase land had always been sustained as a part of the appropriate and acknowledged jurisdiction of a court of equity, although the vendor has in most cases another remedy by an action at law upon the agreement to purchase (*Brown v. Haff*, 5 Paige 235). One of the earliest decisions of this court was to the same effect (*Crary v. Smith*, 2 N. Y. 60), and the right of a vendee to maintain specific performance is too well settled to require further discussion. Vann, J., in *Baumann v. Pinckney*, 118 N. Y. 604-612.—ED.

"Salem, April 20, 1842. The above copy of an open letter from Mr. Phillips to Messrs. T. F. Youngs & Co., of which I am the bearer, is a correct memorandum of an agreement this day concluded between Mr. Phillips and myself.

"(Signed)

WM. BERGER."

The defendant afterward informed the plaintiff that he acted only as agent, and that his principal declined to perform the contract.

*H. F. Clark & D. Lord*, for the plaintiff, insisted that the agreement was a contract for the sale of the plaintiff's judgment, and that its specific performance could be decreed in equity.

*C. O'Connor*, for the defendant, claimed that it was a mere agreement by the friend of a debtor to compromise his debt; and so long as it was executory did not bind either party.

EDMONDS, J. If this were a contract for the absolute purchase, by the defendants, of the judgments against the Morrisons, I entertain no doubt that a bill for a specific performance would lie. The jurisdiction of this court, in compelling a specific performance of contracts relating to lands, is pretty well settled; but not so in regard to personal contracts—that is, contracts for personal acts, or for the sale and delivery of personal property. The reason for the distinction between the two classes of contracts has long since passed away. Yet the distinction still, in a measure, remains. Judge Story, with great propriety, in his commentaries on equity jurisprudence, remarks that there is no reasonable objection to allowing the party who is injured by the breach to have an election either to take damages at law, or to have a specific performance in equity. The courts have not yet gone that length; but when they do, they will relieve the subject of specific performance of many of its embarrassments, and remove from this branch of equity jurisprudence many of the artificial distinctions to which the courts have been compelled to have recourse in order to justify their advance toward such a sound general rule.

The rule in regard to personal contracts yet falls short of that, and is extended only to cases where the party wants the thing in specie and he cannot otherwise be compensated; that is, where an award of damages would not put him in a situation as beneficial as if the agreement were specifically performed.<sup>1</sup> Or, where the compensation in damages would fall short of the redress which his situation might require.<sup>2</sup> The general rule is not to entertain jurisdiction to decree a specific performance of agreements respecting goods, chattels, stock, choses in action and other things of a mere personal nature; but the rule is qualified, and is

<sup>1</sup> *Harnett v. Yielding*, per *Ld. Redesdale*, 2 Sch. & Lef. 552.

<sup>2</sup> *Story's Eq. Juris.* § 716.

limited to cases where a compensation in damages would furnish a complete and satisfactory remedy.<sup>1</sup>

The contract in this case respects a chose in action, viz., the sale or compromise of a judgment. And for the defendant's refusal to complete his purchase, an action at law would lie, and damages could be recovered against him. But what damages? And would that be a complete and satisfactory remedy? The remedy of a specific performance is mutual and reciprocal, as well for the vendor as the purchaser; and the true inquiry is, would an action at law afford to the defendant a complete and satisfactory remedy, if the plaintiff had refused to assign or release the judgment according to his contract? I can well imagine many uses to which the defendant might have put the judgment, which could not be at all, except by very vague conjectures, measured or estimated. And if, on that account, he would have been entitled to a specific performance, then for the same reasons the plaintiff would be entitled. But without enlarging upon this train of reasoning, I refer to the case of *Adderley v. Dixon*,<sup>2</sup> as precisely in point, and entirely decisive of this branch of the case. In that case the contract was for the purchase of debts which had been proved under a bankrupt's commission. In that case, as in this, the bill for a specific performance was filed by the vendor; and it was objected that if the court were to make a decree, it would in effect be nothing more than a verdict in an action of assumpsit for the amount of the purchase money. That is precisely the objection made in this case. But the court decreed a specific performance, because damages at law could not accurately represent the value of the debts, and to compel the purchaser to take such damages would be to compel him to sell them at a conjectural price; and because where a bill would lie for the purchaser it would lie for the vendor. This case was approved by the late vice chancellor, in *Hamblin v. Dinneford*,<sup>3</sup> and is undoubtedly good law.

If, then, the contract between these parties is binding upon them, its performance can be enforced here. But is it binding? If it is a contract for the purchase of the judgment by the defendant, it is undoubtedly binding. If, however, it was merely an agreement that the plaintiff would receive one-half his demand and release the residue, whether it could be enforced either in law or equity is a different question.<sup>4</sup>

The general rule is well settled that the payment of a less sum than the whole debt, without a release, is no satisfaction of the plaintiff's

<sup>1</sup> Story's Eq. Juris. § 718; *Wood v. Radcliffe*, 3 Hare's Rep. 304.

<sup>2</sup> 1 Sim. & Stu. 607.

<sup>3</sup> 2 Edw. 531.

<sup>4</sup> The discussion of this question has been omitted.—Ed.

claim.<sup>1</sup> And a mere agreement to accept less than the real debt would be *nudum pactum*.<sup>2</sup> But it is otherwise when a beneficial interest is acquired and a valuable consideration received by the creditor when he agrees to accept less than his whole demand. It would be an abuse of terms to call that a *nudum pactum*.<sup>3</sup> In such cases the rule is, that where by the agreement to settle there is a benefit, or even a legal possibility of benefit to the creditor, the additional weight will turn the scale and render the consideration sufficient to support the agreement.<sup>4</sup> So that if a debtor offers additional security on condition that his creditor shall give up a portion of the debt, and the creditor accepts such security for a less sum, as a satisfaction of the whole debt, it is a valid discharge.<sup>5</sup> And an agreement to discharge the debt on receiving such additional security would be binding.<sup>6</sup>

Whether, then, the agreement between these parties was one for the purchase of the judgment by the defendant, or one by which the plaintiff agreed to receive security for less than the amount of his claim and discharge, it was valid and binding on the plaintiff, and its performance by him could have been enforced in equity; and on the principle of mutuality he can enforce it on his part.

There must therefore be a decree for the plaintiff.<sup>7</sup>

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MARTIN VERY, APPELLANT, v. JONAS LEVY.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM,  
1851.

[Reported in 13 Howard 345.]

THIS was an appeal from the Circuit Court of the United States for the District of Arkansas.

In 1841 one Darwin Lindsley owned a lot of land in the town of Little Rock, and State of Arkansas, which was known as Lot No. 7, in block or square No. 35, in that part of the city west of the Quapaw line, and known as the Old Town.

<sup>1</sup> *Cumber v. Ware*, 1 Str. 426; *Harrison v. Wilcox*, 2 John. Rep. 449; *Fitch v. Sutton*, 5 East, 232; *Seymour v. Minturn*, 17 John. Rep. 169; *Boyd v. Hitchcock*, 20 Id. 78.

<sup>2</sup> *Heathcote v. Cruikshanks*, 2 Term Rep. 24.

<sup>3</sup> 20 John. Rep. 78.

<sup>4</sup> *Cumber v. Ware*, 1 Smith's Leading Cases, 147; *Le Page v. McCrea*, 1 Wend. 172; *Nevins v. Deperries*, 4 N. Y. Legal Observer, 70.

<sup>5</sup> *Sheehy v. Mandeville*, 6 Cranch, 253.

<sup>6</sup> *Steinman v. Magnus*, 11 East, 390.

<sup>7</sup> Affirmed on appeal, 8 Barb. 527.—ED.

On the 3d of March, 1841, he sold this lot to Jonas Levy, who gave two bonds, each for \$4,000, one payable five years after date and the other six years after date. Both were to carry interest at 7 per cent., payable quarter-yearly. The bond payable in five years was not involved in the present suit, and no further notice need be taken of it. Both bonds were secured by a mortgage of the property.

On the 25th of March, 1841, Lindsley assigned the six years bond to Martin Very, a citizen of the State of Indiana.

This bond had the following credits indorsed upon it :

1841, March 15,	. . . . .	\$550.00
1842, January 29,	. . . . .	181.12
1843, March 3 (in goods)	. . . . .	1,898.25

The last credit was signed Martin Very, by J. S. Davis, and arose in this way :

On the 25th of November, 1842, Davis addressed the following letter to Levy :

“NEW ALBANY, Indiana, Nov. 25, 1842.

“DEAR SIR : My object in writing to you is to inquire what you will give in cash and jewelry for the last note that you gave to Darwin Lindsley, and which was assigned by him to Martin Very. I have bought a part of the note and am authorized to make disposition of it, and I thought, as a matter of justice, you should have the refusal of the note, at a considerable discount, if you desired it. Please let me hear from you at your earliest convenience. I write for myself and Mr. Very.

I am, respectfully yours, etc.,

“MR. JONAS LEVY.

JOHN S. DAVIS.

“(Indorsed).—Mr. JONAS LEVY, Little Rock, Arkansas.

“(Postmarked).—New Albany, Ind., Nov. 26.”

On the 28th of January, 1843, Very executed the following power of attorney to Davis :

“Know all men by these presents, that I, Martin Very, of the county of Floyd, and State of Indiana, have made, constituted, and appointed, and do, by these presents, make, ordain, constitute, and appoint, John S. Davis, of the city of New Albany, Indiana, my true and lawful attorney, for me, and in my name, and for my use, to ask, demand, sue for, recover, and receive, all such sum or sums of money, notes, bills, bonds, mortgages, or debts, which are or shall be due, owing, or belonging to me, in any manner, or by any means whatsoever ; and I hereby give my said attorney full power and authority to trade, sell, and dispose of any notes, bills, bonds, or mortgages, held or owned by me, on any resident or residents of the State of Arkansas ; and I hereby give my said attor-

ney full power and authority, in and about the premises, to have, use, and take all lawful ways and means, in my name, for the purposes aforesaid ; and, upon the receipt of such debts, dues, or sums of money, to make, seal, and deliver, acquittances and other sufficient discharges for me, and in my name, or, upon the sale of any bill, bond, note, or mortgage, to execute a good and sufficient assignment of the same to the purchaser thereof, for me, and in my name ; and, generally, to do and perform, in my name, all other acts and things necessary to be done and performed in and about the premises, as fully and amply, to all intents and purposes, as I myself could or might do, if personally present ; and attorneys, one or more, under him, for the purpose aforesaid, to make and constitute, and again at pleasure revoke. And I hereby ratify and confirm all and whatsoever my said attorney shall lawfully do, in my name, in and about the premises, by virtue of these presents ; and I hereby make this power of attorney irrevocable, to all intents and purposes. In testimony whereof, I have hereunto set my hand and seal, this, the 28th day of January, in the year of our Lord, 1843.

“ MARTIN VERY. [SEAL.]

“ Signed, sealed, and delivered in presence of

“ JOS. P. H. THORNTON.”

Under this power Davis went to Little Rock, and, on the 3d of March, 1843, put the receipt above mentioned upon the back of the bond for \$1,898.25, paid in goods ; and, on the same day, executed the following paper, viz. :

“ LITTLE ROCK, March 3d, '43.

“ I hereby agree to take in goods, such as jewelry, etc., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by the said Lindsley ; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices, at said Little Rock ; said goods to be called for within twelve months from this time.

“ MARTIN VERY.

“ By J. S. DAVIS,

“ *Attorney in fact.*”

Davis stated in his deposition that in January, 1844, he wrote to Levy directing him to pay the balance in jewelry, watches, etc., to Mr. Waring in Little Rock ; that he received an answer from Levy declining to do so ; but that he had lost or mislaid this answer from Levy.

On the 3d of February, 1844, Davis wrote to Levy the following letter :

“ NEW ALBANY, Feb. 3, 1844.

“ DEAR SIR : If you can pay the balance of your note in good silver or gold watches and good jewelry, at fair prices, say about half of each, or two-thirds watches, you will please notify me of the fact by return of

mail and I will send on for them at once. The things you let me have were before too high—at least Mr. Very says so. Let me hear from you. I am your friend,

JOHN H. DAVIS.

“Mr. J. LEVY.

“(Postmark)—New Albany, Ind., Feb. 5.

“(Indorsed)—Mr. JONAS LEVY, Jeweller, Little Rock, Ark.”

In April, 1848, Very filed his bill in the Circuit Court of the United States for the District of Arkansas against Levy, for the purpose of foreclosing the mortgage. The answer of Levy admitted all the allegations of the bill, but set up as a defense the execution of the power of attorney by Very to Davis, and the subsequent agreement between Davis and himself, by which the goods were to be called for within twelve months. It was then alleged, that not only during the next twelve months, but always afterwards, Levy had kept on hand goods enough of the proper character to pay the balance due, been always ready and still was ready to deliver them, and had often urged the complainant to receive and accept them, and would deposit them in the custody of any one directed by the court.

Levy brought into court a large quantity of goods and jewelry, which was placed in the hands of a receiver.

The case being heard on bill, amendment, answers, replications, exhibits, and testimony, the court held Very bound by the agreement, and found that Levy had always had sufficient goods on hand ready to be delivered, and directed the Master to ascertain the balance due on the bond and the value of the goods delivered to the receiver.

The Master reported the balance due on the 3d of March, 1844, to be \$2,002.59, and the value of the goods \$5,776.99. No exception was taken to the report, and it was confirmed.

The court then ordered the complainant to select out of the goods, to the amount of \$2,002.59, and on his failure, after notice to his solicitor, that the Master should do so. The complainant failed to select, the Master set apart the requisite amount, the residue were redelivered to Levy, and the court decreed that Very should receive the goods so set apart by the Master, and that the bond and mortgage were satisfied; denied the relief prayed and dismissed the bill; all costs to be paid by the complainant.

Very appealed to this court. It was argued by *Mr. Sebastian* for the appellant, and by *Mr. Lawrence* for the appellee, on whose side there was also a brief filed by Mr. Pike.

Levy's entire defense rests on this unauthorized contract made by Davis, and a contract, too, which the only evidence (that of Davis) establishing its existence, proves conclusively to have been obtained by fraud. And will a court of equity under such circumstances enforce it?



Mr. Justice CURTIS delivered the opinion of the court.

This is a suit in equity to foreclose a mortgage commenced in the Circuit Court of the United States for the District of Arkansas. The bill alleges that on the 3d of March, 1841, the respondent, Levy, executed his writing obligatory for the sum of four thousand dollars, bearing interest at the rate of seven per cent. per annum, payable to Darwin Lindsley in six years after its date, and secured the same by a mortgage on certain premises situated in the city of Little Rock; that by assignment from Lindsley the complainant became the owner of this bond and mortgage on the 25th of March, 1841, and the bill prays for an account and foreclosure.

The answer of Levy admits the execution of a bond and mortgage and their assignment to the complainant, and avers that on the 3d of March, 1843, he agreed with the complainant, through one John S. Davis, his agent, to deliver goods, such as jewelry, etc., in which the respondent dealt at Little Rock, upon reasonable prices, in satisfaction of this bond and mortgage, within twelve months from the 3d of March, 1843; that in pursuance of that agreement he did actually deliver on that day a part of the goods, agreed to be of the value of \$1,898.25, and afterwards, on the same day, the complainant, through his agent, Davis, signed and delivered to the respondent a memorandum in writing, as follows:

“Little Rock, March 3d, '43. I hereby agree to take in goods, such as jewelry, etc., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by said Lindsley; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices at said Little Rock; said goods to be called for within twelve months from this time. Martin Very. By J. S. Davis, Attorney in fact.”

That in further pursuance of this agreement, the respondent kept in his hands and ready for delivery and withdrawn from his trade, a sufficient amount of goods, such as are referred to in the memorandum, during the whole year which elapsed after the making of the agreement, and was constantly ready and willing to deliver the same at Little Rock, but the complainant was not there, and did not authorize any one to receive them; that the respondent has ever since been ready and willing to perform his agreement, and offers to bring the goods into court, or place them in the hands of a receiver. The court below appointed a receiver, ascertained the amount of goods necessary to satisfy the unpaid residue of the bond, ordered the receiver, upon demand, to deliver the same to the complainant, in full satisfaction of the bond and mortgage, decreed the mortgage satisfied, and ordered the complainant to pay the costs. From this decree the complainant appealed.

An agreement by a creditor to receive specific articles in satisfaction

of a money debt is binding on his conscience ; and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go further ; and in a proper case will enforce the execution of such an agreement. At law a mere accord is not a defense ; and before breach of a sealed instrument there is a technical rule which prevents such an instrument from being discharged, except by matter of as high a nature as the deed itself.<sup>1</sup> But no such difficulties exist in equity. On the broad principle that what has been agreed to be done shall be considered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a court of law, in a case free from the technical difficulties above noticed, will do the same thing.<sup>2</sup>

The decree of the Circuit Court is affirmed with costs.<sup>3</sup>

*Order.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Arkansas, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

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ANN MARIA DEEN, RESPONDENT, v. WILLIAM MILNE, AS  
EXECUTOR, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 16, 1889.

[*Reported in 113 New York Reports 303.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 30, 1888, which modified, and affirmed as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to establish and to compel the specific performance of an alleged stipulation for the discontinuance of an action

<sup>1</sup> Alden v. Blague, Cro. Jac. 99 ; Kaye v. Waghorne, 1 Taunt. 428 ; Bayley v. Homan, 3 Bin. N. C. 915.

<sup>2</sup> Bradley v. Gregory, 2 Camp. 383.

<sup>3</sup> A portion of the opinion has been omitted.—ED.

in the Marine Court of the city of New York, wherein the plaintiff here was plaintiff and the defendant's testator was defendant, and the cancellation of a judgment entered therein against the plaintiff for costs,

The material facts are stated in the opinion.

*Edward C. Perkins* for appellant.

*Esek Cowen* for respondent.

PECKHAM, J. Upon the trial in the Supreme Court of the action of *Wilson v. Deen*, the parties entered into an agreement in writing that a former action commenced in the Marine Court of New York by Mrs. Deen against Wilson, in which the defendant had obtained judgment for costs, should be discontinued and the judgment entered therein should be vacated and cancelled. This is one of the findings of fact made in this case, and although the evidence is to some extent, perhaps, conflicting, yet there is enough upon which the trial court could base its findings within any rule as to the clearness and fullness with which an agreement must be proved where a decree for a specific performance of its terms is asked for.

The original written stipulation signed by the attorneys for the plaintiff in the suit in the Supreme Court has been lost, but its terms were quite sufficiently proved by the production of a duplicate signed by the attorneys for the other side at the same time. It was executed on or about December 2, 1874. The judgment of the Marine Court has never, in fact, been vacated of record, and this action was commenced July 22, 1884, and the relief asked for was that the Marine Court judgment might be vacated and set aside by reason of the agreement above mentioned (and which was set forth in the complaint, and its loss alleged), and that the defendant should be required to file in the Marine Court the consents in his possession, or under his control, to the vacating of such judgment, and that such action should be adjudged discontinued by the consent of the parties. The defendant answered, setting up several defenses.

The action is simply one to compel the specific performance of the agreement to discontinue the Marine Court action and to vacate the judgment entered therein.

Although the agreement does not relate to lands, yet that is no fatal obstacle to a suit for a specific performance.<sup>1</sup>

The contract having been lost, the plaintiff herein could not go to the clerk of the Marine Court and ask to have the judgment vacated of record on her mere statement as to what such agreement was. Possibly, if the stipulation were in existence, the plaintiff might have pro-

<sup>1</sup> Pomeroy on Con., Spec. Per., § 10 *et seq.*, and authorities cited in notes.

duced it to the Marine Court and asked to have an entry vacating the judgment properly made. But it was lost, and in order to obtain any relief it was necessary to establish, or, in other words, to prove the making of the agreement, and then have it specifically enforced. There was no adequate remedy at law in the sense in which that term is used under such circumstances. In refusing the specific performance of a contract duly proved, but of which, for some reason, it is held to be inequitable to decree specific performance, the court says, upon such refusal, that it leaves the party to his remedy at law, meaning thereby to an action at law to recover his damages for the refusal of the defendant to carry out his contract. The plaintiff here has no such remedy which is at all adequate. It is by no means clear that the plaintiff had any remedy by motion in the Marine Court, for she would have to establish the agreement and then ask the court to carry it out on motion. Whether the Marine Court has any such equitable power is, perhaps, questionable. But the cases where the court has refused to take jurisdiction of an original suit to set aside a sale made in another suit, under a decree for such sale, have no bearing here. They were cases of original bills filed to obtain a resale of mortgaged premises under a decree in a former suit, where the sale was alleged to be irregular for some reason, or the application was on the ground of inadequacy of price, surprise, and the like; and it has been always held that such relief must be asked for in the original suit and on motion to open the sale and have another one ordered. Such are the cases of *Nicholl v. Nicholl*,<sup>1</sup> *American Insurance Company v. Oakley*,<sup>2</sup> *Brown v. Frost*,<sup>3</sup> *Libby v. Rosekrans*,<sup>4</sup> *McCotter v. Jay*,<sup>5</sup> *Gould v. Mortimer*.<sup>6</sup> The cases proceed upon the assumed validity of the judgments, but ask to have the sale thereunder set aside and a new sale ordered, for the reason of some alleged irregularity or as a favor.

Here the plaintiff must establish an agreement, and then the court is asked to specifically enforce it. The fact that the agreement when established or proved relates to the vacating of a judgment in some other court is wholly immaterial. It is the defendant who has agreed to have it vacated, and the court is asked to compel him to perform his contract. If the plaintiff had another remedy by motion to another court to compel the defendant to thus perform his contract, it would be no answer to this action, for in such event it would only show that the plaintiff could apply in either court and obtain relief on proving his case. In both courts the character of the relief would be the same, the contract would be specifically performed and the judgment would be

<sup>1</sup> 8 Paige 349.

<sup>2</sup> 9 Id. 259.

<sup>3</sup> 10 Id. 243.

<sup>4</sup> 55 Barb. 202, 219.

<sup>5</sup> 30 N. Y. 80.

<sup>6</sup> 16 Abb. Pr. 448.

vacated. It is in no sense the case of another and adequate remedy at law.<sup>1</sup>

It should, therefore, be affirmed, with costs.

All concur, except GRAY, J., not sitting.

Judgment affirmed.

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NORTON v. MASCALL.

IN CHANCERY, BEFORE LORD JEFFERYS, C., MAY, 1687.

[*Reported in 2 Vernon 24.*]

THE plaintiff and defendant had submitted to an arbitrament by bond, and an award was made, not binding by form of law, by which the plaintiff was to pay the defendant £900, and to seal a release to the defendant; and the defendant was to assign several securities he had from the plaintiff. The plaintiff sold some lands to raise the £900, expecting the defendant would receive it, as he gave him intimation he would, and tendered him the £900 and a release executed by the plaintiff; and though there was no other execution on the plaintiff's part of the award, and though the award was extra judicial, and not good in strictness of law, yet the LORD CHANCELLOR decreed it should be performed in specie.

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HALL v. HARDY.

IN THE HIGH COURT OF CHANCERY, BEFORE SIR JOSEPH JEKYLL, M.R., TRINITY TERM, 1733.

[*Reported in 3 Peere Williams 186.*]

UPON a bill brought to compel the defendant to make a specific performance of an award, the case was thus: The plaintiff and defendant were brother and sister, between whom there was a dispute touching the fee simple of a small parcel of land under their father's will; and the plaintiff and defendant entered into a bond in the penalty of £200 to stand to the award of arbitrators touching this matter. The arbitrators made an award, that the plaintiff should pay £10 to the defendant at such a day, and £30 to the defendant at another day; and that thereupon the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and his heirs. The plaintiff paid the defendant the £10 which the

<sup>1</sup> A portion of the opinion has been omitted.—ED.

defendant accepted upon the day on which it was awarded to be paid ; afterward the plaintiff tendered the remaining £30 on the day on which that was awarded to be paid, and the defendant was willing to take the money, but would not take the fine and deed of uses. Wherefore the plaintiff brought this bill to compel the defendant to a specific performance of the award.

Upon opening the cause, the Master of the Rolls said he thought this a strange bill, for which he knew no precedent, and that the plaintiff must sue his bond.

Whereupon I urged that the plaintiff had actually paid the £10 according to the award, and the defendant accepted it, and thereby undertaken to perform the award ; that if this suit were not to be allowed, the plaintiff would have no remedy to get back the money paid by her to the defendant ; that in *Norton v. Mansell*,<sup>1</sup> the court decreed a specific performance of an award, though in that case it was not executed, and in strictness of law void.

To which his Honor replied, that because the award was not good in law, therefore in the case cited there might be reason to decree a specific performance. However, the court desiring to know what the counsel for the defendant had to say as to the defendant's having accepted part of the money, it was insisted on his behalf to be sufficient, that there was (unless in very particular circumstances) no instance of a bill being brought for a specific performance of an award. Besides, that this was an unreasonable award, viz., that the husband should procure his wife to join with him in a fine, which it might not be in his power to do ; and therefore the court would not oblige him to it. Also the wife's joining ought to be free, and not by the compulsion of her husband ; that the plaintiff had a plain, proper, and natural remedy, which was to sue the bond, whereon the penalty would be recovered ; and even as to the money which had been paid, if the defendant would not perform the award by procuring his wife to join with him in a fine, the plaintiff might recover it back, as received to the plaintiff's use.

MASTER OF THE ROLLS. There have been a hundred precedents where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it. The money paid in pursuance of the award cannot be said to have been paid by the plaintiff to the use of the plaintiff himself ; and the precedent in *Mr. Vernon* shows that this court has decreed a specific performance of an award, which is more especially reasonable in the present case, where the plaintiff has paid and the defendant accepted part of the money awarded ; for by this acceptance the defendant has

<sup>1</sup> 2 Vern. 24.

undertaken to perform the award, has consented to it, and made it his own agreement for a valuable consideration, viz., the money paid him. Wherefore, take a decree for the defendant's performance of the award, upon the payment of the residue of the money awarded, and let him pay costs, it being a defense against conscience to take the money awarded, and yet refuse to perform his part of the award.

NOTE.—These decrees may not have been usual, because awards are commonly to pay money ; in which cases a bill in equity to compel a performance is improper ; but where the award is to do any thing in specie, as to convey an estate, etc., in such case, if the defendant has accepted the money awarded him in satisfaction of the conveyance, it is highly reasonable that he should make the conveyance ; the rather, for that if the plaintiff had sued the bond at law, the defendant would have been relievable by bill in equity against the penalty of the bond, upon a *quantum damnificatus*. So that such a decree, as in the principal case, prevents a suit in equity.

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MILNES v. GERY.

IN THE HIGH COURT OF CHANCERY, BEFORE SIR WILLIAM GRANT,  
M.R., NOVEMBER 24, 26 ; DECEMBER 1, 8, 14, 1807.

[Reported in 14 Vesey 400.]

By indentures of lease and release, previous to the marriage of John Milnes and Mary Selina Gery, one-third part of certain estates was settled, after the respective deaths of William Gery, the father of Mary Selina, and of his mother, Eleanor Gery, on the husband and wife for life, and afterward on the children of the marriage in the usual manner, and the settlement contained the following proviso :

Provided, nevertheless, that notwithstanding any of the uses or estates, hereby created, it shall and may be lawful to and for the trustees or the survivor of them, etc., at any time or times during the joint lives of the said John Milnes and Mary Selina Gery, his intended wife, or during the life of the survivor, with the consent and approbation of them, or the survivor of them, testified in writing for that purpose, by good and sufficient conveyances and assurances in the law to sell, convey and dispose of the same undivided third part of and in all and every the said manor and messuages, lands, etc., herein before conveyed to the Rev. Hugh Wade Gery, for one-third part or share of such price as the entirety of the same hereditaments shall be valued at by two indifferent persons, the one to be named by the said John Milnes and Mary Selina Gery during their joint lives, or by the survivor of them during his or

her life, and the other by the said Hugh Wade Gery ; and that, if such persons so nominated should happen to disagree, then those two shall choose a third person, whose determination therein shall be final, according to the condition of a certain bond, bearing even date with the said settlement, and made from the said John Milnes to the said Hugh Wade Gery, in the penal sum of £12,000 in case the said Hugh Wade Gery should choose to become the purchaser thereof, and should declare such his intention in writing six months next after the several deceases of the said William and Eleanor Gery ; with a power, in case of the refusal of Hugh Wade Gery, to sell to other persons.

Notice was served accordingly in due time after the decease of William and Eleanor Gery by Hugh Wade Gery upon Mr. Milnes ; and the parties appointed each a person to set a value on the said estates. The persons appointed measured the premises, and held several meetings, in order to determine the value, but they differed greatly in their respective estimates ; the valuer of Milnes estimating the property very considerably higher than the valuer of the other party ; nor were they able to agree upon any third party, who should make a final determination.

The plaintiff, therefore, filed his bill to have the agreement carried into execution, praying that the notice by the defendant may be considered binding, and that a proper person or proper persons may be appointed by the court to make a valuation of the entirety of the said premises ; or that the valuation thereof should be ascertained in such other manner as the court should direct.

The defendant by his answer relied upon the incomplete state of the agreement, when it broke off, and also upon a waiver on the part of the plaintiff ; insisting also that no consent was given by Mrs. Milnes.

After the argument, which turned chiefly upon the circumstances insisted upon by the answer, the Master of the Rolls desired that the case should be argued upon a point that had not been much noticed, whether this court has any jurisdiction to do what was prayed by the bill, observing that the parties having agreed upon a particular mode of settling the price, if that mode fails by any means, it seems this court cannot substitute another mode ; and no action could be maintained. That doubt occurred in the case of *Cooth v. Jackson*, and both Lord Rosslyn and Lord Eldon thought that the failure of the arbitration put an end to the agreement ; and in *Hall v. Warren* (which was mentioned by Mr. Alexander) the point in favor of such a jurisdiction was assumed but not argued.

*Mr. Alexander* and *Mr. Johnson* for the plaintiff.

*Sir Samuel Romilly*, *Mr. Leach*, and *Mr. Wingfield* for the defendant.

THE MASTER OF THE ROLLS. The more I have considered this case, the more I am satisfied that, independently of all other objections,



there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract which this court is called upon to execute? The price is of the essence of a contract of sale. In this instance the parties have agreed upon a particular mode of ascertaining the price. The agreement, that the price shall be fixed in one specific manner certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The court declaring that the one shall take, and the other shall give, a price fixed in any other manner does not execute any agreement of theirs, but makes an agreement for them, upon a notion, that it may be as advantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence, which upon a subject materially interesting to him he has reposed in an individual of his own selection? No substantial difference arises from the circumstance that in this case the decision may ultimately fall to an umpire not directly nominated by the parties, as through the medium of the original nominees they had an influence upon the choice. No one could be chosen without the concurrence of the persons in whose judgment they reciprocally confided.

The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value are pointed out; there is nothing, therefore, precluding the court from adopting any means adapted to that purpose. The case, in which the court has modified particular subordinate parts of an agreement, falls far short of the decree that is now demanded. Perhaps some of those cases may be thought rather to require defense for the length to which they have gone, than to furnish a justification for still further extending the discretionary power, of which they are instances. The court never professes to bind a man to any agreement, except that which he has made, but sometimes holds the agreement, which it executes, and that which he has made, to be substantially the same, when to common understandings there is a very perceptible difference between them. The court, however, has never gone the length of compelling a party to buy or sell the whole subject of his agreement at a price that he has never fixed, and that was never fixed in any mode to which he has given his consent.

In the case of *Hall v. Warren*, it was rather assumed than proved that if Warren was competent to enter into the agreement, some means might be found to carry it into execution. That was so little discussed that the attention of the court was not drawn to the point; and the

doubt, recently thrown upon that point in the case of Cooth v. Jackson, was not at all adverted to. I state it as a doubt only, as the decision was ultimately upon a different ground; but neither Lord Rosslyn nor Lord Eldon conceived that the court could be substituted for the arbitrators, to make a division of the estate. The division of an estate does not imply more personal confidence, or which other persons will be less capable of executing, than the ascertainment of value; and the admission there was that the defendant was instrumental in preventing the award by private instructions to the arbitrator. Upon the principle that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted whether an agreement that did not settle the price was at all binding. Justinian's Institutes and the Code state that doubt, and resolve it by declaring that such an agreement should be valid and complete, when and if the party to whom it was referred should fix the price; otherwise it should be totally inoperative: "*quasi nullo pretio statuto*"; and such clearly is the law of England.

I do not know that upon this point there can be any difference between decisions at law and in equity. If you go into a court of law for damages, you must be able to state some valid, legal contract, which the other party wrongfully refuses to perform; if you come into a court of equity for a specific performance, you must also be able to state some contract, legal or equitable, concluded between the parties, which the one refuses to execute. In this case the plaintiff seeks to compel the defendant to take this estate at such price as a master of this court shall find it to be worth admitting that the defendant never made that agreement; and my opinion is, that the agreement he has made is not substantially, or in any fair sense, the same with that; and it could only be by an arbitrary discretion that the court could substitute the one in the place of the other.

The bill must therefore be dismissed without costs.

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SIR MARK WOOD, BART., v. EDMUND GRIFFITH.

IN CHANCERY, BEFORE LORD ELDON, C., FEBRUARY 10, 11, 12,  
1818.

[Reported in 1 Swanston 43.]

By articles of agreement, dated 15th November, 1797, Michael Hicks Beach, with the consent of other persons interested, agreed to sell to Edmund Griffith, for £23,000, an estate called the East Mark estate; and by an indorsement on the articles, Mr. Griffith declared that the purchase was made for the equal benefit of Sir Mark Wood and himself.

In the same year possession was taken under the contract, and £5,000 were paid by Sir Mark Wood on account of the purchase-money. In 1799 a further sum of £2,000 was paid by him ; and in 1800 a lease of the estate was executed by Sir Mark Wood and Griffith to George Webb Hall for a term of twenty-one years at a rent of £1,170. On the 24th of January, 1806, Beach and the other vendors filed a bill in the Court of Exchequer against Sir Mark Wood, Griffith, and Hall, praying the specific performance of the contract for the purchase of the estate ; and in that cause the court directed the usual reference to the Deputy Remembrancer to inquire whether the plaintiffs could make a good title. Disputes having arisen between Sir Mark Wood and Griffith concerning the management of the estate and their respective rights and interests therein, and various suits having been instituted by them against each other on the 4th of July, 1806, by an order made in a cause then depending between them in the Court of King's Bench, all matters in difference between the parties were referred to arbitration.

By his award, dated the 9th of March, 1809, the arbitrator, after declaring, among other things, that a sum of £1,250 was due from Mr. Griffith to Sir Mark Wood, and directing payment thereof on the 15th of June next, unless it should have been previously paid, out of Griffith's share of "the purchase-money to arise by the sale of the said estate thereafter directed to be sold," proceeded in the following words:

"I further declare and award that all the right, title, and interest of the said Sir Mark Wood and Edmund Griffith in the said East Mark estate ought to be forthwith sold, and that the said Sir Mark Wood and Edmund Griffith are to be equally interested in and liable to all benefit or loss which may ultimately arise or happen from such sale. And inasmuch as the said Michael Hicks Beach and Henrietta Maria, his wife, Richard Messiter, and Joseph Pitt have, by their bill filed in the Court of Exchequer as hereinbefore mentioned, prayed that in default of immediate payment by the said Sir Mark Wood and Edmund Griffith of what should be found due to the said Richard Messiter and Joseph Pitt for principal and interest on the residue of the said sum of £23,000, the said estate, or a competent part thereof, might be immediately sold under the decree of the said court, to raise the amount of what should be found due. I do further award and direct that the said Sir Mark Wood do, some time in the course of the first six days of Easter term next, or so soon afterwards as the said court shall think fit to hear the application, cause a motion to be made, praying the said court to direct a sale of the said East Mark estate in one lot, by public auction, before the Deputy Remembrancer, at such time as the said court shall think proper under the circumstances of the case, but with liberty for the said Sir Mark Wood and Edmund Griffith respectively to bid for the same at

such sale. And I direct the said Edmund Griffith to consent to such application; or, in case the said plaintiffs in the said suit shall in the meantime apply to the said court to direct such sale, I award and direct the said Sir Mark Wood and Edmund Griffith respectively to consent thereto; and in either of the said cases I direct them, the said Sir Mark Wood and Edmund Griffith respectively, to consent; that if he shall be declared the purchaser of the said premises at such sale he will accept such title thereto as the said Michael Hicks Beach and Henrietta Maria, his wife, Richard Messiter, and Joseph Pitt shall be able to make thereto; and that he shall pay his purchase-money and complete his purchase forthwith."

The arbitrator then directed the distribution of the purchase-money, in case the Court of Exchequer should order such sale, first in satisfaction of the sum due to the vendors, then of the advances made by Sir Mark Wood, and afterwards in equal moieties between Sir Mark Wood and Griffith, and continued as follows:

"But in case the said Court of Exchequer, upon such application as aforesaid, shall not think fit to direct a sale of the said estate, then I direct that they, the said Sir Mark Wood and Edmund Griffith, shall, within fourteen days after the said court shall have signified such its determination thereon, join in giving a proper authority in writing, for Messrs. Hoggart and Phillips, of Broad Street, in the city of London, auctioneers, to sell all the estate, right, title, and interest of them, the said Sir Mark Wood and Edmund Griffith, to and in the said premises by public auction within six months after such authority shall be given, at which sale they, the said Sir Mark Wood and Edmund Griffith respectively, are to be at liberty to be bidders; and the moneys for which such estate, right, title, and interest to and in the said premises shall be sold at such sale, shall, after payment of all incidental expenses, be applied in the same manner as is hereinbefore directed respecting the surplus of the purchase-money of the said estate, if sold under the directions of the Court of Exchequer, after satisfying the payments which the said court shall direct to be made thereout as aforesaid. And in either of the cases aforesaid I award and direct that they, the said Sir Mark Wood and Edmund Griffith respectively, do execute all proper and necessary conveyances of the said premises, and every part thereof, and of their respective rights and interests in and to the same, to the purchaser or purchasers thereof, and do all acts necessary to carry such sale into effect. But if in either of the cases aforesaid it shall appear that the said Michael Hicks Beach and Henrietta Maria, his wife, Richard Messiter, and Joseph Pitt cannot make a good and sufficient title to the said premises, or any part thereof, or if for any other reason the said contract for the sale of the said estate, as between the said last-

mentioned parties and the said Sir Mark Wood and Edmund Griffith, cannot be carried into execution, then, inasmuch as the said Michael Hicks Beach and Henrietta Maria, his wife, and their trustees are not parties to this reference, it does not appear to me that I can make any specific award concerning the said East Mark estate. But I award and direct that if upon the completion of any sale of the said estate, or of the interest of the said Sir Mark Wood and Edmund Griffith therein, as hereinbefore directed, or upon the vacating or rescinding the said purchase contract for want of a good title or otherwise as aforesaid, the said Sir Mark Wood shall not receive from the net produce of such sale, or from the said Michael Hicks Beach or the said trustees or out of the said Court of Exchequer or otherwise, the whole of the said sums of £5,000 and £2,000 so advanced by him as aforesaid, with such interest as aforesaid, then and in that case the said Edmund Griffith shall make good and pay to the said Sir Mark Wood one moiety of the deficiency of the said two principal sums and interest ; and if in either of the said last-mentioned cases the sum or sums to be received by the said Sir Mark Wood shall exceed the said sums of £5,000 and £2,000 and interest as aforesaid, then I award and direct that the said Edmund Griffith shall be entitled to one moiety of such excess, and the said Sir Mark Wood to the other part thereof."

Within the first six days of Easter term after the date of the award Sir Mark Wood accordingly, with the consent of Griffith, moved in the cause depending in the Exchequer that a sale might be directed of the East Mark estate ; but the plaintiffs in the Exchequer opposing the motion, it was, on the 12th of February, 1811, refused.

Within fourteen days after the refusal of that application Sir Mark Wood gave written notice to Griffith of his readiness to join in authorizing a sale of all the estate, right, title, and interest of himself and Griffith in the East Mark estate, pursuant to the award, and tendered to Griffith for his signature, which he refused, an authority to the auctioneers for making such sale.

The bill, filed by Sir Mark Wood, stating these facts, prayed that Griffith might be directed specifically to perform the award so far as relates to the sale of all the estate, right, title, and interest of the plaintiff and the defendant to and in the East Mark estate, and forthwith to sign the authority before set forth to enable the auctioneers to make such sale, or that it might be referred to the Master to settle a proper authority for that purpose, and that the defendant might be directed to sign the same when so settled ; and that he might be directed to do all other necessary acts for perfecting such sale on his part, and that the moneys to arise from such sale might be applied according to the directions of the award.

The defendant, by his answer, insisted that he was not bound to execute an authority for the sale of the estate, it being uncertain whether the vendors could convey a good title; and the arbitrator having declared that in case of their inability so to do, it did not appear to him that he could make a specific award concerning the estate, and in the event of the rescinding that contract for want of a good title or otherwise, having given directions for the settlement of the business between the plaintiff and the defendant.

The answer further represented that in Trinity Term, 1811, the plaintiff, by means of a partial and unfair statement of the award, procured a writ of attachment against the defendant for an alleged contempt of court in not giving an authority for the sale of the estate; when the defendant, having in his answer to the interrogatories exhibited to him, stated that it did not appear that the vendors could make a good title, he was reported not in contempt, and the writ of attachment was quashed; and the answer insisted on those proceedings as confirming the defendant's construction of the award.

The answer also stated that the defendant had advanced large sums of money in the management and concerns of the estate, and that a compulsory sale with a defective title, as required by the plaintiff, would be attended with great detriment to him.

The decree made by the Master of the Rolls on the 22d of March, 1814, declared that the defendant was bound to perform his part of the award by joining with the plaintiff in the sale of all the estate, right, title, and interest of the plaintiff and defendant to and in the East Mark estate; and ordered that the defendant should join the plaintiff in signing an authority to Messrs. Hoggart and Phillips to sell all such estate, right, title, and interest, pursuant to the award accordingly; and in case the parties differed about the form of such authority, that it should be referred to the Master to settle the same; and that the plaintiff and defendant should duly sign such authority when so settled; and after such sale should have been made, that the plaintiff and the defendant should respectively execute all proper and necessary conveyances of their respective rights and interests in and to the East Mark estate to the purchaser or purchasers at such sale, and do all acts necessary to carry such sale into effect; and that the moneys for which the said estate, right, title, and interest should be sold, after payment of all incidental expenses, should be paid and applied in such manner as in the award directed.

On the 23d of May, 1815, an order was made by consent for a reference to the Master to settle and approve a particular and conditions for the sale of all the estate, right, title, and interest of the plaintiff and defendant to and in the East Mark estate. On the 15th of September,

1815, the sale took place, and Mr. Farquhar became the purchaser at the price of £10,100, and by an order of the 22d of January, 1816, it was referred to the Master to approve a proper conveyance. Before the sale the defendant presented a petition of appeal from the decree at the rolls; and having been attached for refusing to execute the deed of conveyance approved by the Master, he was, on the 11th of July, 1817, discharged on executing the deed as an escrow, to be deposited in the Master's office, and abide the event of the appeal.

The appeal having been argued on a former day by *Sir Samuel Romilly*, *Mr. Leach*, and *Mr. Cook* for the plaintiff, and by *Mr. Hart* and *Mr. Spranger* for the defendant, the Lord Chancellor now gave judgment.

THE LORD CHANCELLOR. This case presents four questions:

1st. What is the meaning of the award? It is contended on the part of Sir Mark Wood that the Court of Exchequer having refused his application made in obedience to the award for an order for the sale of the estate, inasmuch as that attempt to dispose of the estate became ineffectual, the interest of himself and Griffith under the contract must be put up to sale. On the other hand, it is urged that till, by the report confirmed, it appears that a good title can be made, it was not the meaning of the award that the equitable interest, which might be more or less or nothing, should be sold.

2d. (A question to which I have given much consideration) supposing the meaning of the award ascertained, and considering an award being founded in an agreement to refer, as an agreement of the parties, of which the specific performance may be enforced, whether the award may not be in its nature so unreasonable, that a court of equity will lend no assistance to its execution? A doubt founded in this instance on the circumstance that, according to the plaintiff's construction, the arbitrator orders a sale before it is known that a good title can be made, and when the period during which the reference of inquiry into the title has been pending, must depreciate the property.

3d. Whether the award can be carried into effect? It is insisted by Mr. Griffith that, supposing the meaning of the award such as the plaintiff contends, it requires the parties to do acts which would amount to champerty or maintenance.

4th. Whether the question on the construction of the award has been already determined, the Court of King's Bench having dismissed the application of Sir Mark Wood for an attachment against Griffith on the report of its officer that Griffith had not been guilty of a breach of the award?

On the decision of these questions depends the general question, Whether, under the circumstances, the decree of the Master of the Rolls ought to be affirmed or reversed?

The decree declares that the defendant is bound to perform his part of the award by joining with the plaintiff in the sale of all their estate, right, title, and interest to and in the East Mark estate. On that principle the decree proceeds; and the subsequent ordering part is calculated only to carry it into effect. The circumstances of the case are these: In 1797 the vendors entered into a contract with Griffith and Wood for the sale of the estate at the price of £23,000; in the same year possession was taken; and the history of this case may, I think, amount to a demonstration that the court acts with something like justice, when, as in later times, it insists that purchasers taking possession of the estate shall not retain the price. The purchase-money was not put into a neutral state between the parties, as perhaps in all cases of possession by the purchaser it ought to be; but Sir Mark Wood paid on account of the joint contract in 1797 £5,000, and in 1799 £2,000, and in 1800 he executed a lease, by which he incurred an obligation to maintain the lessee in the enjoyment of the estate, for no less a term than twenty-one years. In 1806 the vendors filed a bill in the Exchequer to compel performance of the contract; and the defendants in that suit putting in question, not the contract, but the title, the court of Exchequer had only to refer it to the Remembrancer to inquire whether a good title could be made. It must be admitted that the case is not without difficulty, for the reference was directed in 1807, and the Remembrancer has not yet resolved that single question. It appears that previously to 1809 Griffith and Wood had unfortunately engaged with each other in various suits at law and in equity, all which were referred to the decision of the arbitrator and decided by his award. The question on the appeal is, whether the Master of the Rolls has rightly construed that award?

It is extremely clear that every award must be certain and final; but it has, particularly in more modern times, been considered the duty of the court, in construing an award, to find that it is certain and final, and, instead of leaning to a construction, which in effect would destroy nine-tenths of the awards made, if possible, to put one consistent sense on all the terms. In considering the meaning of this award relative to the sale of the estate, it must be recollected that the business of the arbitrator was to settle the differences between Griffith and Wood; and that the Court of Exchequer or the vendors, plaintiffs in that court, might not consent to the sale of the interest, such as it was, or that property so circumstanced might not meet with a buyer, and that, notwithstanding the direction to sell, the estate might thus remain unsold.

The direction for the sale of the right, title, etc., is, according to its incontrovertible meaning, a direction that all the right, title, and interest



in the estate (those words never having been before used in the award) should be forthwith sold. The arbitrator seems to have intended a sale not only of the right, title, and interest, but of the estate itself, if it could be brought to sale. The direction is express that Wood and Griffith shall consent to a sale, and shall, if either of them becomes the purchaser, accept such title as the plaintiffs in the Exchequer can make. Attending to the constant language and practice of this court, where it is repeatedly held that a party has by his acts rendered it impossible for him to object to a title, and coupling that with this express direction, it cannot be doubted that if the plaintiff or defendant bought the estate they must take such title as could be made. The arbitrator, though he could compel them to consent to the sale, yet could make no such effectual order on the vendors, who were not parties to the reference. He foresaw that they might choose to retain the estate, notwithstanding the objections to the title, rather than carry it to sale subject to the depreciation arising from those objections. Providing for the event of their withholding their consent, he says that in case the Court of Exchequer should not think fit to direct a sale, Griffith and Wood shall give authority to sell, not the estate, but all the right, title, and interest. Here is no qualification, no direction that the sale shall depend on the Remembrancer's report that the title is good.

Then comes the clause on which so much difficulty has arisen : "But if in either of the cases aforesaid it shall appear that the said Michael Hicks Beach, etc., cannot make a good title, etc., it does not appear to me that I can make any specific award concerning the said East Mark estate." It occurred to the arbitrator that it might finally appear that a title could not be made to this estate, that the purchasers would not be obliged to take it, and that therefore in certain events which might happen he could not make a specific award respecting the estate itself. Does that render the award less final and certain with respect to Griffith and Wood? Being, as I say they were, the owners of the estate in equity, they had a right, subject to considerations of law to which I shall presently advert, to sell such right, title, and interest as they had. It is impossible on a fair exposition to contend that the arbitrator meant by this clause to defeat all the prior clauses. In the construction of an award the court is bound, so far as the terms will admit, to give to it such a meaning as shall render it conclusive ; and not by the construction of one part to defeat another. That is my opinion on the first point.

It is said that this opinion clashes with the judgment of the Court of King's Bench. I think not ; but were it otherwise, if upon investigation I become convinced that their judgment is wrong, I should

violate my duty by adopting it in preference to that which I think right.

One difficulty which I confess I felt I shall now state, together with the grounds on which I have at length overcome it. That a bill will lie for the specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then the bill calls only for a specific performance of an agreement in another shape; but the court has always exercised the discretion of withholding its assistance for the performance of unreasonable agreements. I was much struck with the consideration of this as an agreement to sell an estate under the circumstances in which the arbitrator has directed a sale. The very fact that the title is in dispute in the Court of Exchequer must throw a damp on the proceedings and depreciate the property.

No one will dispute this proposition, that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term for 100 years contracts to sell the fee he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term, and this court will arrange the equities between the parties. But the present agreement is to be regarded as an agreement embodied in an award; and the question is, what is the effect of an agreement coming into a court of equity in that shape? and that question must be considered with reference to the cases in which courts have determined, that they will conform to the opinion of judges chosen by the parties. If judges so chosen erroneously decide a question of law the court will abide by that decision. Upon that principle I am of opinion that the objection of the unreasonableness of this award cannot be sustained.

It is then contended that the performance of the award will involve the parties in the guilt of champerty and maintenance. It must be admitted that neither this court nor any other will enforce an agreement by which, if carried into execution, the parties would be compelled under the process of a court of justice to do that which in the view of justice is criminal. In many of the proceedings relative to this award, on motions for rules for an attachment, and to discharge rules, etc., this objection might have been urged; but without advertg to that circumstance, let us now consider the foundation of the objection according to the settled practice of the court. I have referred to a class of cases in which this court has been in the habit of declaring that a party

who contracts for the purchase of an estate in fee simple is entitled to what the vendor can give. It is extremely clear that an equitable interest under a contract of purchase may be the subject of sale. A person claiming under that contract becomes in equity a trustee for the persons with whom he afterwards contracts; without entering into any covenants for that purpose they are obliged to indemnify him from the consequence of all acts which he must execute for their benefit; and a court of equity not only allows, but actually compels him to permit them to use his name in all proceedings for obtaining the benefit of their contract. Assuming that the award directs the sale of the estate, right, title, etc., before the determination of the suit in the Exchequer, what is that but what happens every day? If Griffith and Wood, during the pendency of the suit in the Exchequer, sold the estate to A B, he would have a right in a court of equity to insist, as purchaser of the estate, that they should convey to him the fee simple or such title as they had. So insisting, he claims no more than they would be entitled to claim if they had not sold their equitable interest; having sold, they become trustees of that equitable interest; their vendee acquires the same right which they had—that is, a right to call on the original vendors, indemnifying them against all costs and charges for the use of their names to enable them to execute the subcontract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance I should violate the established habits of this court, which has always given to parties entering into a subcontract the benefit which the vendors derived from the primary contract.

I think that the opinion of the Court of King's Bench was not against the contract; but if it were it would be my duty as a judge, with all respect to their authority, to express my own judgment. The opinion of that court on an attachment is in truth little more than the opinion of their officer. It is a consolation to me that if I am wrong in this case my error may be corrected elsewhere; but I have taken great pains to be right.

The decree must be affirmed.

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On this day Mr. Cooke moved, on the part of the plaintiff, that the conveyance executed by the defendant might be delivered out of the Master's office, to be executed by the plaintiff, and delivered to Farquhar, the purchaser.

The LORD CHANCELLOR. The suit originated in a bill filed by Sir Mark Wood, praying the specific performance of the award. The late Master of the Rolls thought that by their agreement so ascertained the

parties bound themselves to bring to sale their interest in the estate, the title to which had not yet been shown to be good, and during the pendency of a suit in the Exchequer between them and the vendors, and of a reference in that suit to the officer of the court to examine the title. He held that the parties had agreed, if the estate itself could not be sold, to a sale of their right, title, and interest ; a species of property which must be carried to market surrounded by difficulties and embarrassments. The purchaser of their interest in the contract might certainly, if a good title could not be made, compel repayment from the original vendors of the sums advanced by Wood ; and he would probably be considered as having a lien on the estate to that amount ; but it might be found that those vendors had no interest in the estate, and in that case the purchaser would have only a personal demand against the individuals who received the money.

I repeat that I proceeded to the confirmation of this judgment most unwillingly, because it occurred to me that it was next to impossible that such an interest could be sold otherwise than to the loss and disadvantage of one, at least, of the persons who had entered into the contract. I took pains to persuade myself that the award had not the meaning imputed to it by the Master of the Rolls ; but being finally of opinion that such was its meaning, I could not refuse to decree the specific performance of the award, considered as an agreement between the parties. The objections of the defendant appeared to me untenable. I thought it impossible to maintain that the court, in enforcing the performance of an agreement embodied in an award, applies exactly the same principles as in the case of a common agreement between A and B. Having submitted to a judge chosen by themselves, the parties give to his acts an authority which the court would not allow to their own. If the objection that the acts which the award directs amount to champerty or maintenance can be sustained, I am satisfied that this court has almost daily decreed a violation of the law.

The order must be made, but I shall give no costs.

## BOUCK AND MACOMB v. WILBER.

IN THE COURT OF CHANCERY OF NEW YORK, MAY 25, 1820.

*[Reported in 4 Johnson, Chancery, 405.]*

THE bill, filed August 4, 1819, stated, among other things, that the plaintiffs were owners of several lots of land in Lawyer and Gimmer's patent, in Schoharie County, and among the rest, of fifty acres, part of lot No. 1, in the first allotment of the patent. That, in 1811, an action of ejectment was brought by the plaintiffs against the defendant, who was in possession of the fifty acres. That when the suit was ready for trial at the circuit, the defendant, and others, on the 22d of September, 1813, entered into an agreement, by which the legal title of the plaintiffs to the land was admitted: and it was agreed, between the parties, that Archibald Croswell, John Adams, and Jabez D. Hammond, or any two of them, should appraise in writing, on or before the 10th of June next, the sum which the defendant, and others, should, under all the circumstances, pay to the plaintiffs for the lots so occupied, and for costs; and the appraisers were authorized to decide on equitable as well as legal principles; and the sums so ascertained were to be paid in four annual installments, secured by bond and mortgage on the land. And the plaintiffs agreed, on their part, in consideration of the sums so ascertained and secured to be paid, to convey the lots to the defendant and the others. That the arbitrators, after hearing the parties and their proofs, on the 19th of May, 1814, made their award under their hands and seals, by which they appraised the sum which the defendant was to pay for the fifty acres in his possession, at \$337.50, and for the costs of the ejectment \$68.68, making, together, \$406.18. That the arbitrators, in describing the fifty acres possessed by the defendant, by mere mistake, and inadvertence, gave an erroneous description of the boundaries. That the plaintiffs being always ready to perform the award on their part, on the 30th of June, 1819, executed a deed of conveyance of the fifty acres to the defendant, and tendered the same to the defendant on the 17th of July, and demanded payment of the sum so awarded; but the defendant refused to pay the money, and receive the deed, and still continues in possession of the land, and has received the rents and profits. Prayer, that the defendant should be decreed to pay to the plaintiffs the \$406.18, with interest and costs, etc., and for general relief.

The answer of the defendant denied that the plaintiffs were owners of the fifty acres, and averred that he had the legal title to the land. That he entered into the agreement as to the submission merely to avoid further litigation. He admitted the award as set forth; that in regard

to the defendant, it includes only one acre, and twenty-two rods, of lot No. 2, in the great subdivision of lot No. 1; and that No. 2 is the one owned and possessed by him. He admitted that the arbitrators might have appraised lot No. 2, it being occupied and claimed by the defendant, and had, through mistake and misapprehension, given a wrong description of it, yet he did not know it to be so, though he had some reason to believe it. But, if that was the appraisal and intention of the arbitrators, they ought to have inserted the true boundaries in their award. He admitted the tender of a deed, etc., and a refusal on his part. He stated that the plaintiffs brought an action at law against the defendant, on the award, to recover the amount, that the defendant pleaded the mistake, etc., and a verdict was found for the defendant, on which judgment was given in May, 1819. That the sum at which the fifty acres were appraised was no more than the fair value, and that he refused to comply with the award, because it was illegal and void.

Witnesses were examined on both sides, and the cause was brought to a hearing on the pleadings and proofs.

*H. Hamilton* and *H. Bouck* for the plaintiffs.

*S. A. Foot* for the defendant.

The CHANCELLOR. It appears very clearly from the answer and the proofs that the arbitrators did appraise and determine according to the articles of submission the sum which the defendant, under all the circumstances of the case, ought to pay for the fifty acres of land which he occupied and claimed. They inadvertently made a mistake in setting out in the award a description of the land; and the description takes in adjoining land, with only a small part of the fifty acres. The mistake is too palpable to be denied, but it was a mistake only of a clerical nature in drawing up the award. The judgment of the arbitrators was truly exercised and passed upon the object of the submission; and the appraisal is admitted to have been just and fair when applied to the defendant's land. There can be no doubt, therefore, that the defendant is bound, in good faith and in conscience, to fulfill the award on his part, according to the judgment and manifest intent of the arbitrators; and the mistake in the description of the boundaries of the land ought to be corrected according to the truth of the case, and the intention of the parties concerned. Had the arbitrators appraised a different tract of land instead of the fifty acres possessed by the defendant, there would have been good ground for rejecting the award as *dehors* the submission. But here the determination was upon the very matter in dispute, and the judgment of the arbitrators is not questioned. The plaintiffs are only seeking the benefit of that judgment, and to be relieved from a plain mistake which impedes it. They are certainly entitled to relief upon the plainest principles of justice; and they can obtain it

consistently with the general doctrine of the court, and the language of all the cases.

In *Norton v. Mascall*<sup>1</sup> an award was made not binding, as the case says, by form of law. Each party had a duty to perform under it. The one was to pay and execute a release, and the other to assign securities. And though "the award was extra judicial, and not good, in strictness of law, yet the Lord Chancellor decreed it should be performed in specie." It seemed to be well understood in many of the cases referred to in *Underhill v. Van Cortlandt*,<sup>2</sup> that such mistakes of an extra judicial nature, and not bearing upon the judgment of the arbitrators, were to be corrected. It was assumed in that case, and in *Shepard v. Merrill*,<sup>3</sup> that a mistake in a matter of fact attending an award could be relieved; and though the decree in the former case has been since reversed by the Court of Errors,<sup>4</sup> it was, as I understood, on the ground of misconduct in the arbitrators or the party, and I believe I may venture to conclude that the whole law of that case remains sound and unshaken.

I shall, accordingly, declare that the plaintiffs are entitled to the benefit of the award, according to the assessment of the arbitrators, and that the erroneous description of the premises shall be deemed to be corrected according to the truth of the fact. The decree must, accordingly, be entered that the defendant, within thirty days, and on an offer of the deed tendered in July last, or another of like import, duly executed, pay to the plaintiffs the sum of \$406.18, awarded, with interest, from the day of the tender of the deed, and costs of the suit to be taxed.

Decree accordingly.

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### MORSE v. MEREST.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., MARCH 5, 1821.

[*Reported in Maddock and Geldart 26.*]

THE plaintiff and defendant entered into a written agreement for sale by the defendant to the plaintiff of a considerable estate at twenty-five years' purchase, on an annual value to be set by A, B, and C, three persons named in the agreement, on or before a certain day.

The valuation had not been made accordingly; but it appeared in evidence that the defendant had prevented the valuation being made on or before the day named.

<sup>1</sup> 2 Vern. 24.

<sup>2</sup> 2 Johns. Ch. Rep. 296.

<sup>3</sup> 2 Johns. Ch. Rep. 339.

<sup>4</sup> *Vide* 17 Johns. Rep. 405-436.

*Mr. Trower, Mr. Bell, and Mr. Roupell*, for the plaintiff, in the course of their argument cited *Milnes v. Geery*<sup>1</sup> and a *dictum* in *Couth v. Jackson*.<sup>2</sup>

*Mr. Horne and Mr. Girdleston*, for the defendant, cited *Crawshay v. Collins*.<sup>3</sup>

The VICE-CHANCELLOR held, that in the case of a reference time was as essential in equity as at law ; but that in equity a defendant was not permitted to set up a legal defense which grew out of his own misconduct, and that this agreement was now to be acted upon as if no time were limited, or the time was not passed. That a man who agreed to sell at a price to be named by A, B, and C could not be compelled by a court of equity to sell at any other price ; but it appearing that the defendant refused to permit the referees to come upon the land, the court had jurisdiction to remove that impediment, and would decree that the defendant should permit the valuation to be made according to the contract ; and if it were so made, then a supplemental bill must be filed for a specific performance upon the terms of their valuation.<sup>4</sup>

<sup>1</sup> 14 Ves. 400.

<sup>2</sup> 6 Ves. 12.

<sup>3</sup> 1 Swan. 40.

<sup>4</sup> “ Supposing that the transaction is unimpeachable on the first ground taken by the plaintiff, the question next arises what is now to be done between the parties? Here, the arbitration originally agreed on has by the death of the arbitrator and umpire been wholly frustrated. And the question arises whether the court can now enforce the specific performance of the agreement in the declaration of trust, by compelling Cheslyn to name a fresh referee, or, in case of his refusal, by referring the account to the Master ; and if so, upon what terms must this be done? Here, the plaintiff Cheslyn comes into equity to ask relief, and before he can obtain that relief, he must of course perform what the court shall deem to be equitable, that is to say, the substance of his agreement. Now, what is that? There is a recital that the plaintiff Cheslyn was, upon an account commencing in 1797, and continued down to the time of the agreement, indebted to Thomas Dalby, but that the balance was not ascertained. It is first provided, that to the extent of £5,000, there should be a lien on the estates mortgaged for that balance when ascertained. And then the deed goes on to provide for a special mode of ascertaining that balance. If the parties cannot agree on it, it is to be ascertained by arbitration. Two persons are named to be the referees, with power to name an umpire ; and there is then a special clause, that in taking the accounts, such arbitrators and umpire are not to allow the claim to be defeated by the Statute of Limitations.

“ Now, I think this agreement is composed of two distinct parts : 1st, It is admitted that there is some balance due to Thomas Dalby ; and it is agreed that the estate is to be subject to a lien for that balance. But, 2d, there is also an agreement as to a specific mode of ascertaining that balance in case of dispute. Now, the latter alone has failed, by events over which the parties had no control. But it seems to me, that notwithstanding this, the former part remains entire, and if Mr. Cheslyn has admitted that there is a balance due, and has by a deed, executed under such circumstances as that it ought to be enforced, agreed



## DARBEY v. WHITAKER ET AL.

IN CHANCERY, BEFORE SIR RICHARD TORIN KINDERSLEY, V.C.,  
JULY 13, 1857.

[*Reported in 4 Drewry 134.*]

THIS was a bill for specific performance.

By lease dated the 6th day of May, 1851, and made between Thomas Wood of the one part, and the plaintiff of the other part, certain premises, known as the "Royal Albert," at the date of the bill occupied by the plaintiff as a beer-house, were demised to the plaintiff, his executors, administrators, and assigns, from the 29th day of September, 1847, for the term of twenty-one years, at a rent of £80.

The plaintiff and the defendants respectively entered into and signed the following agreement, in writing: "Memorandum of an agreement made and entered into this 23d day of October, 1856, between Mr. Frederick Darbey, of Albert Terrace, Paddington (hereinafter called the vendor), of the one part, and Thomas Whitaker and William Abbey York, of 6 Hawley Place, Kentish Town (hereinafter called the purchasers), of the other part. The said vendor, in consideration of the sum of £50, to him now paid by the said purchasers, as the said vendor doth hereby acknowledge, by way of deposit, and in part of the sum of £545, the consideration agreed to be given for the purchase of the lease of the messuage or tenement hereinafter mentioned, and for the trade, goodwill, and possession thereof, and of the residue of such purchase-money

that his estate shall be subject to a lien for that balance, why am I to decree a reconveyance of the estate without compelling him to fulfill that part of his agreement? It appears to me that I ought not to do so—and that in this case I ought to declare that such lien exists.

"But according to this view of the case, the special mode of ascertaining the balance has failed; and the Master therefore, in taking the account, ought to allow to Mr. Cheslyn the benefit of the Statute of Limitations, and all other defenses which could legally have been made by him at the date when the declaration of trust was executed. For the proper mode, as it seems to me, of construing Mr. Cheslyn's stipulation, is to take the whole clauses as to the arbitration together. If the balance had been settled in the way proposed, and by the individuals named, it might be in his judgment reasonable to give a greater latitude to the discretion of his selected judges. But it would not be in accordance with this to give the same power to the Master as to other persons not in the same situation. That bargain alone, which the court clearly sees that he has made, ought to be enforced. But it is not clear to me that this was more than an absolute agreement that the estate should be bound for the true balance, with a conditional waiver of the defense of the Statute of Limitations, in case the balance was determined by selected judges."—Alderson, B. *Cheslyn v. Dalby*, 2 Y. & C. 170-197.—ED.

to be paid as hereinafter stipulated, agrees, on or before the 11th day of November next, to assign unto the purchasers, their executors, administrators, or assigns, or such person as they shall appoint, all that messuage, tenement, or beer-house called the Royal Albert, situate in Albert Terrace, Bishop's road, Paddington, with the yard, outbuildings, and appurtenances thereto belonging, for the residue of a term of years, for which the said vendor holds the same under lease, of which twelve years were expired from Michaelmas last, subject to the yearly rent of £80, and to the covenants in such lease contained (the same, nevertheless, being only the usual and ordinary covenants contained in leases of beer-houses), and from all other incumbrances; and the said vendor agrees to deliver to the said purchasers possession of the premises on or before the 11th day of November next, clear of all rent, rates, taxes, and gas to that time, and to make good or allow for the external broken windows, and to make such other allowances as are usual for outgoing to incoming tenants of beer-houses. Also to sell to them all the tenant's fixtures, furniture and effects in the said house and premises at such price as the same shall be valued at by Mr. Geo. Knight and Mr. Lounds, or their umpire; and also all his present good and saleable stock of porter and ales which shall then be in the said house and premises, not exceeding porter three butts, ale twelve barrels, at the valuation of two licensed gaugers, to be named by the parties hereto or the umpire of such two gaugers. And the said vendor further agrees that he will not take or occupy a public-house, or be directly or indirectly interested or concerned in the trade or business of a licensed beer-seller, retail brewer, or dealer in beer by wholesale or retail, within one-third of a mile of the said premises, while the said purchasers or their widows shall continue possession thereof; or, in the event of his doing so, that he will, within fourteen days after the demand thereof, return and pay to the said purchasers, their executors or administrators, £150, part of the said purchase-money for the good-will in trade, as liquidated damages, without any abatement whatsoever. A covenant to this effect to be inserted in the said assignment for the consideration aforesaid; the said purchasers agree to accept such assignment without requiring evidence of any title prior to the above-mentioned lease, nor make any objection thereto, notwithstanding any recital, statement or covenant therein contained, or by reason of the lease being a derivative or underlease. And they agree to pay to the said vendor the sum of £495 residue of the purchase-moneys for the said beer-house, trade and good-will and possession, as before mentioned, on the execution of the said assignment and the delivery thereof to them, and the possession of the said beer-house and premises; and they agree at the same time to pay the said vendor the sum at which the said tenant's fixtures, furniture, effects and

stock shall be valued in the manner before mentioned, and a due proportion for the unexpired term in the current policies of insurance against fire of the said premises, effects and stock, and in all other respects to fulfill this agreement on their parts. It is further mutually agreed between the vendor and purchasers that all expenses attending the completion of this agreement shall be borne and paid by them in equal moieties ; and after either of them shall refuse or neglect to perform this agreement on his or their part, he or they shall pay unto the other of them, who shall be willing to complete the same, the sum of £150, as or in the nature of liquidated damages, and recoverable," etc. [The rest was immaterial to the questions argued.]

*Mr. Baily* and *Mr. Kingdon* for the plaintiff.

*Mr. Glasse* and *Mr. Tripp* for the defendant.

The VICE-CHANCELLOR. Many objections have been taken by the defendant ; one is, that the plaintiff has failed to produce the original lease. I think there is nothing in that objection. [His Honor referred to the clause in the agreement, and stated that he was of opinion that protected the plaintiff.]

Then, it is said, there is a forfeiture, or a liability to forfeit, by reason of the plaintiff not having duly insured. I think the defendant wholly fails in proof of that.

Next, it is said, there is misrepresentation of facts as to the value of the trade. The onus of proof of such misrepresentation lies on the defendant, and I think in that also he has failed.

Next, it is said, there can be no specific performance of a contract to purchase a good-will. No doubt you cannot have a specific performance of a contract to purchase a good-will alone, unconnected with business premises, by reason of the uncertainty of the subject matter. But when a good-will is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and good-will, there is not the slightest ground for doubt that such a contract is a fit matter for a decree in a suit for specific performance.

Next, it is argued that time was in this case of the essence of the contract ; but when I find that the non-performance of the contract on the day arose from the defendant himself insisting on some terms, that is not a ground on which he could resist specific performance.

Then, lastly, is raised a question in which it is with great regret that I feel myself under the necessity of refusing a decree.

By the terms of the contract, the premises are to be sold for a fixed sum, and besides the premises, the plaintiff agrees to sell the fixtures and stock in trade. [His Honor referred to the passage in P. 136.]

Now I assume it to be clear that this court has no power to decree specific performance of a contract for sale or purchase at a

price to be fixed by arbitration, unless the arbitrators have actually fixed the price.

It appears to me that that is implied by the very nature of a decree for specific performance. What would it be? A decree that directs payment to the plaintiff of such a sum of money as A and B shall fix. I never saw such a decree, and I think the court cannot make it, on the ground that this court will never make a decree that it cannot see its way to enforce. Now how could I enforce such a decree? What is the time to be allowed for arbitration? How can I compel the arbitration? It appears in this case as a fact that one of the arbitrators has refused to go on, because he was told by the defendant that he did not mean to complete. How can I be sure that he will go on? And even if the arbitrators do go on, and differ, how can I compel the appointment of an umpire?

[His Honor then adverted to the argument, that the agreement was composed of separate parts, and decided that it was not; that it was one agreement.]

The bill was accordingly dismissed, but without costs, the court considering that moral justice was on the plaintiff's side.

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### VICKERS v. VICKERS.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., July 10, 26, 1867.

[*Reported in Law Reports, 4 Equity Cases 529.*]

THE plaintiff, Edward Vickers, and the defendant, James Vickers, brothers, being in partnership as distillers, the defendant, by a deed dated the 31st of October, 1863, agreed to buy out the plaintiff, and in the same deed there was a provision that if the defendant should, during the plaintiff's life, be desirous of retiring, he should give notice, and the plaintiff should have an option of re-purchase, on the terms that, within six months after a notice by the plaintiff, the premises, good-will of the business, fixtures, utensils, and stock in trade, and all such subsisting contracts as the plaintiff should be willing to take, should be valued "in the usual way by two valuers"—one to be named by the plaintiff, the other by the defendant, "or by the umpire of the said valuers."

Notice of intention to retire was, on the 30th of December, 1863, given by the defendant, and, on the 30th of June, 1864, the plaintiff gave notice of his election to purchase. The defendant appointed a valuer, but afterwards altered his mind, and would not allow the valuation to be proceeded with.

After some negotiations which proved abortive, this bill was filed on the 23d of May, 1865, praying for a declaration that the plaintiff was entitled to become the purchaser of the business, and of the property connected therewith, as on and from the 30th of June, 1864, at a valuation; and that specific performance of the contract for sale and purchase of the business to and by the plaintiff might be decreed, and that "if, and so far as might be necessary," the deed of the 31st of October, 1863, "might be rectified in accordance with the terms of the agreement in which the plaintiff retired from the business in favor of the defendant"; and other consequential relief.

The only question of interest was, whether the contract was one which the court had power to enforce.

The clauses of the deed to which reference was made in the argument and judgment were as follows:

3. (After a stipulation by Edward that, in case of punctual payment of the installments of the purchase-money, he would not carry on business as a distiller within 100 miles of London): "Provided always, nevertheless, that in case the said business shall be disposed of by the said James Vickers during the lifetime of the said Edward Vickers, under the provision hereinafter in that behalf contained, then, and in that case, from and after the death of the said James Vickers, this present stipulation shall cease and be at an end; and the said Edward Vickers shall be at full liberty, without the necessity of any consent on the part of the said executors or administrators of the said James Vickers, to carry on the said business of a rectifying distiller and wine and spirit merchant, or any branches or department thereof, at his own will and pleasure. . . .

"5. In the event of the said James Vickers being desirous of retiring from the said business during the life of the said Edward Vickers, he shall give notice in writing to that effect to the said Edward Vickers, and the said Edward Vickers shall have the right of purchasing the same upon the terms hereinafter mentioned. In case, within six calendar months next after the notice in writing of the desire of the said James Vickers to retire, as aforesaid, shall have been given by, or on behalf of, the said James Vickers to the said Edward Vickers, or left for him at his usual or last known place of abode or of business in England, he, the said Edward Vickers, shall elect to purchase the same, then and in such case the premises on which the said business shall for the time being be carried on, the good-will of the trade, the fixtures, plant, utensils, and stock in trade of the said business, as on the day preceding the expiration of six calendar months next after such notice of an intention to retire being given or left as aforesaid, and also all such subsisting contracts (if any) entered into by or on behalf of the said James Vickers, in rela-

tion to the said business, as the said Edward Vickers shall be willing to take (but no others), are to be valued in the usual way by two valuers, one to be named by the said Edward Vickers, and the other by the said James Vickers, if still living, and if not, by his executors or administrators, or by the umpire of the said valuers ; and the said Edward Vickers shall thereupon purchase and take to the said business and the aforesaid property connected therewith.

“ 6. In the event of the said James Vickers dying in the lifetime of the said Edward Vickers, then (unless the said Edward Vickers shall during the lifetime of the said James Vickers have declined to purchase the said business as aforesaid, in which case this present provision shall not take effect) the executors or administrators of the said James Vickers shall give up the said business to the said Edward Vickers, unless, within three calendar months after the death of the said James Vickers, the said executors or administrators shall enter into an obligation to pay to the said Edward Vickers an annuity of £1,000 during the remainder of the life of the said Edward Vickers, to be paid in the same manner and on the same days of the year as the annuity hereinbefore covenanted to be paid to him, and as an uninterrupted continuation thereof. Should such executors or administrators decide on giving up the said business to the said Edward Vickers, the premises on which the said business shall for the time being be carried on, the good-will of trade, fixtures, plant, utensils, and the stocks in trade of the said business, as on the day preceding the expiration of three calendar months after the death of the said James Vickers, and also all such subsisting contracts (if any) entered into by or on behalf of the said James Vickers, in relation to the said business, as the said Edward Vickers shall be willing to take (but no others), are to be valued in the usual way by two valuers, one to be named by the said Edward Vickers, and the other by the executors or administrators of the said James Vickers, or by the umpire of the said valuers ; and the said Edward Vickers shall thereupon purchase and take to the said business and the aforesaid property connected therewith. . . . In case the said James Vickers shall not be carrying on the said business of a rectifying ‘s-tiller and wine and spirit merchant at the time of his death, or, in case of any other reason, his executors or administrators shall be unable to make over to the said Edward Vickers, in manner aforesaid, the said business and the aforesaid property connected therewith, then and in any such case, unless the said Edward Vickers shall, during the life of the said James Vickers, have declined to purchase the said business as aforesaid, in which case this present provision shall not take effect, the said executors and administrators, or the estate of the said James Vickers, shall be bound to pay to the said Edward Vickers, during the then

remainder of his life, the said continued annuity of £1,000, by the payments and in manner aforesaid."

*Mr. W. M. James, Q.C., Mr. Druce, Q.C., and Mr. Dauney* for the plaintiff.

*Sir Roundell Palmer, Q.C., Mr. Kay, Q.C., and Mr. C. Hall* for the defendant.

July 26. SIR W. PAGE WOOD, V.C. The short point in this case is whether the contract between these parties is within the principle of *Milnes v. Gery*.<sup>1</sup>

[His Honor read the terms of the contract set out above, observing that all events seemed to have been provided for, except this particular event which had occurred, of one of the parties having named a valuer, and then having forbidden him to act. His Honor further observed that it had occurred to him, at one time, that more effect might be given to the previous clause about arbitration, by considering the terms of the last clause, which provided, that in the event of James's death, the executors were either to give a bond for the due payment of the annuity, or to hand over the business. Supposing the executors refused to give a bond, then Edward would have to take the business; but he could only do so by paying for it at a valuation. Then supposing the executors were to do as the defendant had done—refuse to go on with the valuation—what was to be done? But it appeared to his Honor that this consideration did not really affect the case; for that would have been a non-handing over of the business without any default of Edward, and he would then be entitled to his annuity. His Honor continued:]

No doubt the parties did not anticipate the event which has happened. Six months were given to James Vickers in which to make his option; and it is clear that nothing could have been less in the minds of the parties than what has unfortunately happened; for the price to be paid by Edward was to be given not only his for own share, but for the share of James which he never owned before. It was to be a new purchase, not only of things as they stood, but of things as they might stand, after the stock had been increased or diminished by the continuance of James's business; and the price was to be ascertained only in one way, namely, by the decision of two persons, to be nominated in the manner described. If a nomination of that kind fails, or if the two persons named do not make their award, this court has said there is no *constat* of the price; the contract is not a complete contract, and there is nothing on which it can act.

The court has adopted this principle (I am not sure that it has not extended it) from the civil law as stated in the Code of Justinian, who

<sup>1</sup> 14 Ves. 400.

seems to have taken great pride in having decided a point, which he said was a knotty point, and had occasioned great controversy among lawyers, namely, if a given man is to name the price, whether that is to be considered as equivalent to the *arbitrium boni viri*. The Emperor Justinian<sup>1</sup> determined that if Titius be unable or unwilling to name the price, the sale is null. But he does not say, that if one of the parties to such an engagement were to throw any obstacle in the way and avail himself of what, in ordinary cases, we should call his own wrong, the court would still hold the same view, and that a substitution could not be made in order to give effect to the *bona fides* of the contract.

In *Wilks v. Davis*,<sup>2</sup> it was decided that where a man says: "I will not execute the arbitration bond," the court will hold him free. Whether that is a desirable conclusion or not, it is now too late to question; the court has so determined, and that, I apprehend, is the law.

I must say that this particular case is one which tries the principle to the utmost; because it is impossible to avoid seeing the enormous inconvenience which must arise from engagements of this kind, whereby A is at liberty to give a notice which will throw on B the task of purchasing at the end of six months—that period being given to B for preparation—and then A may say, when everything is ready, and B has made his preparations, "all this is to go for nothing, I will not allow my valuer to proceed." It is true that B might take the same course, and at the last moment decline to name a valuer; but in an ordinary case that would be a very strange proceeding, and strange cases should not be permitted to make bad law.

But I must, nevertheless, adhere to what has been decided. I cannot distinguish this case from *Milnes v. Gery*,<sup>3</sup> and especially from *Wilks v. Davis*.<sup>4</sup>

Mr. James referred me to that class of authorities, under the Common Law Procedure Act, where there has been an actual reference to arbitration, and the parties have declined to name arbitrators. The line may be at times very fine, but I apprehend that in all these cases (as in that of *Collins v. Collins*,<sup>5</sup> where I agree with the Master of the Rolls, that it could not have been intended by the Legislature that the principle of *Milnes v. Gery* should be overruled), if there be a clear right to have some sum or other by way of damages ascertained in some way, and it comes to this, that the valuers have to adjudicate on a point of law, or a point of right between the parties, arising out of the facts, then it ceases to be a simple valuation, and becomes an arbitration.

<sup>1</sup> Inst. 3, 24, 1; Cod. 4, 38, 15.

<sup>2</sup> 3 Mer. 507.

<sup>3</sup> 14 Ves. 400.

<sup>4</sup> 3 Mer. 507.

<sup>5</sup> 26 Beav. 306.



In this instance there is no difficulty, because the courts have decided, and we must take it to be positive law, that there is no existing contract until this valuation has taken place ; and therefore there is nothing for arbitrators, who may be appointed by the court, to arbitrate upon. They have no authority ; no stranger can be invoked. The only persons who can act are two persons to be named, or two persons to be selected by others ; they are to act when the time arrives ; if they never come into existence the contract does not exist. That is the principle on which the cases have been decided, and which I am obliged to follow.

The bill must be dismissed ; but, considering the conduct of the parties, without costs.

Solicitors for the plaintiff: *Messrs. Ellis, Parker & Clarke.*

Solicitor for the defendant : *Mr. Charles Rivington.*

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FLINT v. BRANDON.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M.R., FEBRUARY  
16, 17, 1803.

[*Reported in 8 Vesey 159.*]

By indentures of lease, dated the 29th of July, 1789, Samuel and Thomas Brandon demised to the plaintiff, his executors, etc., a piece of ground, called the Gravel Pits, at Newington, containing 2 acres, 12 poles, then in the possession of Thomas Clutton, to hold from the 29th of September, 1799, the day on which the lease to Clutton would expire, for the term of 21 years ; nevertheless the same to be put into the possession of plaintiff in the same state and condition as it was so expressly covenanted, declared, and agreed, to be yielded up by the said Thomas Clutton, his executors, etc., unto the original landlord in and by the lease granted to Clutton ; paying the yearly rent of £12, with all the usual covenants.

This lease contained a covenant by the lessors, that the plaintiff, his executors, etc., should at the expiration of the then existing lease to Clutton be put into possession of the said premises thereby demised ; and that the same premises should then be in the same state and condition as he the said Thomas Clutton for himself, his executors, etc., did covenant, etc., to and with the original landlord, his heirs, etc., to leave and yield up the said premises. They also covenanted to grant to the plaintiff two further terms of 20 years each in succession on payment of a fine of £2.

The original lease was granted by Henry Penton to Clutton for a term, which expired on the 29th of September, 1799; and by a memorandum indorsed, dated the 8th of June, 1779, it was declared, that it should be lawful for Clutton, his executors, administrators, and assigns, to break up or dig for gravel any part of the land; and he thereby for himself, his executors, administrators, and assigns, covenanted to pay the sum of £20 for every acre he or they should so break up or dig, and to make good the same at or before the expiration of the within lease.

Samuel and Thomas Brandon purchased this piece of ground from Penton. Thomas Brandon and Clutton died.

The bill, filed in 1800 against Samuel Brandon and the executors of Thomas, prayed, that the defendants may be decreed specifically to perform and carry into execution the grant, covenants, and agreements made with the plaintiff by the said indenture; and that they may be ordered to put the plaintiff in possession of the piece of ground so demised to him in such state and condition as Clutton, his executors, etc., ought to have made good the same.

The answer stated that the plaintiff was in possession; and submitted that, if the plaintiff has any demand, it is by action of covenant, and not by suit in this court.

*Mr. Richards* and *Mr. Wingfield* for the plaintiff.

*Mr. Romilly* and *Mr. Martin* for the defendant.

THE MASTER OF THE ROLLS. This court does not, I apprehend, profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere. In *Errington v. Aynesley*<sup>1</sup> Lord Kenyon says, "a specific performance is only decreed where the party wants the thing in specie, and cannot have it any other way." I will not say courts of equity have in every instance confined themselves within this line; but this being the principle, I will not deviate from it farther than I am bound from deference to precedent and authority. In the present case complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which by the covenant it ought to be. The plaintiff will be entitled to recover damages in an action for breach of the contract. In some respects the legal remedy is better than any this court can give; for the plaintiff recovering, and having the disposition of the money, may perform the work in such manner as he thinks proper; whereas, if a specific performance is decreed, a question may arise, whether the work is sufficiently performed. The jury also may take into consideration any

<sup>1</sup> 2 Bro. C. C. 341.

injury to him by not having performed at the commencement of the lease ; but this court can only decree a performance now.

As to the cases upon building contracts, it is unnecessary to make observations upon them. If it is settled that such contracts should be specifically performed, I should think myself bound to follow that course, without inquiring whether it is strictly consonant to principle. But I am not barred from that inquiry, where a contract of another species is for the first time brought into this court for a specific performance. No instance of a specific performance of such a covenant as this has been produced. Therefore I am at liberty to do what upon principle ought to be done to dismiss this bill.

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LANE v. NEWDIGATE.

IN CHANCERY, BEFORE LORD ELDON, C., NOVEMBER 2, 13, 1804.

[*Reported in 10 Vesey 192.*]

THE plaintiff was assignee of a lease, granted by the defendant, for the purpose of erecting mills and other buildings ; with covenants for the supply of water from canals and reservoirs on the defendant's estates, reserving to the defendant the right of working and using his then or future collieries, either with regard to the supply of water, or other uses of the collieries, or any locks for the passage of his boats or otherwise ; the liberties and privileges granted being, as expressed in the lease, intended to be subordinate to the use and enjoyment of the collieries ; the defendant to have due regard to the mills, etc., and doing as little mischief as the nature of the case would admit.

The bill prayed, that the defendant may be decreed so to use and manage the waters of the canals as not to injure the plaintiff in the occupation of his manufactory ; and, in particular, that he may be restrained from using the locks, and thereby drawing off the waters, which would otherwise run to and supply the manufactory ; and that he may be decreed to restore the cut for carrying the waste waters from the Arbury canal to Kenilworth pool, and to restore Kenilworth stop-gate and the banks of the canal to their former height ; and also to repair such stop-gates, bridges, canals, and towing-paths as were made previously to granting the lease ; and that he may be decreed to make compensation for the injury sustained by their having been suffered to go out of repair ; and that he may be decreed to remove the locks, which have been made since the lease, and to make compensation for the injury sustained by the said locks having been made so near the

manufactory, thereby injuring the machinery ; and that he may be decreed to pay the plaintiff the expense he has been put to by working the steam engine to supply the want of water.

The LORD CHANCELLOR, upon the motion for the injunction, expressed a difficulty, whether it is according to the practice of the court to decree, or order, repairs to be done.

*Mr. Romilly*, in support of the injunction, said the repairs to be done in this case are in effect nothing more than was done in *Robinson v. Lord Byron* ;<sup>1</sup> viz., raising the dam-heads, so that the water shall not escape, as it will otherwise.

The LORD CHANCELLOR. So, as to restoring the stop-gate, the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction, I shall order, will create the necessity of restoring the stop-gate ; and attention will be had to the manner in which he is to use these locks ; and he will find it difficult, I apprehend, to avoid completely repairing these works.

The order pronounced was, that the defendant, his agents, etc., be restrained until further order from further impeding, obstructing, or hindering the plaintiff from navigating the canal for the necessary purposes of the mill, or from using and enjoying the demised premises, and the mills and buildings erected thereon, or the liberties and privileges, granted by the indenture of lease, etc., contrary to the covenant, by continuing to keep the said canals, or the banks, gates, locks, or works of the same respectively, out of good repair, order, or condition ; and also from further troubling, molesting, and preventing the plaintiff, contrary to the covenant, in the use and enjoyment of the said mills and buildings, or the liberty, privilege, and power of drawing for the use of the said mill from the canals, etc., a sufficient quantity of water for the use and working of the said mill, by diverting, draining, or drawing off water ; or preventing the same by the use of any lock or locks, erected by the defendant, from remaining and continuing in the said canals, or by continuing the removal of the stop-gate, mentioned in the pleadings in the action, brought by the plaintiff, to have been erected ; and by means of which the water could and would have been kept and retained in the said pool for the use of the mill ; but nothing in this order is to extend to diminish, lessen, hinder, or prejudice the working, using, or enjoying, by the defendant or his present and future collieries, either with regard to the supply of water for his fire-engine, or other uses of the collieries, or of any locks to be erected for the passage of his boats, or otherwise : the defendant having due regard to the said mills, and doing as little damage thereto as the nature of the case will admit.

<sup>1</sup> 1 Bro. C. C. 588.

## STORER v. GREAT WESTERN RAILWAY COMPANY.

IN CHANCERY, BEFORE SIR J. L. KNIGHT BRUCE, V.C., NOVEMBER  
12, 1842.

[*Reported in 2 Young & Collyer, Chancery, 48.*]

THE plaintiff was the owner of a mansion house and pleasure grounds, and lands adjoining.

The defendants had obtained power, under certain acts of Parliament, to construct a railway from London to Bristol, but desiring to deviate from the line to which, by those acts, they were restricted, gave notice of an intended application to Parliament for another act to authorize such deviation, and to carry their railway across certain specified lands, amongst which were the plaintiff's pleasure grounds and lands.

The plaintiff gave the company notice of his intention to oppose their application. A treaty was afterward entered into between the parties, and on the faith of the agreement, which was the result of that treaty, he withdrew his opposition. The bill was passed accordingly, the defendants constructed their railway across the plaintiff's pleasure grounds and lands, and the public had ever since used it.

The agreement was under seal, dated the 24th of April, 1837, and made between the defendants, Messrs. Gibbs, Gower & Fenwick, thereof, the directors of the company, on behalf of the company, of the one part, and the plaintiff of the other part. By this agreement the plaintiff agreed to withdraw his opposition to the defendants' bill, and the defendants agreed to purchase so much land as was necessary for their purposes, at a price named, and to construct and for ever thereafter maintain one neat archway, sufficient to permit a loaded carriage of hay to pass under the archway, at such place as the plaintiff, his heirs and assigns, should think most convenient in his pleasure grounds, and should form and complete the approaches to such archway.

The agreement not having been performed with respect to the construction of the archway and its approaches, the present bill was filed to enforce the specific performance of the agreement in that particular.

*Mr. Wigram* and *Mr. Bazalgette* for the plaintiff. The court has jurisdiction to decree the specific performance of an agreement to build; and though in the case of erecting a house there may possibly be some difficulty on this head, there can be no such difficulty where relief in specie is the only substantial relief, and the only relief prayed: *Allen v. Harding*,<sup>1</sup> *Holt v. Holt*.<sup>2</sup> In *City of London v. Nash*<sup>3</sup> the court entertained the jurisdiction; but, under the circumstances of that case,

<sup>1</sup> 2 Eq. Cas. Ab. 17.    <sup>2</sup> 2 Vern. 322; S. C. 1 Ch. Ca. 190.    <sup>3</sup> 3 Atk. 512.

gave relief by way of inquiry of damages before a jury. Specific performance of a contract to build a house was decreed in *Pembroke v. Thorpe*.<sup>1</sup> In another case, *Moseley v. Virgin*,<sup>2</sup> the bill was dismissed; but the court there said, "If the transaction and agreement (to build) is in its nature defined, perhaps there would not be much difficulty to decree specific performance. In *Franklyn v. Tuton* <sup>3</sup> relief was given upon the same principle.

The rule to be derived from all the cases is this—that where, from the nature of the relief asked, performance in specie will alone answer the justice of the case, there it is granted. It may be conceded that the authorities also show that the court will not give such relief where performance in specie is not necessary: *Errington v. Aynesly*,<sup>4</sup> *Flint v. Brandon*.<sup>5</sup> Here, however, such necessity exists. The company is seised in fee of the soil on which the archway is contracted to be built, and the plaintiff cannot go upon their soil. It was only upon a consideration of these principles that relief was not given in *Lucas v. Comerford*.<sup>6</sup> In *Lane v. Newdigate*,<sup>7</sup> an order specifically to repair was refused, but the object was effected by a negative injunction. *Rankin v. Huskisson*,<sup>8</sup> *Whittaker v. Howe*.<sup>9</sup>

If the court should decree specific performance it will also grant an injunction against using the railway in the meantime, so as effectually to secure to the plaintiff the relief prayed. It is not material that the injunction has not been prayed for. The plaintiff's case is shortly this: that he cannot go upon the defendants' soil to construct the archway, and no amount of damages will compensate him.

*Mr. Cooper, Mr. Stevens, and Mr. Osborne* for the company. As to the alleged jurisdiction to decree the specific performance of a contract of this nature, it is submitted that, where the building has not been commenced and does not exist, the court will not interfere, but leave the party to a more fitting remedy at law. In the case of a contract to build a square, if one house were in course of building the court might interfere. So, if the company were in this case building the archway in a way differing from the agreement of 1837. The exercise of this ancient jurisdiction may be traced from the Year Books. In Lord Hardwicke's time, the remedy by action on the case became more common, and as that action could be applied to these contracts, there was less occasion for the interference of this court. In this case we submit that the plaintiff's whole remedy is at law.

The case of *Allen v. Harding* does not assist the plaintiff's argument; the ground of decision there being that the contract was for the benefit

<sup>1</sup> 3 Swan. 437, n.

<sup>4</sup> 2 Bro. C. C. 342

<sup>7</sup> 10 Ves. 192.

<sup>2</sup> 3 Ves. 184.

<sup>5</sup> 8 Ves. 162.

<sup>8</sup> 4 Sim. 13.

<sup>3</sup> 5 Mad. 469.

<sup>6</sup> 3 Bro. C. C. 166; 1 Ves.

<sup>9</sup> 3 Bea. 383.

of the church. The most material case for the plaintiff is that of *Pembroke v. Thorpe*, which was in the nature of a case for a partition. That, however, was special in its circumstances. Besides, Lord Hardwicke in reconsidering the question, seven years afterward, in *The City of London v. Nash*, changed his opinion. In *Franklyn v. Tuton* the decree was unopposed. [The VICE-CHANCELLOR.—That is important.] It was the case of a building erected at variance with a plan, and comes within the distinction for which we contend. *Moseley v. Virgin* was a case of waste. In later times the court has refused to interfere. In *Errington v. Aynesly* the court declined to order specific performance, because money was an adequate compensation. In *Lucas v. Comerford*, Lord Thurlow, having had occasion to consider the doctrine, said there could not be a decree to rebuild, as he could no more undertake the conduct of a rebuilding than of repairs. No dictum of Lord Eldon to the contrary can be found.

The court has always repudiated a jurisdiction to enforce a covenant to repair. If there were jurisdiction to decree the making an archway, or building a house, why not also to decree the digging a well or papering a room? If any such jurisdiction exist the absence of modern decrees is remarkable. In *Flint v. Brandon* the decree of specific performance was refused. There are other authorities—*Booth v. Pollard*,<sup>1</sup> where several cases were cited; and the cases collected in a note to 3 Swan. 437. Lord Henley<sup>2</sup> and Mr. Justice Story<sup>3</sup> also collect the authorities, and the conclusion appears to be that the court has no such jurisdiction. The performance of this agreement is so difficult as almost to be impossible.

The VICE CHANCELLOR. If the thing be reasonably possible it must be done. The difficulty and expense of performing the contract do not necessarily form an objection. In a case, I think, of the Brighton Railway, before Lord Cottenham, it was shown that the expense of making a road would be very great and burdensome; but his Lordship did not accede to that reasoning. I have no doubt that this work ought to be done; the only question is, whether it can be enforced on these pleadings, but I am clear that under some shape of the pleadings it can be enforced.

*Mr. Cooper* then stated that the directors, being trustees, could not consent to a decree; but, as the Vice-Chancellor had intimated his opinion, the defendants would submit to such a decree as the court might make.

The VICE-CHANCELLOR. The course of the argument and the intimation of the defendants' counsel render it unnecessary for me to give that further consideration to the authorities and points in difference

<sup>1</sup> 4 Y. & C. 61.

<sup>2</sup> Eden on Injun. 26.

<sup>3</sup> 2 Eq. Jur. 24.

which, if the case were still adversely contested, I should have done. Consistently with the principle of the case of *Flint v. Brandon*, with which I agree, it is competent to this court to interfere to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. The defendants, having purchased land intersecting the plaintiff's land, contracted to make a communication for carriages, through the land thus acquired by them, for the plaintiff from one side to the other. The defendants have acquired property under that contract, and its performance is now resisted; for what reason it does not on the pleadings plainly appear. Damages would not be an adequate compensation. In my opinion, the plaintiff has a right to specific performance, and it is competent to this court to say that the work shall be properly done. The company seem to think that the court might deal more leniently with them than a jury; in that they are probably right, for this would possibly be a case for very heavy damages. There is no difficulty in enforcing such a decree. The court has to order the thing to be done, and then it is a question capable of solution whether the order has been obeyed. The company is bound to perform the agreement; but, on the other hand, the plaintiff must give the company every facility for making the approaches, and must put them, as I understand he undertakes to do, into possession of the land necessary for such approaches. Though this is not a judgment after all the deliberation which, under other circumstances, I should have bestowed on the case, yet my present opinion is clearly as I have stated.

Declare that the defendants, the company, are bound to construct and for ever hereafter to maintain one neat archway sufficient to permit a loaded carriage of hay to pass under the railway, at such place as the plaintiff shall think most convenient in his pleasure grounds, and to form and complete the approaches to such archway. Let the plaintiff point out such place within a reasonable time, with liberty to the defendants to apply to this court in case of refusal by the plaintiff to afford them all reasonable assistance in his power for such work or otherwise, and with liberty to the plaintiff to apply in case of delay by the defendants or otherwise. The company to pay all costs of this suit, including the costs of the other defendants. Let the other defendants, on consent of the plaintiff and the defendants, the company, be now dismissed.



ROSS v. THE UNION PACIFIC RAILWAY COMPANY  
(EASTERN DIVISION).

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT  
OF KANSAS, BEFORE MR. JUSTICE MILLER AT  
CHAMBERS, OCTOBER 28, 1863.

[*Reported in 1 Woolworth 26.*]

THE act of Congress incorporating the Union Pacific Railroad Company granted the same aid to the Leavenworth, Pawnee, and Western Railroad Company as it did to the main line; that is, a certain amount of land and of government bonds per mile. The last-named company was incorporated by the Legislature of Kansas, and by an act of the same Legislature its name was changed to the Union Pacific Railway (Eastern Division).

On the 19th of September, 1862, this company, by its former name, entered into a contract with Ross, Steel & Co., the substance of which, so far as it is material to be stated here, was as follows:

Ross, Steel & Co. agreed to furnish all the materials for, and to construct, complete, and equip a first-class railroad from the mouth of the Kansas River, on the south side thereof, to the one hundredth meridian, together with necessary buildings, etc., according to a certain prescribed standard, of the best available material, with a branch to Leavenworth; to locate the line according to the act of Congress above mentioned, and upon the most feasible route, with the easiest curves and grades practicable; to commence the work on the 1st day of November, 1862, and complete the same within the time prescribed by the act.

The company agreed to pay for the work, as each section of forty miles was completed, at rates per mile as follows: 1st, \$16,000 in United States bonds; 2d, \$11,500 in bonds of the company, secured by mortgage on all its property and earnings; 3d, \$6,000 in full paid stock of said company. These payments are to be made as each section of forty miles is accepted by the United States Commissioners, as provided for in the act. As each section is completed, it is to be turned over by the contractors to the company, the same to be kept in good order and condition until accepted by the commissioners. The company was also to appoint three persons to act as trustees for the holders of its mortgaged bonds, and superintend the issue, sale and cancelling of them, and the payment of interest thereon. Disagreements arising between the parties in the course of the work were to be referred to the arbitrament of an engineer named, whose decision was to be final; and should he decide that the work was not progressing with

sufficient rapidity, the company was to be at liberty to put on an additional force to carry it forward, so long as Ross, Steel & Co. neglected to do so.

Ross, Steel & Co. entered upon the execution of this contract. They expended some \$50,000 upon the grading, and had about one hundred men employed on the work, and had made provision in the way of material and capital for pushing the work forward with vigor. No payments had been made by the company. About the 1st of June, 1863, General John C. Fremont and Samuel Hallett purchased almost all of the stock of the company, and thus obtained entire control of its affairs. Shortly afterwards they notified Ross, Steel & Co. that they should ignore the contract and construct the road themselves. Some negotiations were had between the parties, but they finally separated, the one side insisting upon, and the other repudiating, the contract.

About the 15th of June, 1863, a deed of trust, in the name of and by the company, was executed to Washington Hunt and Samuel B. Ruggles, as trustees, of all the line of railroad built and to be built, with its equipment, to secure certain bonds to be issued thereunder, to the amount of \$5,760,000; and on the 1st day of July, another deed of trust was in like manner made to the same trustees of the lands of the company, to secure other bonds to be issued thereunder, to the amount of \$7,200,000. These deeds of trust completely disposed of all the assets of the corporation, and conveyed away the entire property upon which Ross, Steel & Co. were to be secured for building the road. No bonds had yet been issued under either of the deeds of trust.

The parties have also given it out that the said company have made a contract with Hallett for the construction of the road.

The object of the bill was to enjoin the issue of the bonds under the two several deeds of trust, and have them delivered up to be cancelled; and for a decree compelling the specific performance of the contract.

A motion was now made for an injunction and was argued by *Mr. Browning* and *Mr. Joy* in support thereof.

*Mr. Ewing* and *Mr. Stinson*, *contra*.

MR. JUSTICE MILLER. This is an application for an injunction, on a bill filed in the Circuit Court of the United States for the District of Kansas.

. . . . .

This contract remains. . . . It is the settled doctrine of this court that such a contract will not be specifically enforced unless the remedy is mutual.

. . . . .

I proceed, then, to inquire whether this contract is of such a charac-

ter that, if the plaintiffs were in default, it could be specifically enforced as against them by a decree of this court.<sup>1</sup>

The covenant on the part of the plaintiffs, although expressed in very simple terms, is nevertheless a very grave undertaking. It is, that they will, within such time as the act of Congress requires, build about 360 miles of railroad, and equip and furnish the same complete with rolling stock, depots, etc., ready for use, furnishing all the materials necessary for this extensive work. Shall this court, in addition to, or rather before, enforcing the covenants of the defendant, undertake to enforce performance on the part of plaintiffs of this covenant of theirs?

No case is reported, I believe—at least none has been produced on the hearing—in which the court has undertaken to compel a party to build a railroad. In fact, the case of *The South Wales Railway Company v. Wythes*,<sup>2</sup> is to the contrary. In this case the court refused specific performance of an agreement for the building of a branch railway, which was entered into during the pendency of a bill before Parliament. See also *The Attorney-General v. The Birmingham and Oxford Junction Railway Company*.<sup>3</sup>

There are several cases on the subject of building houses and bridges, which, as that subject bears an analogy to that of building railroads, I will now examine.

The first case claiming attention is that of *The City of London v. Nash*.<sup>4</sup> In this case, Lord Hardwicke decreed that a covenant in a lease to rebuild should be specifically enforced, on the ground that it was essential to the security of the landlord; but, at the same time, he held that a covenant to repair would not be enforced, because compensation in damages could be had at law. This case does not seem to place the jurisdiction of the court to compel the performance of the contract on any ground generally applicable to building contracts.

The next case, in the order of time, is *Errington v. Aynesly*,<sup>5</sup> in which Sir Lloyd Kenyon, Master of the Rolls, refused to decree a specific performance of a contract to build, mainly on the ground that if one person would not build, another might be found who would.

In *Lucas v. Comeford*,<sup>6</sup> decided very shortly after the above case, Lord Thurlow held the same doctrine, and refused a decree, saying that

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

<sup>2</sup> 1 K. & J. 186, S. C., 5 De G. M. & G. 880.

<sup>3</sup> 3 Macnaughton & G. 453, S. C., 16 Jur. 113, affirming S. C., 15 Jur. 1024, S. C., 7 Eng. L. & Eq. 283; *The People v. The Albany and Vermont Railroad Company*, 24 New York 261.

<sup>4</sup> 3 Atk. 512, S. C., 1 Ves. Jr. 12.

<sup>5</sup> 2 Brown's Ch. 341.

<sup>6</sup> 3 Brown's Ch. 166, S. C., 1 Ves. Jr. 235.

the court could not undertake to superintend the construction of a building any more than it could the repairing of it.

In *Morely v. Virgin*,<sup>1</sup> Lord Loughborough refused to decree the performance of a contract to lay out £1,000 in a building, because there was not sufficient definiteness to the contract. But he took occasion to say that there would be a distinction between the case of a covenant to repair and one to build; and that cases might arise where the contract, being sufficiently specific, might perhaps be enforced. I think that Lord Loughborough, in alluding to Lord Thurlow's decision, did not correctly state the grounds of it; yet it does not seem to me that he intended to overrule that decision, or that he said anything which could have such an effect.

In *Fleet v. Branden*,<sup>2</sup> the Chancellor refused to decree the specific performance of an agreement to level and fill up a gravel-pit, on the ground that an adequate remedy for a breach of such contract could be had at law.

Thus far it would seem that no case overrules the decision of Lord Thurlow against decreeing specific performance of building contracts. We are now, however, to examine a class of cases which are supposed to establish a contrary doctrine. Before we enter upon their consideration, let us remark certain circumstances which attend them.

1. In each case, the building was to be done upon the land of the person who agreed to do it.

2. The consideration for the agreement, in every instance, was the sale or conveyance of the land on which the building was to be erected; and the plaintiff had already, by such conveyance on his part, executed the contract.

3. In all of them, the building was in some way essential to the use, or contributory to the value, of adjoining land belonging to the plaintiff.

The first of these cases is that of *Storer v. The Great Western Railway Company*.<sup>3</sup> The plaintiff had sold to the railway company the right of way through his pleasure grounds, and the company had agreed, in order that he might have the full use of his adjoining land, that it would make an arched way under its road-bed, large enough for a wagon loaded with hay to pass with facility. The court decreed that the arched way should be made. The Vice-Chancellor said that "it was competent for that court to enforce the specific performance of a contract by the defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and one which cannot be compensated in damages."

The next case is that of *Price v. The Corporation of Penzance*.<sup>1</sup> In this case, the plaintiff had sold the town some land, and the corporation covenanted to lay out streets, and build houses on it, especially to erect a fish-market. The defendants, without awaiting a decree, built a market. The court, although the relief was not resisted, approved the principle above stated. Wigram, Vice-Chancellor, says: "The contract was, that the corporation having purchased the plaintiff's land, should, at their own expense, make a street, and also a market. Under this contract, the corporation have taken possession of the land, and converted it; and having had the benefit of the contract in specie, as far as they are concerned, I need not say that the court will go to any length which it can to compel them to perform the contract in specie."

In *Stuyvesant v. New York City*,<sup>2</sup> the plaintiff, being the owner of a large tract of land in the City of New York, had granted to the city corporation a certain part thereof for the purposes of a public square; and in the conveyance which was executed by the defendant, it covenanted to grade, inclose and improve the premises in a manner therein provided, the plaintiff having exacted this covenant in order to increase the value of the adjoining lands which he retained. After two judgments at law for damages, he brought his bill for specific performance, and Chancellor Woolworth decreed in his favor. In the course of his opinion, that distinguished jurist says: "The true rule on the subject of decreeing the specific performance of a covenant in such cases is, that where, from the nature of the relief sought, performance in specie will alone answer the purposes of justice, this court will compel a specific performance, instead of leaving the complainant to a remedy at law, which is wholly inadequate. The court has jurisdiction, therefore, to compel the specific performance by the defendant of a covenant to do certain specified work, or to make certain improvements or erections, upon his own land for the benefit of the complainant, as the owner of the adjoining property, who has an interest in having such work done or such improvements or erections made; and where the injury to the complainant, from the breach of the covenant, is of such a nature as not to be capable of being adequately compensated in damages."

In *Burchett and others v. Boling*,<sup>3</sup> the partners had entered into a contract to build a hotel on the land of the plaintiff, which he agreed to convey for that purpose, and to receive two shares of the capital stock of the hotel therefor. He conveyed, and removed some buildings from the land, and delivered possession. The other parties commenced erecting the hotel, but afterward abandoned the enterprise. The court decreed that they should complete the building. All these cases are

<sup>1</sup> 4 Hare 506.

<sup>2</sup> 11 Paige 414.

<sup>3</sup> 5 Mumford's Va. R. 442.

clearly referable to the principle laid down in the case of *Storer v. The Great Western Railway Company*. Judge Story adopted the precise language of the court in that case, without claiming that the principle goes any further.<sup>1</sup> I think the cases cited rest on a principle clearly distinguishable from that of enforcing building contracts generally, in which parties have contracted, for money or personal property as the consideration, to build on the plaintiff's land; and there is no special reason to render non-performance incapable of being compensated in damages.

In a case reported in 3 *Humphrey, Tenn.*, 657, upon a contract like that in the case last cited, except that it was wholly executory, the court refused to decree specific performance against the party who was to convey the land, although the plaintiffs were ready and willing to perform on their part.

I have thus attempted to analyze all the cases bearing on the subject which have been cited by counsel, or which I have been able to find in the short time I have had for examination; and I do not think that any of them overrule, or are in any manner inconsistent with, the case decided by Lord Thurlow, in 3 *Brown's Ch.* 166, notes.<sup>2</sup> On the contrary, the decrees which have been granted are based on principles entirely reconcilable with that case. And when we take into consideration the length of time it has stood, during which no decree, resting on the general principle, has been rendered to enforce a building contract, I am inclined to concur fully with Judge Story, that "in cases of contract to build a house or a bridge," or, I will venture to add, a railroad, "a specific performance would not now be decreed."<sup>3</sup>

I have been much pressed by counsel for the plaintiffs with the argument of the distinguished jurist just named, in favor of a general enforcement of this class of contracts.<sup>4</sup> But it is evident that the author is there stating not what the rule is, but what he thinks it should be. And I cannot say that I am very strongly impressed by the reasoning with which he supports the abstract propriety of his opinion. It seems to me, that to establish the general doctrine that contracts for building may be specifically enforced in equity, would be to invite into litigation very many matters which are now generally settled by the parties on a basis much more beneficial to both; and that it would require the constant supervision of the court, through its officers, in the conduct of affairs it is very poorly adapted to administer. The result of the court's drawing to itself such a jurisdiction would certainly be far less remedial than the ordinary action for damages.

<sup>1</sup> Story's Eq. Jr., § 721 *a*.

<sup>2</sup> 2 Story's Eq. Jr. § 716, note 2.

<sup>3</sup> 1 Ves. Jr. 235.

<sup>4</sup> 2 Story Eq. Jr., § 728.

There is another consideration to be noted in this connection. If the act to be done by the delinquent party, whether the plaintiff or the defendant here, were a single act, to compel which a single decree of the court would be sufficient, a case would be presented very unlike that before us. Years must elapse before this work can be done and paid for. At every step in its progress the interposition of the court, either by orders in this case or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischiefs of such a course. The rule is settled, even in the English Chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once ; that it will not decree a party to perform a continuous duty extending over a number of years, but will leave the opposite party to his remedy at law. It was on this principle that Lord Hardwicke proceeded in the case of *The City of London v. Nash*, cited above. In answer to the objection to the plaintiffs' having specific performance of the contract, he expressly says : " The objection will not hold, for upon a covenant to build the plaintiffs are clearly entitled to come into this court for a specific performance—otherwise on a covenant to repair ; for to build is one entire single thing, and if not done prevents that security which the City of London has for the rent by virtue of the lease."

And this may have been a reason, and a very strong reason, for the rule, now well settled, that a covenant to repair will not be specifically enforced.<sup>1</sup>

The case cited above of *The South Wales Railway Company v. Wythes*<sup>2</sup> is in many of its features like that before us now. After some negotiations between the parties, not necessary here to notice, a memorandum was entered into between the company and the defendants as contractors, providing, among other things, that " The company to find the land within a reasonable time and build the stations. The contractors to give a bond to the amount of £50,000 to secure the performance of their contract, and to undertake to execute the works for a double line of railway, and the ballasting and permanent way for a single line, according to the terms of the specification to be prepared by the engineer for the time being of the company, for the sum of £290,000, to be complete ready for opening by the 1st of December, 1855, to be paid in a new stock to be created, bearing £5 per cent. interest from

<sup>1</sup> *Gervais v. Edwards*, 2 D. & War. 80 ; *Hill v. Croll*, 2 Phill. 60 ; *Saunderson v. Cockermouth, etc., Railway Company*, 11 Beavan 497 ; *Nickels v. Hancock*, 7 De G. M. & G. 300, 327 ; *Ogden v. Fossick*, 11 W. R. 128, L. J.

<sup>2</sup> 1 K. & J. 186, 24 Law J. Rep., N. S., Ch. 1.

the day of the line being so ready for opening, such interest being derived from the receipts upon the branch line, £60 per cent. of such gross receipts being devoted to such purpose, and an additional £10 per cent. of such receipts, making £70 per cent., on all traffic over the said branch, which shall pass to and from, or beyond Carmathen, or any other more distant place on the main line, the residue of the gross receipts upon the said branch being retained by the company for working the branch; any arrear of the interest of £5 per cent. in one year to be made good out of any surplus in any following year or years until the stock is redeemed.

. . . . .

"Any of the details of this arrangement, in case of difference, to be determined by a referee, to be appointed by the Solicitor-General for the time being, on the application of either party, such referee to draw out and settle, on behalf of both parties, the documents necessary to carry it out. The arbitrators, under working clause, to have the power of considering whether the mode of working the Pembroke branch is reasonable, having reference to the company's mode of working the branch to Heyland, and if the arbitrators make any award, both parties to abide by it."

A bill was filed to compel the specific performance of this contract by the company against the contractors. To the bill was a general demurrer, which Vice-Chancellor Woods sustained, and the case was appealed to the Lord Justices. Lord Justice Knight Bruce, in his judgment, says: "There are several very satisfactory reasons why a specific performance of this agreement should not be enforced in a court of equity, and I will mention some—I do not say all—of those reasons. In the first place, by the agreement it is provided, in the most vague terms, that the plaintiffs shall find the land—the land, I suppose, for the stations—within a reasonable time and build the stations; then the contractors are to give a bond for £50,000 to secure the performance of their contract, and they are to execute the works for a double line of railway according to the terms of the specifications to be prepared by the engineer 'for the time being' of the company; then the contract provides for the payment of a sum of £290,000 to the defendants, with interest, in a manner which I assume, for the purposes of the argument, to be intelligible. Skillful, experienced and honorable as the engineer of this present time, and of the time of the contract, is and was, it is obvious that the engineer of the time when the works may be, if ever, completed may not be the engineer of to-day, and the engineer of that time might be both incompetent and dishonest. In my opinion, it would not be a proper course for a court of equity to take, to force such an agreement on any man or body of men. But, then, it has been



said that a specification has been prepared by the present engineer of the company, Mr. Brunel ; but that makes no difference. Whether, if such specification had been not only prepared but accepted and approved of by the defendants, that would have made any difference, it is not necessary to say, because there is no such allegation in the bill ; the only allegation in the bill being that the plaintiffs believe that the specification had been approved."

He closes by saying : " I have never known any attempt like the present, and certainly this court will be no party to the entertainment of a suit to enforce so vague, so obscure, so uncertain an agreement, the suit to enforce which has been successfully demurred to ; and the suit, being frivolous and utterly vain, will be of course dismissed, and equally, of course, be dismissed with costs."

It will be observed that the infirmity of uncertain and vague stipulations is common to that and this contract, for this line of road remains unlocated, and according to the usual course of such enterprises must be subject to changes not possible now to foresee ; and in this way differences irreconcilable between the parties, and which this court cannot determine, may, and almost certainly will, arise. So, too, as to the performance of the work the same difficulties are very likely to occur. Then there is the great consideration of time. Years will be required for the execution of the contract. In the case cited twenty-two miles of a branch road was to be built. Here is a line of 360 miles stretching out into a new, unpopulated, almost unknown region. Other points of similarity might be mentioned. In fact, where the cases differ it is against the claim of the plaintiff here.

It seems, therefore, that in granting this injunction, which would require that this railroad should be built, equipped and delivered by one party, and payments made by the other under the control and compulsion of the court, I should be going far beyond any adjudged case, or any principle established by any adjudged case. More than that, I should proceed in the very face of some of the highest authorities, and, in direct opposition thereto, inaugurate a policy without a precedent, involving interests of the greatest consequence to every-day life. The effect of the doctrine if established no wisdom can foresee.

Entertaining these views, I must decline to make this advance and shall overrule the motion for an injunction.

Motion for an injunction overruled.<sup>1</sup>

<sup>1</sup> But we are further of opinion that if the contract is to be construed as the appellant insists it should be construed, it is not one to be enforced in equity. We have already shown that to decree the specific enforcement of this contract is to impose upon the company an obligation, without limit of time, to keep its principal office of business at the city of Marshall, to keep its main machine

## BLACKETT v. BATES.

IN CHANCERY, BEFORE LORD CRANWORTH, C., DECEMBER 19, 20,  
21, 1865.

[*Reported in Law Reports, 1 Chancery Appeal Cases 117.*]

THIS was an appeal by the defendant from a decree of Vice-Chancellor Wood, and from an order overruling a demurrer to the bill.

The plaintiff was the owner of a colliery called Wylam Colliery, which had communication with the river Tyne by means of a railway,

shops there, and its car works there, and its other principal offices there, although the exigencies of railroad business in the State of Texas may imperatively demand that these establishments, or some of them, should be removed to places other than the city of Marshall, and that this would be also required by the convenience of the public, in which case both the public convenience and the best interests of the railroad company would be sacrificed by a contract which is perpetual, that all of its business offices and business shall forever remain at Marshall.

It appears to us that if the city of Marshall has under such a contract a remedy for its violation, it is much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand. Nor do we see any substantial difficulty in ascertaining this compensation. Though there may not be any rule by which these damages can be estimated with precision, this is not a conclusive objection against a resort to a court of law, for it is very well known that in all judicial proceedings for injuries inflicted by one party on another, whether arising out of tort or out of contract, the relief given by way of damages is never the exact sum which compensates for the injury done, but, with all the rules which have been adopted for the measurement of damages, the relief is only approximately perfect.

There would be, in this instance, the sums of money advanced by the city, and possibly the bonds furnished by the county, as a means of ascertaining the compensation due to the city of Marshall. Other considerations, such as the length of time that the contract has been complied with, the value of this compliance to the city, the probable loss of taxable property resulting from the violation of the contract, and other elements not necessary to be enumerated now, might enter into the question of damages, if the contract has really been violated. On the other hand, the enforcement of the contract by a decree of the court requiring the company to restore in all its fullness the offices, the workshops, and whatever has been removed from the city of Marshall, and the continued and perpetual compliance with all those conditions by the company, to be enforced in the future under the eye of a court of chancery, against the public interest, and, perhaps, manifestly to the prejudice and injury of the railroad company, exercising to some extent the public function authorized by the acts of Congress or of the Legislature of Texas, present difficulties far more formidable than the action at law.

about five miles long, from Wylam to Lemington, made by the ancestors of the plaintiff, under a private arrangement with six persons, over whose lands, as well as those of the plaintiff, it ran. Such way-leave rents as were from time to time agreed upon, were paid to the six landowners. The defendant was one of the persons over whose land the railway ran, and had for some time used the railway throughout its whole length, on terms from time to time agreed upon between him and the plaintiff.

Disputes having arisen between them, the plaintiff brought an action to recover what he claimed to be due from the defendant for the use of the railway, and by an order at *nisi prius* on the 26th of February, 1863, all matters in dispute between the parties were referred to arbitration.

If the court had rendered a decree restoring all the offices and machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily superintend the execution of this decree. It must be making constant inquiry as to whether every one of the subjects of the contract which have been removed has been restored. It must consider whether this has been done perfectly and in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes in this way an endless duty, inappropriate to the functions of the court, which is as ill-calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance.

The cases cited on this subject in the brief of counsel we think are conclusive. In *Marble Company v. Ripley*, 10 Wall. 339, 358, it was said: "Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor and cultivated judgment. It is in effect a personal contract to deliver marble of certain kinds, in blocks of a kind that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed the case must remain in the court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, and whether it was of suitable size or shape or proportion."

This question was very fully considered in reference to a contract for building a railroad in the case of *Ross v. Union Pacific Railway Company*, 1 Wool. C. C. 26, in which nearly all the authorities up to that time are fully considered. It was decided that the court could not enter upon the duty of compelling one party to build a railroad and the other party to pay for it according to contract. See also *Port Clinton Railroad Company v. Cleveland & Toledo Railroad Company*, 13 Ohio St. 544; *South Wales Railway Co. v. Wythes*, 5 De G. M. & G. 800; *Powell Duffryn Steam Coal Co. v. Taff Vale Railway Company*, L. R. 9 Ch. 331.—*Mr. Justice MILLER, Texas, etc., Railway Company v. Marshall*, 136 U. S. 393-405.—ED.

On the 6th of June, 1863, the arbitrator made his award, containing provisions, of which the short effect was as follows: He awarded that the defendant should pay to the plaintiff a certain sum, and should, within twenty-one days, execute and deliver to the plaintiff a lease, in the form and words set out in the schedule. He further awarded that, in addition, and without prejudice, to the exceptions and reservations in favor of the defendant contained in the lease, the defendant, his heirs, and assigns, and his and their lessees, etc., should have, as from the 31st of March then last, and thenceforth during the continuance of the lease, full power of passing and repassing with wagons, etc., for the purposes therein mentioned, along not only so much of the railway as was upon the defendant's land, but upon so much as passed over the lands of any other persons from whom the defendant could obtain a right of way leave, and over the lands of the plaintiff. He further awarded that the defendant, his heirs, or assigns, etc., might require the plaintiff, his heirs, etc., to supply engine power for drawing the defendant's wagons over the railway, if, and during such time or times as, the plaintiff, his heirs, etc., should keep an engine or engines for use on the railway. He further awarded that the defendant, his heirs, etc., should pay to the plaintiff, his heirs, etc., remuneration for the above privileges at the rates therein mentioned, being  $\frac{1}{2}$ d. per ton per mile for the use of the railway, the like additional rate for way-leave over so much of the railway as lay on the lands of the plaintiff, and 2d. per ton per mile for haulage. He further awarded that the defendant, his heirs, etc., should keep full, detailed, and accurate accounts of all leadings over the railway under the above powers, containing such particulars as therein mentioned, and deliver a monthly account to the plaintiff, his executors, administrators, and assigns, and permit the plaintiff, his executors, administrators, and assigns to have access to the accounts kept as above. He also awarded that the defendant, his executors, administrators, etc., might stop any wagons for the purpose of weighing, causing as little hindrance as might be to the traffic. He also awarded that the plaintiff, his executors, administrators, and assigns, should, during the continuance of the lease, keep the railway between Wylam and Lemington (*i.e.*, the whole line) in good repair and condition, for the use and exercise of the liberties and privileges thereby awarded.

The schedule to the award contained the form of the lease at full length, by which the defendant purported to demise to the plaintiff, for twenty-one years, a way-leave over so much of the railway as lay on the defendant's land. It is unnecessary to give any particulars of this lease, it being sufficient to say that it contained reservations to the defendant of divers privileges over that part of the line which lay on his own land, but did not purport to provide in any manner for the privileges awarded

to the defendant in respect of those parts of the line which were not situate on his property.

On the 27th of June, 1863, the defendant's solicitors tendered to the plaintiff a lease executed by the defendant, and requested the plaintiff to execute a counterpart. The plaintiff did not accept the lease or execute a counterpart.

On the 29th of June the defendant served the plaintiff with a notice to quit. On the 24th of November, 1863, the plaintiff obtained a rule *nisi* from the Court of Exchequer to set aside the award. On the 28th of April, 1864, this rule was after argument discharged.

On the 2d of May, 1864, the plaintiff's solicitors wrote to the defendant's solicitors, stating the plaintiff's readiness to accept the lease and execute a counterpart. The defendant, on the 6th, refused to grant the lease. The plaintiff, on the 13th of July, 1864, filed his bill for the specific performance of the award. On the 13th of January, 1865, a general demurrer for want of equity was overruled by Vice-Chancellor Wood.<sup>1</sup> The cause was then set down upon motion for decree, and on the 10th of May a decree was made, the material parts of which were as follows :

“Order that the defendant do specifically perform the award in the pleadings mentioned on his part, and that he do for that purpose execute to the plaintiff a lease in the words and figures in the schedule to the said award contained, such lease to bear date the 27th day of June, 1863, being the day on which the defendant signed and sealed, as an escrow, the indenture in the answer mentioned, and order that in any proceedings at law or otherwise, in respect of such lease or any of the provisions thereof, neither the plaintiff nor the defendant, nor any person or persons claiming under them respectively, be at liberty to dispute the date of such lease.

“Order that the plaintiff do execute and deliver to the defendant a counterpart of such lease ; and the plaintiff and defendant, and all persons claiming under them respectively, are to admit that such lease was executed on the day on which it bears date.

“Declare that the defendant, his heirs and assigns, are entitled as from and after the 31st day of March, 1863, being the date in the said award in that behalf mentioned, and during the continuance of such lease, to the full enjoyment of the full power and liberty of passing and repassing with all or any wagons, trucks, or other carriages whatsoever, laden or unladen, and drawn or propelled by horses or steam, or other engines of present use, or future invention, over the lands in the said award mentioned, and for the purposes and subject to the provisions and restrictions in the said award also mentioned.

<sup>1</sup> 2 H. & M. 270.

"Declare that the defendant, his heirs, and assigns, or his or their grantees, lessees, or tenants, are also entitled during the continuance of the said lease, and during such time or times as the lessee (plaintiff), his heirs, executors, administrators, or assigns, shall keep an engine, or engines, for use on the said wagon-way, but not otherwise, to require the lessee (plaintiff), his heirs, executors, administrators, or assigns, to supply engine power for all or any such leadings as in the said award in that behalf mentioned, the lessor (defendant), his heirs, and assigns, and his and their grantees, lessees, and tenants, paying unto the lessee (plaintiff), his heirs, executors, administrators, or assigns, remuneration for the aforesaid privileges, in manner, and to the amount, provided in that behalf in the said award, and also keeping such full detailed and correct accounts as in the said award in that behalf mentioned, and stating and delivering or causing to be stated and delivered, to the lessee (plaintiff), his executors, administrators, or assigns, or his or their agent, or agents, a true copy of such accounts, in the manner in the said award mentioned, and permitting the lessee (plaintiff), his executors, administrators, and assigns, or his or their agents, to have such access to, and power of making extracts or copies from or of the same, as in the same award mentioned.

"Order that an injunction be awarded to restrain the plaintiff, his servants and agents, and all persons claiming under him by virtue of the said lease, until further order, from in any way hindering or interfering with the defendant, or those claiming under him, from or in respect of the full enjoyment of all such rights and privileges as aforesaid. But such injunction is not to prevent the plaintiff, or those claiming under him, from stopping any wagons, trucks, or other carriages used by the defendant, or those claiming under him, in the exercise of such privileges as aforesaid, and weighing the same and the contents, causing thereby as little hindrance or interruption as reasonably may be, in or to the use, exercise, or enjoyment of the said powers and privileges, or any of them.

"Declare that the plaintiff, and those claiming under him, are bound during the continuance of the said lease, to keep the wagon-way between Wylam and Lemington in good repair and condition, for the use and exercise by the defendant, and those claiming under him, of the liberties and privileges aforesaid. And any of the parties are to be at liberty to apply in respect of such repair as they may be advised."

The defendant now appealed from the whole of this decree, and also from the order overruling the demurrer. A question was raised whether the appellant or the plaintiff should open the case. The Lord Chancellor ruled that the plaintiff should begin.

*Mr. Willcock*, Q.C., and *Mr. Faber* in support of the orders appealed from.

*Mr. Rolt*, Q.C., and *Mr. Batten* for the appellant.

Dec. 21. LORD CRANWORTH, L.C., after stating the facts, continued :

The rights of the parties in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for specific performance? I think not, and for this short and simple reason—that the court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks—the lease; but the defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by the plaintiff of daily duties during the whole term of the lease. The court has no means of enforcing the performance of these duties, all it can do is to punish the plaintiff by imprisonment or fine, if he does not perform them. The form of the decree itself shows the want of jurisdiction. It does not, and it could not, decree a specific performance by the plaintiff of that part of the award which gives the defendant the way-leave over the whole line, and a right to have engine power supplied by the plaintiff, it only declares the rights of the defendant, and then awards an injunction against the plaintiff, restraining him from failing to do what he is bound to do. This appears to me to be perfectly novel. If the question had merely been as to a matter of form I should have endeavored to get over the difficulty, but it appears to me that an undertaking by the plaintiff to the same effect would be equally objectionable, for in either case the court might be called upon for a number of years to issue repeated attachments against the plaintiff for his default in performing what he had agreed to do. The same observations apply to so much of the decree as relates to keeping the railway in repair. No attempt is made to decree specific performance, but a declaration is made of the obligation of the plaintiff, and liberty to apply is given in case of this obligation not being performed. This appears to me to be assuming a jurisdiction which only belongs to courts of common law, of interfering when a party has violated a legal obligation; I am of opinion, therefore, that the decree ought to be reversed.

I should have come to the above conclusion even if there had been no authority precisely in point, but there is abundance of authority. In *Gervais v. Edwards*,<sup>1</sup> where the dispute arose upon an arrangement between the proprietors of lands on the opposite banks of a river, as to future injury which might be done by the water, Lord St. Leonards

<sup>1</sup> 2 D. & War. 80.

refused to give any relief because no present decree could be made. The same principle is clearly laid down in *Hills v. Croll*,<sup>1</sup> and in other cases to which it is unnecessary to refer. In order that the court may interfere, there must be mutual rights capable of being enforced by the court. Now, here, if the defendant had been willing to perform the award, and the plaintiff unwilling, could the defendant have filed a bill for specific performance of the agreement to keep the road in repair, or to supply engine-power? It is clear that such a bill could not be maintained. This disposes of the case, there being no mutuality.

If the arbitrator, instead of awarding that the plaintiff should do certain acts, had awarded that the lease to be executed should contain covenants by the plaintiff to do them, the case would have stood on an entirely different footing. The court would not then have been called upon to enforce, either directly or indirectly, the doing of those acts, but merely to decree the execution of a lease containing certain covenants, a kind of relief which is clearly within the jurisdiction of the court, and open to no objection.

I am further disposed to think that, even if the case had been of such a nature that specific performance could have been decreed, the plaintiff's title to relief would have been barred by his conduct. The award was made in June, 1863, and the present bill was not filed until July, 1864. It is true that the intermediate period was filled up by legal proceedings, which the plaintiff says that he could not expedite. But they were proceedings in which the plaintiff was endeavoring to set aside the award. It is a strong thing to say that, after a party has denied the validity of an agreement, and taken proceedings to set it aside, he can, when the result of those proceedings has proved adverse, turn round and insist on specific performance. I do not, however, decide the case on this ground, but on the ground that the award contains provisions which cannot, according to the course of the court, be made the subject of a decree for specific performance.

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### HOOD v. NORTH EASTERN RAILWAY COMPANY.

IN CHANCERY, BEFORE SIR W. M. JAMES, V.C., JULY 29, 1869.

[*Reported in Law Reports, 8 Equity Cases 666.*]

THIS was a bill by the owner of the Pepper Hall estate in Yorkshire to enforce specific performance of an agreement entered into in 1838 between the Great North of England Railway Company (now vested in the defendants the North Eastern Railway Company) and the plain-

<sup>1</sup> 2 Ph. 60.



tiff's predecessors in title for the permanent use of certain land, then purchased by the company, as a first-class station and goods depot.

In 1838 Lord Alvanley, with the consent of his trustees, contracted to sell a portion of the Pepper Hall estate, of which he was then owner, to the Great North of England Railway Company for the purposes of their undertaking, it being one of the terms of the agreement that the company should provide certain special railway accommodation for the use of Lord Alvanley and the owner for the time being of the property.

Accordingly, in the deed of conveyance to the company dated the 26th of March, 1838, the company, for themselves and their successors, covenanted with Lord Alvanley's trustees that the piece or parcel of ground therein described should at all times after the completion of the then intended railway be used as a depot or place for deposit of coals, wares, merchandise, articles, and things which should be carried or conveyed, or intended to be carried or conveyed, along the then intended railway, or any branches thereof, or any part or parts thereof respectively to be erected and built upon the west side of the said railway, and should be for ever thereafter used and employed as and for a first-class station or place for the purposes of taking up and setting down passengers traveling along the said railway. And that the said company should not at any time thereafter, without the consent in writing of the said R. P. Arden, or his assigns, or the owner or owners for the time being, or of the person or persons entitled to the rents and profits, of such parts of the said fields or closes therein mentioned, as were not thereby conveyed, erect or build on the same piece or parcel of ground any other dwelling-houses, erections, or buildings than should be absolutely necessary for the proper conducting and managing the said depot or place of deposit as aforesaid.

The plaintiff became the purchaser of the Pepper Hall estate in 1863.

The Great North of England Railway, together with all obligations and liabilities attaching thereto, had, under the provisions of various Acts of Parliament, now become vested in defendants, the North Eastern Railway Company. The line, which had been long since completed, passed through the Pepper Hall estate (consisting of a mansion-house and upwards of 2,000 acres of land) for between two and three miles, and the land mentioned in the covenant formed the site of the Cowton station, about two miles from the mansion-house, which had been enlarged by the plaintiff and made his usual place of residence.

The bill charged that the land now forming the site of Cowton station was not used and employed as a first-class station conformably to

the covenant. In particular, none of the fast trains on the line were advertised to stop at Cowton station for the purposes of taking up and setting down passengers, and only those trains stopped there which stopped at nearly all other stations on the line. The station was also deficient in the necessary accommodation for the conveyance of horses and carriages along the railway. Further than this, the land was not used as a depot for goods, all articles consigned to Cowton being taken on, in the first instance, either to Northallerton or Darlington station, and thence sent back to Cowton station, subject to an increased charge for carriage.

It appeared that in 1853 Lord Alvanley had sent to one of the directors a friendly letter of complaint as to the want of fast trains stopping at the station, and that the directors on that occasion gave instructions that first-class trains should stop at Cowton when Lord Alvanley required it. In answer to a complaint by the plaintiff in 1863, shortly after his purchase of the property, the company gave directions that certain trains (the 7.20 A.M. up from Newcastle and the 4.30 P.M. down from York) should stop at Cowton.

Under these circumstances, not being satisfied with this increase of accommodation, the plaintiff, who alleged that he was subjected to great loss and injury by the non-performance of the covenant, and that the value of his property was considerably diminished thereby, had filed his bill praying (1) specific performance of the covenant contained in the indenture of March, 1838; (2) an injunction to restrain the company from using the land in any other manner than as a first-class station for taking up and setting down passengers traveling along the railway, and as a depot for taking up and delivering of goods and things carried along the railway.

The company, by their answer and evidence, stated that it was not their custom, or that of any other railway company in this country, to divide the stations on their line of railway into classes, and that no definite or intelligible meaning could be attached to the designation first class, second class, or third class as applied to stations; and it was submitted whether the terms of the covenant were sufficiently intelligible or definite to enable this court to enforce specific performance thereof, and whether the covenant (if any definite meaning could be attached to it) was one of which the court could decree specific performance and whether the remedy of plaintiff (if any) was not at law. They insisted that they had always used the land in question as a station or place for the purpose of taking up and setting down passengers traveling along the line, having a due regard to the accommodation of the persons for the time being entitled to the benefit of the covenant. It was also stated that Cowton was a small village only, without any junc-

tion or branch line at the station, and it was admitted that more trains stopped at Northallerton, Darlington, and Thirsk stations than at Cowton, and that only those trains stopped at Cowton which stopped at all, or nearly all, other stations on the line ; but the number of trains stopping at those stations was determined, not by their importance or size as stations, but chiefly by their importance and utility as junctions with other lines now forming part of the North Eastern system.

The effect of the evidence, so far as is material, is stated in the judgment.

*Mr. Amphlett, Q.C., and Mr. Jones-Bateman* for the plaintiff.

*Mr. Kay, Q.C., and Mr. G. Williamson* for the company.

SIR W. M. JAMES, V.C. The plaintiff is clearly entitled to the benefit of the covenant between the railway company, now represented by the North Eastern Railway Company, and his predecessor in title, Lord Alvanley. The covenant was one by which, in consideration of Lord Alvanley giving up his land to the company and allowing them to go through his estate for about three miles, they deliberately bargained with him—it being one of the terms introduced by him in the course of the negotiation, and one on which he insisted, and to which they deliberately assented—that he should have on his estate, for the convenience of himself and his tenants, “a first class station for the purpose of taking up and setting down passengers traveling along the said railway.”<sup>1</sup>

There being, therefore, no substantial difficulty in ascertaining the meaning, and the company not having, in my opinion, done anything of late years to keep this up as a first-class station, it remains to be considered whether I can in this suit give the plaintiff relief, or whether I am obliged to do that which is almost a scandal to our law, drive a man to what used to be called “the other side of Westminster Hall,” and say I will dismiss your bill without prejudice to an action. I think I am not obliged to do that, but that I am in a position to give the plaintiff substantial relief, based upon the breach of the covenant committed by the company, without imposing any unnecessary or unreasonable burden upon the company. Upon the evidence, not only the trains which ought to have been stopped are not stopped, but the accommodation originally provided by the company (and then it seems to have been barely sufficient) has been gradually withdrawn and become worse and worse, so that it is now as bad as a third-class station. It is not indeed suggested that any building has been taken down, but some of the rooms have been appropriated to other purposes. But that does not diminish the breach, as it appears to me immaterial whether it has

<sup>1</sup> A portion of the opinion discussing the definiteness of the contract has been omitted.—ED.

been caused by taking down or by applying to some other purpose. I think, therefore, that I can provide relief in that respect. With regard to the goods depot, that part of the plaintiff's case is really idle. The grievance complained of as to the goods going to Northallerton and coming back charged with sixpence on this parcel and sixpence for that is not the sort of thing with which this court can interfere. Then, again, as to the mere goods depot, it is exactly the same as it was from the day when the covenant was first made, and really it is too late now to complain that something ought to be done which, if done at all, ought to have been done more than twenty years ago.

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MINUTE OF DECREE.—Declare that the company has committed a breach of its covenant in not *bona fide* using and employing the parcel of ground in the bill mentioned as and for a first-class station or place for the purposes of taking up and setting down passengers traveling along the railway in the bill mentioned.

Refer it to Chambers to inquire what rooms and conveniences ought to be supplied and used for the reasonable accommodation of the station at Cowton as a first-class station, and order the defendants to supply such rooms and conveniences accordingly.

Restrain the railway company from allowing any of its ordinary or fast trains, other than mail, express, or special trains, to pass the station without staying there for the purpose of taking and setting down passengers.

Liberty to the defendants to apply to the court for a relaxation of this injunction if it should be made to appear at any future time that sufficient accommodation can be furnished for the use of the plaintiff, his heirs and assigns, without stopping all the trains aforesaid.

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## WILSON v. FURNESS RAILWAY COMPANY.

IN CHANCERY, BEFORE SIR W. M. JAMES, V.C., NOVEMBER 3, 1869.

[*Reported in Law Reports, 9 Equity Cases 28.*]

### DEMURRER.

The bill, which prayed specific performance of an agreement by a railway company to make, construct, and complete the road and wharf specified in that agreement and annexed plan, and to do and perform all works and matters necessary for the completion of the road and wharf, contained the following statement :

By the Ulverstone and Lancaster Railway Act, 1851, it was provided that, subject to any waiver or alteration which might be allowed and approved by the Admiralty, the two several viaducts for carrying the railway across the Kent and Leven estuaries should be so constructed

by the company in a certain specified manner and according to the approval of the Admiralty, and that, subject to any waiver or alteration to be allowed and approved as thereinbefore mentioned, the company should construct an opening swing or drawbridge of not less than thirty-six feet clear width, the site and mode of constructing the same to be only in accordance with such approval and direction.

By an agreement of the 25th of June, 1862, between the eight plaintiffs of the first part and the company of the second part, after reciting the Act of 1851, and that the viaduct had been, by the partial exercise by the Admiralty of the power of waiver, constructed without an opening bridge, but with preparations for making the opening at a future time, upon certain notice, and that the company were desirous of obtaining a waiver of the obligation to construct the drawbridge, and that the parties of the first part, "on their own behalf, and as representing the inhabitants of Arnside, Milnthorpe, Kendal, and places adjoining or near to the viaduct, and who were interested in the question, had hitherto objected to the waiver of the said opening bridge, and that in order to obviate all further differences the company and the parties of the first part, on behalf of themselves and the said inhabitants, had agreed together: 1. If the Admiralty should waive the construction of and the right to require any opening swing or drawbridge in the viaduct, and if G. E. Wilson (one of the plaintiffs) and the other land-owners should convey the land required for so much of the road thereafter agreed to be made as would pass through their respective estates, and also in consideration of the sum of £200 to be contributed and paid to the company towards the expense of the works, the company would at their own expense, and within six months from the date of the waiver and the delivery to them of the land for the purpose (unless prevented by damage done by the tide to the works), make upon the land obtained for the purpose a carriage road, sixteen feet wide, from Dixe's inn, from Milnthorpe to the wharf thereafter mentioned, in the route or direction shown on the plan thereto annexed, and would also, whenever any accommodation or occupation road crossed the line of road to be made, make road approaches as good as they then were, or as near thereto as circumstances would permit; and would also yearly after the completion of the road pay to the corporation of Kendal (who should be bound to show the application thereof) the sum of £5, to be applied yearly in repairing or improving that part of the road lying within the division of Hazlestack (the £5 not to be paid by the company when the £5 of the preceding year should be remaining unexpended in the hands of the corporation); and would also, at the costs of the company, within the same time as provided for the making of the road, make and at all times thereafter maintain upon the seashore or

beach a wharf at or near the place shown on the plan annexed, with proper mooring posts, to be at all times used as a public wharf for loading and discharging of vessels, and which wharf should be sixty feet in length, and of a suitable and convenient height.

The agreement also provided, 2, that after the completion of the road and wharf any difference between the parties as to the sufficiency thereof should be referred to arbitration; and, 3, that any difference between the parties respecting the construction of any article or clause in the agreement, or respecting any matter or thing thereby agreed to be done by the company, should be referred to the arbitration of two persons, one to be appointed by the company, the other by the parties of the first part, with a provision for appointment of an umpire; and also that if any award should find the road or wharf insufficient it should state in what respect it was so, and direct what should be done to make it sufficient; and that every award duly made should be binding upon the parties, and every such submission to arbitration should be made a rule of court.

It was also provided, 4, that upon completion of the road and wharf Wilson and Wakefield should pay to the company the sum of £200; and, 5, that the parties of the first part, on behalf of themselves and the inhabitants aforesaid, would forthwith, at the expense of the company, join and concur, and use their best endeavors to procure all other necessary parties to join and concur, in making the necessary application to the Admiralty for obtaining the waiver.

The bill proceeded to state as follows: The Admiralty had waived the right to require the construction of any opening swing bridge on the viaduct according to the terms of the agreement. The land required for the purpose of the aforesaid road was duly conveyed according to the terms of the agreement, and was now vested in and in the possession of the company. The company had commenced making the road, but had not completed it according to the terms and provisions of the agreement; it was in a very incomplete condition, and the company had not made or commenced the wharf mentioned in the agreement. The company had from time to time been required to make and complete the road and wharf, but had neglected so to do, though always admitting their liability, and promising to complete the same. In April last the company requested the plaintiffs to release them from making the wharf, stating that on this condition payment of the £200 would not be required. The plaintiffs, however, refused, and on the 14th of July last filed their bill against the company for specific performance of the agreement of June, 1862, and for damages.

To this bill the defendants demurred.

*Mr. Fry*, Q.C., and *Mr. Currey* in support of the demurrer.

*Mr. Kay*, Q.C., and *Mr. Nalder*, for the plaintiffs, were not called upon.

SIR W. M. JAMES, V.C. This demurrer must be overruled. With regard to the main point in question, it is entirely governed by *Storer v. Great Western Railway Company*,<sup>1</sup> and in truth the agreement appears to me to be even stronger than it was in that case. In this case all that is required is that a road be made—a thing which presents the least possible amount of difficulty of all works required to be constructed—and the company have actually in this case been released with regard to making certain roadways and the like, and they not only got released from that obligation, but they have got the land conveyed to them and vested in them upon which the road is to be made, having taken it for the purposes of the road. It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, “This is a sort of thing which the court finds a difficulty in doing, and will not do.” Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties in order to perform the agreement. I can easily conceive if there were a difficulty about the statutory power that the court might see its way by ordering the company to permit the plaintiffs to do these works at the expense of the company, because the company have got the land, and the court might say, “You must allow the plaintiff to do so, but you must pay all the costs that the plaintiffs have been put to.” It appears to me that such a decree as that made in *Storer v. Great Western Railway Company*<sup>2</sup> might be very well made on this bill, and that every circumstance that induced the court to direct specific performance there exists here more strongly than in that case.<sup>3</sup>

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BECK ET. AL. v. ALLISON.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 21, 1874.

[Reported in *56 New York Reports* 366.]

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiffs entered upon the decision of the court at Special Term.

This action was to enforce specific performance of certain covenants to repair contained in a lease executed by defendant to Luke Poole &

<sup>1</sup> 2 Y. & C. Ch. 48.

<sup>2</sup> 2 Y. & C. Ch. 48.

<sup>3</sup> A portion of the opinion has been omitted.—ED.

Co., of premises known as 44 Vesey Street, New York, which lease was held by plaintiffs as assignee.

The facts are sufficiently set forth in the opinion.

*Andrew Boardman* for the appellant.

*Wm. W. MacFarland* for the respondents.

GROVER, J. This action was brought by the plaintiffs as assignees of a lease made by the defendant of the premises known as 44 Vesey Street, in the city of New York, for two years, containing a provision for a renewal, at the option of the lessees for a further term of three years, by giving the lessor notice as therein provided, which notice had been given as therein provided, for the specific performance of an agreement made by the lessor to repair damages caused by fire. The lease provided that all other repairs were to be made by the lessees, and the case shows that this agreement of the lessor was interlined after the preparation, but before the execution of the lease. The case shows that the premises were nearly destroyed by fire while in the occupation of the plaintiffs, under the lease, so as substantially to require rebuilding; but the trial judge found that they could be repaired, and the defendant must, after affirmance of the judgment by the General Term, be held in this court concluded by this finding. The judge further found that a reasonable time for doing the requisite repairs was four months.

The question is thus presented whether equity will enforce the specific performance of an agreement for making repairs of this character. The learned chief justice who gave the opinion of the General Term, after an elaborate and learned examination of the English authorities, arrived at the conclusion that equity would specifically enforce agreements for making repairs. In this he differs from Judge Story, who, after an examination and citation of some of the leading cases relied upon by the learned judge, adopts precisely an opposite conclusion.<sup>1</sup> The accuracy of the conclusion of Judge Story is strongly corroborated by the fact, that in this State, and so far as I am aware, in this country, no court of equity has ever attempted the exercise of any such power. The same conclusion is substantially adopted by a learned English author on a work upon this particular branch of equity jurisprudence, who refers to most of the cases relied upon by the learned judge.<sup>2</sup> I shall refer to only a few of the cases cited by the judge, although I have examined nearly all. *City of London v. Nash*,<sup>3</sup> decided by Lord Hardwicke, is much relied upon in the opinion. In this case the Chancellor stated that equity would enforce the performance of a building contract, for the reason that it was an entire thing, but not a contract for repairs. While

<sup>1</sup> 1 Story's Equity 726, §§ 726, 727.

<sup>2</sup> Fry on Specific Performance, 19, § 48.

<sup>3</sup> 1 Vesey 11; more fully reported 3 Atkyns 512.



I am unable to see if the former is thus enforced, why the latter should not be, for the reason that the former would be attended by about the same difficulties as the latter, and a legal remedy would be equally applicable to both, yet the case is authority against the conclusion of the General Term in the present case, as this is an agreement for making repairs. It may be further remarked, that a specific performance of the contract to rebuild was not decreed, the Chancellor being of opinion that that would be inequitable under the circumstances, and the party injured by the breach of the contract was left to his legal remedy for the recovery of damages. The judgment given is no authority for enforcing the specific performance of contracts to build. In the subsequent case of *Lucas v. Commerford*<sup>1</sup> it was expressly held by Chancellor Thurlow that there could not be a decree to rebuild, as the court could no more undertake the conduct of a rebuilding than of a repair. I think the soundness of the reason given a full answer to the criticism of this Chancellor contained in the opinion with a view to impair the authority of the judgment given in this case. In *Rayner v. Stone*<sup>2</sup> a demurrer to a bill for the specific performance of covenants contained in a lease to repair hedges and the mansion house, was sustained by Lord Worthington. Among the reasons assigned for the judgment was that the court had no officer to see to the performance, which the Chancellor said was, to him, very strong. He asks how can a master judge of repairs in husbandry, etc. He adds that it is said that this is an equitable right, and that it was insisted that he should put the plaintiff in a better state than what he could be at law, but the court had no jurisdiction to strip the defendant of the right to try the supposed breach of covenant at law. Besides, how can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from their proper trial and jurisdiction. These reasons apply with all their force to an attempt to enforce the specific performance of the contract in question. The court must first adjudge what repairs are to be made and the time within which they are to be done. When this is accomplished more serious difficulties remain. The idea that the court can appoint a receiver to take possession of the property and cause the work to be done, with money furnished by the defendant, would be, in the language of Lord Worthington, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how, and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise, not only the question whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefor as will exonerate him from

<sup>1</sup> 3 Brown 166.<sup>2</sup> 2 Eden 128.

the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not in all cases, afford full redress for the injury. It is for these reasons that such powers have never been exercised in this country. It was for these reasons that the court in the *South Wales R. Co. v. Whyte*<sup>1</sup> refused to decree the specific performance of a contract to construct a branch railway. The case enforcing the specific performance of an agreement made by a railway company with a land owner, to construct an arch under their road for his use, does not militate against this doctrine. Damages in an action at law would not, in such a case, afford adequate redress. The same may be said of the case enforcing a contract for the construction of a wharf, etc. The want of an adequate remedy at law has always been regarded as a proper ground for sustaining a bill in equity.<sup>2</sup> What was said by Lord Hardwicke in *Rook v. Worth*<sup>3</sup> was intended to apply to the particular facts of that case, which related to questions as to the rights of a tenant in tail and the reversioner, which could not well be protected in a legal action.

But I do not deem it necessary further to pursue the investigation. As I understand the English cases, the power of enforcing the specific performance of contracts for repairs is not now exercised by courts of equity there, and there is no authority for its exercise by the courts of this State. This being so, a court of equity had no jurisdiction, as such, of the action.<sup>4</sup>

The judgment appealed from must be reversed, and a new trial ordered.

All concur.

Judgment reversed.

<sup>1</sup> 5 De G. McN. & Gord. 880.

<sup>2</sup> See *Wilson v. Furness R. Co.*, 9 Equity Cases 28

<sup>3</sup> 1 Vesey Sr. 460.

<sup>4</sup> A portion of the opinion discussing a question of code practice has been omitted.—ED.

## CAROLINE W. LAWRENCE, INDIVIDUALLY AND AS EXECUTRIX AND TRUSTEE, ETC., AND OTHERS, APPELLANTS, v. THE SARATOGA LAKE RAILWAY COMPANY, RESPONDENT.

IN THE SUPREME COURT OF NEW YORK, GENERAL TERM, MAY, 1885.

*[Reported in 36 Hun 467.]*

APPEAL from a judgment entered at a Special Term dismissing the complaint in this action.

The action was brought to enforce the specific performance of a contract made by the defendant with the plaintiff's testator for the purchase of lands, now occupied by the defendant with its railroad tracks. In July, 1880, Henry Lawrence was the owner of a tract of land in the northeast part of the village of Saratoga Springs, upon which was situated his residence, a large boarding-house known as the Mansion House, a mineral spring known as the Excelsior Spring, with its bottling-houses and appurtenances and other improvements.

The Saratoga Lake Railway Company desired to acquire a right of way through these premises, and prepared a map showing their proposed route and the land they desired, amounting to about four and a half acres, and asked Mr. Lawrence for a proposition, in writing, of the terms upon which he would give such right of way to the company.

Mr. Lawrence then gave to W. L. Burt, the defendant's agent, an instrument which provided, among other things, as follows: "For and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I, Henry Lawrence, of Saratoga Springs, N. Y., do hereby agree to convey to William L. Burt, the right of way, sixty-six feet in width, through my lands in the valley from East Avenue to my east line—to lay and construct a double track railroad from the village of Saratoga Springs to Saratoga Lake, upon the following conditions, however:

"Said Burt shall, simultaneously with the construction of said railroad, erect, at or near the Excelsior Spring, owned by me, a neat and tasteful station building for the accommodation of passengers to and from said spring, which shall be a regular station of the road, and all regular trains shall stop at said station, the name of which shall be 'Excelsior Spring Station.'" . . .

That thereafter the said William L. Burt, for and on behalf of the said defendant, and on or about the 28th day of August, 1880, again applied to the said Henry Lawrence and stated to him, in substance, that the said defendant had concluded to build said railroad under the grade of Spring Avenue, at the same time showed and delivered to him a map

prepared in the office of and signed by the chief engineer of said defendant, representing the proposed line of said railroad across the lands of said Lawrence, which is the same on which said railroad was afterwards built, and which map was dated August 28, 1880, and entitled "map of the lands of the Excelsior Spring Company proposed to be taken by the Saratoga Lake Railway Company," and asked said Lawrence to give him a proposition, in writing, of the terms and conditions upon which he would consent to the modifications of the terms and conditions contained in the paper dated July 31, 1880, so as to allow the said railroad to be built under the grade of Spring Avenue as aforesaid, and on the line designated on said map. Upon said map, when so delivered, a point on the said lands of said Lawrence, outside of but near to the line of said proposed railway, was designated "depot and station." The said Lawrence, pursuant to the request of the said William L. Burt, mentioned in the last finding, prepared and delivered to the said Burt a proposition, in writing, of the terms and conditions on which he would consent to the modification of the said paper, dated July 31, 1880, in the respect above mentioned, which proposed modification is the following, among others, viz.: "You are to construct and maintain a neat and good bridge, near the west end of what is described on map as 'potato field,' for an 'overhead' drive across your road. Spring Avenue is to be terraced or sloped from a line two feet west of present footpath, so as not to injure said footpath or the double row of trees. . . . The present footpath to remain as it is, except at the crossing of railroad, where neat and suitable steps are to be constructed and maintained by the said Burt or assigns, leading from each side up over the railroad bridge and down to the station. If desired, a bridge is to be constructed and maintained over railroad at old highway at my east line."

The defendant accepted these propositions and entered into the possession of the described right of way; commenced building their road with its cuts and embankments, and have since finished it.

The defendants failed to complete the work on Spring Avenue as provided in the contract, but left it in such a rough, unsafe and improper condition that Mr. Lawrence was compelled to expend \$3,194.40 to put it in the condition required by the contract. The court held that the plaintiffs were entitled to recover this amount. The defendant has wholly neglected to erect a station-house or stop its trains as required by the contract, and has neglected and refused to build bridges for crossing at two of the places designated in the contract. The defendant has so altered and changed the face of the property, by digging ditches, building embankments, cutting down trees and changing water courses, that the premises cannot be restored to their former condition.

The court found, among other conclusions of law, that damages would

not adequately compensate plaintiffs for defendant's failure to fulfill the said agreement, and justice and equity required that the same should be specifically performed by the defendant. That the agreements referred to in the finding are so indefinite and uncertain, and relate to the performance of business of such a nature and continuance, that the court cannot direct specific performance. That the plaintiffs' complaint should be dismissed, without costs and without prejudice to any action or proceeding that plaintiffs, or any of them, may see fit to institute by reason of any of the matters which have come in question in this action.

*Charles S. Lester* for the appellants.

*A. Pond* for the respondent.

LEARNED, P. J. The objection that the present plaintiffs have not the title to the land, or did not succeed to the title of Henry Lawrence, is not well taken. After his death, pending the action, a stipulation was signed by defendant's attorney that the present plaintiffs had succeeded to his interests. And on that stipulation an order was made reciting the fact of such succession and ordering the substitution. That is sufficient. Nor is the objection well taken that Henry Lawrence is not alleged or proved to have been the owner in fee. No dispute arose on that point. The defendant took possession under him and by virtue of his title, and is in possession only by virtue of his title. When called on to perform its contract it cannot retain possession and deny his title.

The objection that the defendant did not sign any contract is not valid. The contract consists of two written propositions made by Lawrence at the request of Burt (who either acted for defendant or to whom the defendant succeeded). The defendant accepted the propositions and acted upon them, entering into the premises of Lawrence by and under the same. And the defendant has proceeded to construct its track and to do many other acts, making permanent changes upon the land; so that the land cannot be restored to plaintiffs in its original condition. These facts are a ground for the enforcement of a contract, although it is not in writing. The reason is, that it would be a fraud for the vendor to permit the vendee, under a verbal contract, to make permanent improvements, and then to deprive the vendee of the land by ejectment. And rights must be mutual. If then a vendor cannot refuse performance when the vendee has entered and made improvements, conversely the vendee cannot refuse to perform in such a case, on the ground that the contract was verbal.

Again, it is true that a verbal contract must be definite in order to entitle either party to specific performance. An indefinite contract cannot be enforced, because the courts do not know what the

parties agreed to. In the present case the contract is in writing. It is distinct and definite. The situation of the road was indicated in a map given in evidence. The circumstance that this map is not attached to the judge's decision did not prevent him from taking it into consideration, and from giving a judgment based upon the map and the other evidence.

The learned justice found that the defendant had neglected and refused to perform three things, which, by the terms of the contract, it was plainly bound to do. He held that damages would not adequately compensate the plaintiffs for this neglect and refusal, and that equity required that the contract should be specifically performed; that unless the whole contract could be specifically performed, no decree for specific performance of a part could be made; that the agreements as to those three things were so indefinite and uncertain, and related to business of such a nature and continuance, that specific performance could not be adjudged. He dismissed the complaint without prejudice to any action by the plaintiffs.

One of the three things was to construct and maintain a bridge over the railroad at the old highway at Lawrence's east line. We see nothing indefinite in this. There can be no difficulty in determining where the highway is. To insist that the railroad cannot build a bridge because they do not know whether it should be of wood, or iron, or gold, or platinum, is a poor excuse. A bridge suitable for a highway crossing is what is intended, and that is definite enough.<sup>1</sup> If defendant were willing to perform its agreement, it would have no difficulty in understanding its obligations.

Another thing to be done is similar: to construct and maintain a neat and good bridge near the west end of the potato field, for an overhead drive over the railroad. It is not shown that the situation of the potato field cannot be determined, or that there is doubt which is its west end. Indeed, by the opinion of the learned justice it appears that the map given in evidence gave the places where the bridges were to be placed. But the defendant's objection is that the size and material are not specified. We do not see why proof might not be given as to the size and material suitable and proper for bridges at those places, and for the purposes indicated. It is often the case that proof of surrounding circumstances is needed to explain a contract. The learned justice, in his conclusions, holds that the defendant is bound by the provisions of the contract, and can only hold the land by performing its agreement, and that justice and equity requires that these provisions should be specifically performed. But if these provisions are so indefinite that the court cannot decide whether or not a pretended performance is a real per-

<sup>1</sup> Jones v. Seligman, 81 N. Y. 190.

formance, then how can the defendant be bound? We have these two alternatives: either the agreement is so indefinite that the court cannot determine when it has been performed. In that case it is void, and the defendants must surrender up the land. Or it is definite enough for the court to decide whether it has been performed. In that case defendants should be made to perform, unless there be some reason to the contrary. Plainly the defendant, who has taken possession of the land under this contract, cannot be permitted to say that the contract is so indefinite that the defendant cannot perform its side of the contract, but that without performing the defendant will keep that land for which the performance of the contract was the consideration.

The third thing to be done by defendant was to erect at or near Excelsior Spring a neat and tasteful station building for the accommodation of passengers to and from said spring, which should be a regular station, and to have all regular trains stop at said station; the name to be Excelsior Spring Station.

The same argument in regard to this building is urged by defendant, viz.: that the words, "a neat and tasteful station building for the accommodation of passengers to and from said spring," are too indefinite. But it is found as a fact that the defendant has built station buildings for similar purposes; one about 4,000 feet east and the other about the same distance west of the spring. Would there be any difficulty on defendant's part in building one at the plaintiff's spring? And would it not be easy for a court or a jury to decide whether a building was a fair and reasonable performance of this agreement, or was a fraud and an evasion?

It is urged that equity will not enforce specifically a contract to build or repair.<sup>1</sup> Of course the evident reason of this rule is that usually damages are a sufficient remedy. The plaintiff can build or repair, and sue for the amount expended. But there are instances where the reason does not exist; and where the plaintiff cannot himself build or repair; and in which damages would not be sufficient. Mr. Pomeroy in his note makes four classes of exceptions; the second is where the defendant has contracted to construct some work on his own land, and the plaintiff has an interest which cannot be compensated in damages. An instance is *Storer v. Great Western Railway Company*.<sup>2</sup> The third is where the defendant has contracted to construct works on land acquired from the plaintiff, and the fourth is where there has been a part performance so that the defendant is enjoying the benefits in

<sup>1</sup> See Story Eq., § 726, etc.; *Beck v. Allison*, 56 N. Y. 366; Pomeroy's Eq., § 1402 n.

<sup>2</sup> 2 Y. & C. 48.

specie. This is illustrated by the case of *Stuyvesant v. Mayor*.<sup>1</sup> Mr. Fry makes similar exceptions.<sup>2</sup>

In the present instance every one of these three exceptions is combined. The contract has been so far performed that the defendant is enjoying the land itself. The land was obtained from the plaintiff upon the agreement to make this building; and the building is to be made upon the defendant's own land (that is land which belongs to defendant in equity, and of which it is in possession), and the plaintiff has a material interest not susceptible of compensation in damages. The plaintiffs cannot build the station building or the bridge, because defendant is in possession. And it is evident that to estimate plaintiffs' damages is exceedingly difficult. Plaintiffs have a spring, to which they desire that passengers shall come. How is it possible to estimate how many, who would come if there were a station building, do not come when there is none.

In addition to the case above cited we may refer to *Lytton v. G. N. R. W. Co.*<sup>3</sup>

The case of *Wilson v. Northampton and B. J. Ry. Co.*<sup>4</sup> is instructive on account of the reasons given for refusing specific performance. In that case there was an agreement to "erect, set up, and construct a station," and the defendant violated the agreement. The court held that it had jurisdiction; but that as there was no agreement respecting the stopping of trains, it might be of no benefit to decree specific performance; that the plaintiff would have better redress by way of damages; that a jury might take into account the probability that the defendant would have used the station and the probable benefits to plaintiff's estate; and that the court in assessing damages could do the same. In the present case the agreement not only provides for building a station-house, but also provides that all passenger trains shall stop there. Thus the case of *Wilson v. N. and B. J. Ry. Co.* becomes an authority in plaintiff's favor.

The defendant urges that the whole contract must be enforced, or no part of it will be. That rule does not apply where the part which cannot be enforced is separable from the other. Where a vendor is unable to completely perform his contract, it is true that the ordinary rule is that the vendee will not be compelled to accept a part. Yet even to this rule there are exceptions, notably when one part is separable from the other.<sup>5</sup> But, on the other hand, when the vendee claims perform-

<sup>1</sup> 11 Paige 414.

<sup>2</sup> Fry's Specific Perf., § 81.

<sup>3</sup> 2 Kay & J. 394; *Greene v. W. C. Ry. Co.*, L. R., 13 Eq. 44; *Sanderson v. Cockermouth, etc., Ry. Co.*, 11 Beav. 497.

<sup>4</sup> L. R., 9 Ch. App. 279.

<sup>5</sup> *Ogden v. Fossick*, 4 DeGex., F. & J. 426; *Powell v. Elliot*, L. R., 10 Ch. 424; *Wilkinson v. Clements*, L. R., 8 Ch. App. 96.



ance and the vendor is unable to make complete performances, the vendee is allowed to have all he can get, with compensation for the deficiency.<sup>1</sup> The principle is that the party who is not in fault shall be entitled to a specific performance of as much of the contract as the other can perform. Here the plaintiffs are not in fault, and the defendant willfully refuses to perform. There is no reason why the court should not compel a specific performance so far as this can be done.<sup>2</sup> A further matter is the agreement to stop all passenger trains at this station. Some objection has been made to the granting of specific performance where the contract requires continuous personal action running through an indefinite period of time.<sup>3</sup> But the propriety of granting this relief in a case like the present was recognized in *Phillip v. Great Western Railway Company*.<sup>4</sup> Although it was held that a train carrying mails was not "under the control" of the company, and therefore the relief was denied.<sup>5</sup>

In the case of *Blanchard v. Detroit, etc., Railroad Co.*,<sup>6</sup> cited by defendant, the court held that the clause in the deed relied upon by plaintiff was only a condition subsequent, not a covenant. Having decided that there was no covenant on the part of the defendant, they proceeded *obiter* to say that the court would not grant specific performance of a covenant to build a depot, and to stop at it at least one train a day. In the cases of *Port Clinton Railway Company v. Cleveland and Toledo Railway Company*<sup>7</sup> there were two actions, and the court held that neither plaintiff had such a standing as to support its claim for relief. In *McCann v. South Nashville Railroad Company*<sup>8</sup> it was held that there was no contract to run cars at proper intervals; that plaintiffs were not parties to the arrangement and that they had not contributed thereto. It will thus be seen that none of these cases are directly in point. And it may be noticed that there are instances in which courts do require defendants to do acts which run through a considerable time, as when they adjudge that a defendant pay alimony.

Further still, most final injunctions are perpetual. There is no difficulty in adjudging that a defendant shall not, for instance, erect a house above a certain height, where to exceed that height would interfere with plaintiff's easement. It is not thought to be any objection to that relief that its effect is to retain the action in court per-

<sup>1</sup> *Morss v. Elmendorf*, 11 Paige 277.

<sup>2</sup> *Story's Eq.* 774, 779; *Pomeroy's Eq.*, § 1407 n.

<sup>3</sup> *Marble Co. v. Ripley*, 10 Wall. 339.

<sup>4</sup> L. R., 7 Ch. App. 409.

<sup>5</sup> See, also, *Rigby v. G. W. Ry. Co.*, 2 Phillips 44.

<sup>6</sup> 31 Mich. 43.

<sup>7</sup> 13 Ohio State 544.

<sup>8</sup> 2 Tenn. Ch. 773.

petually. Now, in the present case, it will be seen that the defendant did not agree to run any train whatever over its road. No decree of specific performance, requiring the defendant to run trains is, therefore, needed or asked for, or proper. All that is required is that the defendant be enjoined from running any regular trains which do not stop at this station.

Certainly there is seldom a case which calls more strongly for the active aid of the court than the present. A corporation gets possession of the plaintiff's land by his consent, and on terms to which they agree; it pays nothing for the land, and is spared the trouble and expense of proceedings to condemn; and then, when in possession, it refuses to perform the things it agreed to do. And it makes no excuse whatever. It seems to hope by delays and technicalities to weary out the perseverance of the present plaintiffs, as it has succeeded in making this action outlive the original plaintiff. The case is another instance showing that the managers of corporations will unblushingly do what, in an individual, they would at once condemn as rank dishonesty.

The Special Term was of the opinion that the relief of specific performance could not be granted, and dismissed the complaint without awarding damages. In the view we take it is not necessary to decide whether the court can award damages, when it is of the opinion that specific performance cannot be had. That was the course taken in *Wilson v. N. and B. J. R. Co.* (*ut supra*).<sup>1</sup>

At any rate, whether or not there could be a recovery of damages in the ordinary meaning, it would be just and equitable to enjoin defendant from using the road over plaintiff's land until it had paid the damages which plaintiffs have sustained in doing that which defendants ought to have done. This case comes to us only on the findings of the court, and the plaintiffs ask that we modify the judgment by giving the relief to which they are entitled. We do not think that this can properly be done. Evidence may be needed at the trial to explain the circumstances surrounding the agreement; the time needed for the construction of the bridges and station; the exact place as shown on the map, etc.

We therefore reverse the judgment and grant a new trial, costs to abide event.

Present—LEARNED, P.J., BOCKES and LANDON, JJ.

Judgment reversed, new trial granted, costs to abide event.<sup>2</sup>

<sup>1</sup> But see *Story Eq.*, § 794 *et seq.*; *Beck v. Allison*, 56 N. Y. 366; *Henderson v. N. Y. C. R. R. Co.*, 78 Id. 423; *Matthews v. D. & H. Co.*, 20 Hun 427; *Code* §§ 968, 969; *Bradley v. Aldrich*, 40 N. Y. 504; *Seeley v. N. Y. Nat. Ex. Bank*, 8 Daly 400; *affd.* 78 N. Y. 608.

<sup>2</sup> Cited with approval in *P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co.*, 144 N. Y. 152-162.—ED.

## RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

IN THE COURT OF APPEALS, NOVEMBER 15, 1892.

[*Reported in Law Reports, 1 Chancery Division* (1893) 116.]

APPEAL from the judgment of Mr. Justice A. L. Smith, sitting for Mr. Justice Romer.<sup>1</sup>

The action was brought upon a covenant in a lease, by which the defendants demised to the plaintiff for twenty-one years a residential flat in a building known as Westminster Chambers, which was let in flats to several tenants. The covenant sued upon was as follows: "It is hereby agreed and declared by and between the parties hereto that the premises hereinbefore expressed to be hereby demised are taken by the lessee subject to the regulations made by the lessors with respect to the duties of the resident porter and other matters for the general convenience of tenants. These regulations are set forth in the schedule hereunder written, and are to be considered as forming part of these presents. The lessors, however, reserve to themselves the right of altering and modifying the regulations (except in the case of the present lessee as to the supply of coal) from time to time as the convenience of the tenants or other special circumstances may render desirable." The schedule was, so far as material, as follows: "(1) The property of the lessors is divided into seven distinct blocks, each having an entrance into Victoria Street, and the rooms in each block are, together with the entrance and staircase belonging to it, in charge of a resident porter appointed and removable by the lessors, but who shall be and act as the servant of the tenants of the several rooms in the block. (3) Tenants have the right to the general services of the porter resident in their block within the scope of his general duties, as defined by rule 6. (4) Tenants have the right to the special services of such porter, as defined by rules 8, 9, and 10. (6) The general duties of the porter which the tenants are entitled to have performed for them free of extra charge are as follows: (*a*) To be constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant. (*b*) To cleanse every morning, before nine o'clock A.M., the general stairs, passages, lifts, and entrances attached to the section, and to attend to the lighting and extinguishing of the gas therein. (*c*) To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors

<sup>1</sup> [1892] 1 Ch. 427.

of the several sets of rooms from the tenants for safe custody on their leaving for the night. (8) The special services of the porter, which he is bound to render to the several tenants, if required, at a charge of 1s. 6d. per week for each room, comprise the cleaning and arrangement of such room and the lighting of the several fires whenever required. (9) Any extra services required of the porter by the tenants, and which are not inconsistent with his general duties, are to be the subject of special arrangement between them. (10) Any services rendered by the porter will be rendered by him as the servant of the tenant, and for which, or the consequences whereof, the lessors will not be responsible."

The action was commenced on the 24th of December, 1890. The statement of claim alleged that since the date of the lease the plaintiff had occupied the demised premises and paid his rent and performed his covenants, but that the defendants had omitted and refused to appoint a resident porter to take charge of the block in which the plaintiff's premises were situate, to be and act as the plaintiff's servant according to the regulations in the schedule. The plaintiff also alleged that a porter had been appointed by the defendants, but that such porter was not constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant, and that such porter had willfully and persistently omitted and neglected to attend on the plaintiff according to the said regulations, and to receive and deliver to the plaintiff all letters, parcels, and messages; and that such porter had not been available when required for the plaintiff to arrange with him for any extra services not inconsistent with his general duties. The plaintiff claimed (1) an injunction against the defendants to restrain them from employing as the porter in charge of the said block any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the plaintiff, according to the regulations contained in the said schedule; (2) specific performance of the agreement to appoint a resident porter in charge of the said block; (3) £100 damages for breaches of covenant.

The facts proved at the trial with regard to the alleged breach of covenant were as follows: The plaintiff became lessee of the flat as from midsummer, 1889. There was only one other residential set of chambers in the block besides that of the plaintiff; but there were several sets of business chambers in such block. In 1887 a man named Benton was appointed to the situation of porter, who, with his wife, resided on the premises. Benton was by avocation a cook, and at that time was acting as chef at a city hotel or restaurant, and con-

tinued so to act till July, 1889. From November, 1890, till August, 1891, he had, at the instance of the directors of the defendant company, been employed from 11 A.M. to 3 P.M. on weekdays at a luncheon club at 3 Victoria Street, Westminster. He was at home on Sundays; but on that day an old woman usually acted for him in his duties as porter, and he was backwards and forwards on weekdays. He had the assistance of a lad in the performance of his duties, who, however, did not reside on the premises. It was proved by the plaintiff and his witnesses that Benton rarely acted as porter; that the door was occasionally opened by his wife, or niece, or by a charwoman, but usually by a boy in his shirt-sleeves and wearing an apron; and that boys and charwomen were the persons who really performed the duties assigned by the regulations to the porter.

The learned judge gave judgment for the plaintiff, concluding in these terms:<sup>1</sup> "My judgment is that the defendants appoint a resident male porter pursuant to the covenant. I will grant an injunction, or decree specific performance of the covenant, if that is the more appropriate course; and in case it is held in the Court of Appeal that I ought not to have done so, I assess the damages down to date of action brought at £25." The judgment of the court as drawn up between the parties was: (1) The court doth order that the defendants be restrained from employing as a porter in charge of the block No 7 Victoria Street any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the plaintiff according to the regulations contained or referred to in the lease. (2) The court doth declare that the agreement contained or referred to in the lease to appoint a resident porter in charge of the said block, ought to be specifically performed, and doth order and adjudge the same accordingly.

*Chadwyck Healey*, Q.C., and *Swinfen Eady* for the defendants.

*Haldane*, Q.C., and *Warrington* for the plaintiff:

It is not a question of enforcing performance of a contract for personal services as suggested. The plaintiff has taken a lease of these premises for twenty-one years on the term that a resident porter should be engaged; and the defendants are seeking to repudiate that term altogether, and refuse to appoint a porter such as is described in the lease. In substance, what the learned judge ordered in the court below was that the defendants should appoint a resident porter, whose duty it should be to do the things mentioned in the lease; and there is no objection to such an order. The court is not asked to decree performance by the porter of the services mentioned in the

<sup>1</sup> [1892] 1 Ch. 433.

lease; and whether the court would interfere if, after a proper porter had been appointed, he did not perform the services specified, is not now in question. The contract is severable. It is, in effect, two contracts, or a contract for two separate things. There is an agreement to appoint a porter to perform certain services and an agreement that when appointed he shall perform them. In such a case the court, in order to do justice, can separate the two parts of the contract, and compel performance of the agreement to appoint a proper porter: *Rigby v. Great Western Railway Company*.<sup>1</sup> What the learned judge in the court below meant to do, as appears from the report, was to compel the appointment of such a porter as is described by the lease. The words referring to his duties must be taken as merely descriptive. If there was any error of form in the judgment as drawn up the defendants' proper course was to apply to the judge for a variation of the terms of the order.

Secondly, this case comes within the principle of the cases in which the court has by injunction compelled a railway company which has taken land on condition of performing certain works to do such works. In such cases courts of equity, in order to do justice where damages would have been an inadequate remedy, have moulded the principles on which they act to meet the exigencies of the particular case. They have treated these cases as exceptions to the rule that the court will not supervise the execution of works, and have granted injunctions, which indirectly had the effect of compelling performance of the contract.<sup>2</sup> Here the plaintiff has entered on premises for residential purposes and become bound by the lease in reliance on the agreement that a porter should be employed to perform certain necessary duties, and the right to bring successive actions for damages for breaches of the agreement is not practically an adequate remedy. The equitable jurisdiction of the court to compel performance of a contract is, after all, discretionary, and ought not to be bound by absolutely rigid rules. It must depend on the circumstances of the case. This is a new case, and in order to do justice the court ought to treat it as an exceptional case, like the railway cases which have been referred to.

LORD ESHER, M.R. I do not think that the points on which we are about to decide this case were brought so fully before the learned judge below as they have been before us. It seems to me that this case comes within one or the other, according to the point of view

<sup>1</sup> 15 L. J. (Ch.) 266.

<sup>2</sup> See *per* Lord Eldon in *Lane v. Newdigate* (10 Ves. 192), and *James, V.C.*, in *Wilson v. Furness Railway Company* (Law Rep. 9 Eq. 28); *Storer v. Great Western Railway Company* (2 Y. & C. Ch. 48).

from which it is regarded, of two well-recognized rules of Chancery practice, which prevent the application of the remedy by compelling specific performance. I do not myself put this case as coming within any rule as to contracts to perform personal services. It is not necessary for me, therefore, to express any opinion as to such a rule. The contract sought to be enforced here is not a contract with a person employed as a servant. It is a contract between a person who has to employ a servant and a person for whose benefit the employment of such servant is to take place. It is a contract between a landlord and his tenant, by which the former undertakes to employ a porter to perform certain services for the benefit of the latter. The contract, therefore, is not merely that the landlord shall employ a porter, but that he shall employ a porter who shall do certain specified work for the benefit of the tenant. That is, in my opinion, one indivisible contract. The performance of what is suggested to be the first part of the contract, viz., the agreement to employ a porter, would be of no use whatever to the tenant unless he performed the services specified. The right of the tenant under the contract is really an entirety, viz., to have a porter employed by whom these services shall be performed; and the breach of the contract substantially is that these services were not performed. The contract is that these services shall be performed during the whole term of the tenancy. It is therefore a long-continuing contract, to be performed from day to day, and under which the circumstances of non-performance might vary from day to day. I apprehend, therefore, that the execution of it would require that constant superintendence by the court, which the court in such cases has always declined to give. Therefore, if the contract is regarded as a whole, there is good ground for saying that it is not one of which the court could compel specific performance. It was contended that the court could grant specific performance of the defendants' obligation to appoint a porter. But then the case is brought within another rule, viz., that when the court cannot compel specific performance of the contract as a whole it will not interfere to compel specific performance of part of a contract. That clearly appears to be a rule of Chancery practice on the subject. Therefore, if it is urged that what the judge has ordered to be performed is merely the obligation to appoint a porter, the case falls within that rule, and on that ground his decision must be reversed. It was argued that the case of *Rigby v. Great Western Railway Company*<sup>1</sup> showed that a contract such as this might be severed, and that performance of part of it could be enforced. But that is not what the case appears to have decided. It decided that where

<sup>1</sup> 15 L. J. (Ch.) 266.

in one contract there were really several wholly independent stipulations the court could grant specific performance of one of them. It is no authority for the proposition that the court can separate part of what is really one single indivisible contract and grant specific performance of that part. Then it was said that this case fell within the exception which has been established in the railway cases. That is admitted to be an exception grafted upon the Chancery jurisdiction by decisions, in which the court, for the reasons stated, treated cases where railway companies had taken land on condition of doing works as exceptional, and granted specific performance. But being admittedly exceptions, these cases do not do away with the general rule, which appears to be applicable to the case before us. The language used by James, V.C., in *Wilson v. Furness Railway Company*<sup>1</sup> was cited to us as an authority to show that the court ought in this case to grant specific performance. That language, as applied by the counsel for the defendants, is really cited as an authority for the proposition that the Court of Chancery will always, regardless of any rules, do what the justice of the particular case requires. But the answer is that the Court of Chancery has never acted on any such proposition. Then the judgment of Lord Eldon in *Lane v. Newdigate*<sup>2</sup> was cited, in which that learned judge appears on that occasion to have deliberately held that the court ought to do indirectly that which it had no power to do directly. That is a doctrine that I, for one, must decline to follow. It appears to me that the appeal must be allowed, and the judgment for the plaintiff must stand only for the damages found by the learned judge.

LOPES, L.J. There are two grounds on which I think that equity would not grant such relief as is claimed in this case. The first of those grounds is this: This, in my opinion, is an entire covenant. The meaning of the contract appears to me to be that the lessors will employ a man to act for the lessees competent to perform the duties of a porter, who shall be in constant attendance, and whose duties during his occasional absence shall be performed by an efficient substitute. That being so, the question arises whether that is an entire contract or one that may be severed into two parts, or perhaps I should rather say, whether it is one contract or two. It was argued that there were two contracts. I do not think that view can be sustained. It was said that one portion of the contract was a contract to appoint a porter. But the appointment of a porter by itself would be utterly useless. What benefit would that be to the lessee? What was contracted for was not the mere appointment of a porter who might be useless, but the employment of a competent porter who

<sup>1</sup> Law Rep. 9 Eq. 28.

<sup>2</sup> 10 Ves. 192.



should perform the specified duties. I think that it is an entire contract. If that be so, it is clear that it is such a contract that, in order to give effect to it by an order for specific performance, the court would have to watch over and supervise its execution. But it is a recognized rule that the court cannot enforce a contract by compelling specific performance where the execution of the contract requires such watching over and supervision by the court. It is another rule that the court will only interfere by way of compelling specific performance where it can give specific performance of the contract as a whole, and that it will not interfere to compel specific performance of part of an entire contract. On that ground I think the remedy asked for cannot be given. Another ground on which the plaintiff fails, in my opinion, is this: The court will not compel specific performance when there is another adequate remedy. Here there is such a remedy, viz., by compensation in damages for breach of the contract. The judge has found £25 to be adequate damages in respect of the breach of the contract up to the time of action brought. But there does not appear to be anything to prevent the plaintiff from bringing fresh actions for future breaches of the covenant, and obtaining in this way an adequate remedy.

KAY, L.J. I agree. This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well-known rules. In this case the plaintiff is the lessee of a flat which forms portion of a large building. In the lease is a covenant to the effect that the premises are taken by the lessee subject to certain regulations made by the lessors with respect to the duties of the resident porter and other matters, which are set out in a schedule. By the schedule it is stated that the building is divided into blocks, and the rooms in each block are, together with the entrance and staircase belonging to it, in charge of a resident porter, appointed and removable by the lessors, but who shall be and act as the servant of the tenants of the several rooms in the block. The tenants are to have the right to the general services of the porter resident in their block within the scope of his general duties as defined by rule 6. They are also to have the right to the special services of such porter as defined by rules 8, 9, and 10. The plaintiff's right under this covenant appears to me to be to have the advantage of the performance of the specified duties by the resident porter. In this case a man was appointed as porter and held office; the complaint really was that he was not a proper porter, and that the tenant did

not get the advantage of the services stipulated for in the schedule; that he was not constantly in attendance, but, being engaged elsewhere, was not on the premises as much as he should be; and that, when he was there, he did not perform his duties himself. When one looks at that which was the real gravamen of the action the contention seems rather odd that we ought to divide the contract into two parts—one that a porter should be appointed, the other that he should perform the duties specified. The lessors' covenant being in substance that the lessee should have the advantage of the performance of certain services by the porter, a covenant which I cannot conceive to be divisible, as was ingeniously suggested, the plaintiff's claim is shaped thus. It is alleged that the lessee took possession under the lease, but that a proper porter was not appointed, and the lessee does not get the advantage of the performance of the porter's duties. He therefore asks for some remedy by means of which he may have these duties performed. That is really the nature of the action. But now it is sought to overlook that, and to say that, though a contract that the lessee shall have the benefit of the performance by the porter of his duties is not the sort of contract of which the plaintiff can have specific performance, yet he can claim to have the contract performed specifically to this extent: he can ask the court to compel the appointment of a proper porter, though, when he is appointed, the court is not asked to compel performance of his duties. As I have said, the contract is really a single contract, viz., that the plaintiff shall have the advantage of performance by the porter of his duties; and I dissent entirely from the notion that this contract can be divided into two parts in the way suggested, and the court asked to grant specific performance of one part, but not of the other.

There are, no doubt, certain cases where a contract may be treated as divisible for the purpose of specific performance. The common case is where there is a contract like that in *Lumley v. Wagner*,<sup>1</sup> in which case the contract was to sing for the plaintiff, and also not to sing for others. The court says in such cases, though we cannot enforce performance of the contract to sing for a particular person, and so cannot enforce the whole contract, nevertheless, there being the independent negative stipulation against singing for others, we can enforce that by injunction. In the case of *Lumley v. Wagner* the Lord Chancellor, in the passage which I cited in *Whitwood Chemical Company v. Hardman*,<sup>2</sup> expressly said that if he had had to deal with the affirmative covenant only that the defendant would sing for

<sup>1</sup> 1 D. M. & G. 604.

<sup>2</sup> [1891] 2 Ch. 416.

the plaintiff he would not have granted an injunction. That is one exception to the rule.

There is another exception to the general rules as to specific performance. Ordinarily the court will not enforce specific performance of works, such as building works, the prosecution of which the court cannot superintend, not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the inability of the court to see that the work is carried out—*Blackett v. Bates*;<sup>1</sup> *Powell Duffryn Steam Coal Company v. Taff Vale Railway Company*.<sup>2</sup> An exception to this rule has been established in cases where a railway company has taken lands from a landowner on the terms that it will carry out certain works. In those cases, because damages are not an adequate remedy, the court has gone to great lengths, and has granted specific performance of the definite works—they must be definite works—which the company that has taken the lands has contracted to do. This case does not come within either of the exceptions to which I have alluded. Therefore, for the reasons stated by the Master of the Rolls, this case is not one in which the court could compel specific performance.

There appears to me to be also another reason for our decision which is quite sufficient. At the time when the action was brought there had been a breach of covenant. The learned judge found no difficulty in assessing damages for breach of the contract down to that time. Why should there be any difficulty with regard to future breaches of contract? I have heard no sufficient reason adduced in the argument. If for the breach of contract down to action brought adequate compensation may be given by damages, that appears to me to be a reason for the court not exercising its extraordinary jurisdiction. A sufficient reply to this argument is not afforded by the mere fact that these damages are not compensation for future breaches of the contract. If that were sufficient I cannot conceive of any case of a continuing contract where specific performance might not be granted. For these reasons I differ respectfully from the learned judge, and think that nothing but a judgment for the damages found by him should be given.

Solicitor for plaintiff, *E. F. M. Ryan*.

Solicitors for defendants, *Troutbeck & Barnes*.

<sup>1</sup> Law Rep. 1 Ch. 124.

<sup>2</sup> Law Rep. 9 Ch. 331.

## KEITH, PROWSE &amp; CO. v. NATIONAL TELEPHONE COMPANY.

IN SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, JANUARY  
30, FEBRUARY 9, 1894.

[*Reported in Law Reports, 2 Chancery (1894) 147.*]

THE plaintiffs were music publishers, and a principal branch of their business consisted of selling, letting, and booking seats at theatres and other places of public amusement. This branch was very extensive, and was carried on by the plaintiffs at various places in London. Their head office was at No. 48 Cheapside, and was connected with the branch offices by private telephone wires, forty-seven in number, supplied and maintained by the defendants, the National Telephone Company, Limited, originally under an agreement between them and the plaintiffs dated the 14th of October, 1889, at a yearly rental of £11 for each wire. By that agreement, which was in a printed common form adopted by the defendants and their customers, the defendant company agreed, in clause 1, to erect and maintain in working order, subject to the provisions therein contained, the wire therein mentioned and the telephonic apparatus relating thereto. By clause 2 the plaintiffs, the "renters," agreed to "hire" the wire and apparatus, and to pay for the use of the same as thereafter mentioned. The agreement then contained, amongst others, the following clauses :

"7. The company may disconnect, without notice and without prejudice to the other clauses of this agreement, any subscriber whose rent, either for exchange or private wire, or both, is overdue, and such subscriber shall remain liable for his rent, just as if no disconnection had taken place.

"8. If the rent shall be in arrear or unpaid for fourteen days next after the days and times herein appointed for payment of the same, or if there shall be any breach or non-observance of the terms of this agreement by the renter, the company may determine this agreement by notice to the renter sent through the post addressed to him or left for him at the address below, or at any other address to which the said wire or apparatus may have been removed with the consent of the company, and such agreement shall determine as from the time of giving such notice, but such determination shall not prejudice or affect the rights or remedies of the company in respect of anything done or omitted by the renter prior thereto."

10. On the determination of the agreement the renter should surrender to the company the wire and apparatus in as good condition as

when received, ordinary wear and tear excepted, and the company might forthwith remove the same, and for that purpose have access at all times through its agents and workmen to the premises of the renter.

11. The agreement was subject to all proper way-leaves, permissions for attachments, poles, and other easements being obtained and retained by the company.

12. The renter covenanted to give every facility in his power in the way of poles, attachments, etc., to the company for running his own wire, and also those of other subscribers to the company's system, whether exchange or private.

Then the plaintiffs thereby agreed with the company, subject to the above conditions, to pay them the sum of £11 per annum, payable quarterly, not in advance, for each of the private wires, the first payment to be made on the 1st day of October, 1889, for the quarter ending the 30th of September, 1889, and each subsequent payment to be made on the corresponding day in each and every following quarter for the use of the private wires between the plaintiff's various addresses. Every new wire, and every disconnection, to be upon a basis of a yearly rental of £11 per wire, and no less a sum than £385 should be payable to the company during any one year for the term of three. "This agreement shall terminate at the end of three years from the 1st of July, 1889." From the 30th of June, 1892, when the three years' term limited by the agreement expired, the agreement was continued by mutual consent, the plaintiffs continuing to pay the defendants the same rent on the same quarter-days as before.

On the 29th of December, 1893, the plaintiffs having made arrangements with another company for the supply of telephonic communication, gave notice in writing to the defendants to determine the agreement for the private wires at the expiration of six months from the 31st of December, 1893; whereupon, on Saturday, the 30th of December, the defendants gave the plaintiffs notice in writing, purporting to be under clause 8 of the agreement, "forthwith" terminating the agreement, or, in the alternative, "forthwith" terminating the arrangement or agreement then subsisting between them.

That notice was enclosed in a letter of the same date from the defendants, informing the plaintiffs that they—the defendants—would proceed on the Monday morning following—the 1st of January, 1894—to disconnect the wires and remove the instruments, and demanding "the undermentioned payments due to the company in respect of your private wires, which are now considerably in arrear." Then followed a statement of payments due for the quarters ending respectively the 30th of June and the 30th of September, 1893, and of a further payment falling due "on the 31st inst."

Subsequently, in the course of the same day—the 30th—the plaintiffs sent the defendants a check for the whole amount demanded; and the defendants then gave the plaintiffs a receipt expressed to be “in full discharge of account for rental of private lines and instruments to the 31st of December, 1893.”

On the Monday morning following—the 1st of January, 1894—some of the defendants’ workmen called at the plaintiffs’ head office and expressed their intention of removing the telephonic instruments there and cutting off the wires outside the premises. As the result of this would have been, practically, to suspend the plaintiffs’ business, they immediately, on the same day, issued the writ in this action, and obtained *ex parte* from the vacation judge an injunction over the first day of the Hilary sittings, restraining the defendants from cutting, disconnecting, removing, or otherwise interfering with any wire which, on the 30th of December, 1893, was used or connected for use as a private wire for telephonic communication for the purposes of the plaintiffs’ business, and then by special leave served the defendants with a notice of motion, with the writ, to continue the injunction until the judgment or further order.

This motion now came on for hearing.

*Warmington, Q.C.*, and *Waggett* for the plaintiffs.

*Renshaw, Q.C.*, and *W. D. Rawlins* for the defendants.

1894, Feb. 9. KEREWICH, J. Many points have been discussed in this case, but I do not find it necessary to deal with more than two. The first question is, whether this is a case in which the court ought to grant an injunction, if the plaintiffs otherwise make out their equity, having regard to the undoubted fact that it would be impossible for the court to decree complete specific performance of the whole of this agreement.<sup>1</sup>

The company agreed, in the first paragraph of the agreement, to erect and maintain in working order, subject to provisions, a certain wire and the telephonic apparatus relating thereto. It would be impossible for the court to supervise a complete performance of that clause of the agreement, and to see to the maintenance of the wire and telephonic apparatus during the period of the agreement; and that, no doubt, raises a difficulty. In *Fothergill v. Rowland*,<sup>2</sup> the late Master of the Rolls asked for a definition of the cases in which an injunction ought not to be granted, on the ground that specific performance was impossible, and of the cases in which the court could compel specific performance by injunction; and he said that he had not been able to obtain an answer from counsel;

<sup>1</sup> Only so much of the case is given as relates to this question.—ED.

<sup>2</sup> Law Rep. 17 Eq. 132, 141.

and not only that, but he obtained, he said, "that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions—that the rule is that the court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the court at all, or something of that kind." And then he comments on *Lumley v. Wagner*,<sup>1</sup> and an earlier case before Lord Cottenham, *Heathcote v. North Staffordshire Railway Company*;<sup>2</sup> but the law is left, notwithstanding the later decisions, in rather an indefinite state. Here it is to be observed that there is no question of erecting the wire and telephonic apparatus; that has all been done. The only question can be about maintenance; and it seems to me that the difficulty of supervising the maintenance ought not to prevent the court from saying that the company must not cut off the wires. They may not be compellable to maintain the wires and telephonic apparatus—that is to say, damages might be the only remedy for non-compliance with that part of the agreement; but yet the essence of the agreement is that the wire and telephonic apparatus, being there, shall be open to the use of the plaintiffs; and that seems necessarily to go to the root of the whole matter. Analogies are dangerous; and I am far from saying that the analogy which I am going to mention is strictly applicable; but I will take a case which appears to me to be near the present case in principle. Suppose there is an agreement, such as is common in the north of England, for the tenancy of manufacturing premises, the lessor providing power which he agrees, for valuable consideration, to provide and maintain in working order, as in the present case. The lessor has the power in some neighboring building in action, and then, in breach of his agreement not to allow it to get into disorder or disrepair, he threatens to cut off the power. I can hardly believe that the court would hesitate in such a case to say, "That you shall not do; it is a direct breach of the agreement, and goes to the root of the agreement. Your agreement was to let the premises with the power; and to say that you will cut off the power is such a direct breach of the agreement, and so destroys it, that you ought to be restrained." I think those considerations are enough to get over the difficulty.

<sup>1</sup> 1 D. M. & G. 604.

<sup>2</sup> 2 Mac. & G. 100, 112.

REUBEN P. JONES v. JOHN S. PARKER AND ANOTHER.

SAME v. ROBBINS B. GROVER AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MAY 29, 1895.

[*Reported in 163 Massachusetts Reports 564.*]

TWO BILLS IN EQUITY, filed June 2, 1894, to enforce specific performance of covenants in leases.

The first bill alleged that, by an indenture dated September 1, 1893, the defendant Parker leased to the plaintiff a portion of the basement in a building to be erected on the corner of Washington Street and Spring Lane in the city of Boston, and covenanted to deliver possession of the same to the plaintiff upon completion of the building, and thereafter, during the term of the lease, reasonably to heat and light the demised premises; that the occupancy of the demised premises by the plaintiff for the purposes contemplated and stipulated for in the lease was impossible without the completion by the defendants of the premises by constructing therein proper apparatus for heating and lighting the same before delivery thereof to the plaintiff; that the building had been completed, and that the interest of the defendant Parker in the building had been assigned to the defendant Emma M. Blackall; that the defendants refused to complete the premises leased to the plaintiff by the construction of apparatus sufficient reasonably to heat and light the same, or to deliver them to the plaintiff, and proposed to rent them to some person other than the plaintiff.

The prayer of the bill was that the defendants be restrained from leasing the premises to any person other than the plaintiff; that they be ordered to complete and deliver them to the plaintiff, with apparatus sufficient reasonably to heat and light the same, and for damages.

The indenture, a copy of which was annexed to the bill, was executed, September 1, 1893, between John S. Parker, lessor, and R. P. Jones of the second part, and leased the premises in question to the plaintiff for the term of six years and eight months from the date thereof, and contained a covenant by the lessor "to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises."

The second bill sought like relief with respect to other premises in the basement of the same building demised to the plaintiff by the defendant Grover and others, lessors, parties of the first part, for the period of ten years, by an indenture bearing date November 7, 1892, and recorded, which contained a covenant "to deliver possession of the said basement to the lessee upon completion; and from such de-



livery, and thereafter during the term of this lease, reasonably to heat and light the demised premises without expense to the lessee." The second bill contained no averment that the lease annexed thereto had been assigned.

The defendants demurred to the bills, and assigned as reasons therefor, applicable to both bills: 1, want of equity; 2, that the plaintiff had a plain, adequate, and complete remedy at law; 3, that it did not appear that at any time since the completion of the building containing the demised premises the plaintiff was ready and willing to accept possession thereof upon delivery by the defendants in accordance with the terms of the indentures; and, as applicable to the first bill only: 1, that it did not appear that the plaintiff was willing to accept possession of the premises unless the defendants would, before such acceptance, do what, by the terms of the obligation, they were under no obligation to do, viz., complete such premises with apparatus sufficient reasonably to heat and light the same; and 2, that the defendants were under no obligation, as alleged by the bill, to complete the demised premises with apparatus for heating and lighting, or to do anything in relation to heating and lighting such premises before the plaintiff was bound to accept possession of the same.

At the hearing in the Superior Court, the demurrers were sustained and the bills dismissed; and the plaintiff appealed to this court.

*J. Willard* for the plaintiff.

*G. L. Wentworth* for the defendants.

HOLMES, J. The case of *Jones v. Parker* is a bill in equity brought by a lessee upon a lease purporting to begin on September 1, 1893, and to demise part of a basement in a building not yet erected. The lessor "covenants to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises." It is alleged that the building has been completed, but that the defendants refuse to complete the premises with apparatus sufficient to heat and light the same, and to deliver the same to the plaintiff. It also is alleged that the occupancy of the premises for the purpose contemplated in the lease was impossible without the construction in the premises of proper apparatus for heating and lighting them before delivery to the plaintiff. The prayer is for specific performance of the covenant quoted, and for damages. The defendant demurs.

It does not need argument to show that the covenant is valid. Whether it should be enforced specifically admits of more doubt, the questions being whether it is certain enough for that purpose,<sup>1</sup> and whether a decree for specific performance would not call on the

<sup>1</sup> *Fry*, Spec. Perf. (3d ed.), §§ 380-386.

court to do more than it is in the habit of undertaking.<sup>1</sup> We are of opinion that specific performance should be decreed. With regard to the want of certainty of the covenant, if the plaintiff were left to an action at law, a jury would have to determine whether what was done amounted to a reasonable heating and lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We do not doubt that an expert would find it as easy to frame a scheme for doing the work. The other question is practical rather than a matter of precedent. It fairly is to be supposed, in the present case, that the difference between the plaintiff and the defendants is only with regard to the necessity of some more or less elaborate apparatus for light and heat, a difference which lies within a narrow compass and which can be adjusted by the court. There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time.<sup>2</sup>

A further objection is taken, that the instrument is a lease and therefore there is a remedy for possession of the premises at law, and that the covenant to heat and light is not to be performed until after possession is taken. It would be a sufficient answer that performance of the covenant to heat and light was to begin at the moment of performance of the covenant to deliver possession, and that the defendant is alleged to have repudiated both of these obligations. But we may go further. According to the allegations of the bill, occupation of the premises for the contemplated purposes is impossible without the completion of them by the construction therein of proper apparatus for heating and lighting. The covenant itself affords an argument that artificial light and heat were necessary constituents of the premises, as natural light was in the *Brande v. Grace*,<sup>3</sup> or a cistern in *Cleves v. Willoughby*.<sup>4</sup> It is "so interwoven with the original contract as to become an essential part of it."<sup>5</sup> If so, the plaintiff would not be bound to accept possession if offered without artificial light and heat, *Cleves v. Willoughby*, *ubi supra*, and although it has been said with truth, in a different class of cases, that the mode in which one party to a bargain shall enable himself to do what he has agreed to do is no part of the contract, *Pratt v. American Bell Telephone Co.*,<sup>6</sup> the present covenant fairly may be construed to mean that, at the moment when delivery of possession is

<sup>1</sup> *Lucas v. Commerford*, 3 Bro. Ch. 166, 167; *Ross v. Union Pacific Railway*, Wool. 26, 43.

<sup>2</sup> *Fry. Spec. Perf.* (3d ed.), §§ 88, 98, 102, 103; *Story, Eq. Jur.*, §§ 725-728; *Y. B.* (8th ed.), IV., pl. 11; *Tyngelden v. Warham*, 2 Cal. Ch. liv.

<sup>3</sup> 154 Mass. 210.

<sup>4</sup> 7 Hill, N. Y., 83, 90, 91.

<sup>5</sup> *Bally v. Wells*, Wilmot, 341, 350.

<sup>6</sup> 141 Mass. 225, 229.

due there shall be the necessary machinery or apparatus without which it would be impossible "thereafter . . . reasonably to heat and light the demised premises."<sup>1</sup>

The last objection taken is based on an allegation that the lessor Parker has conveyed the reversion to Blackall. It is not alleged that Blackall had notice of Parker's covenant. But as the lease is for less than seven years, it is valid without recording or notice, Pub. Sts. c. 120, § 4, and the assignment does not entitle Blackall to prevent the performance of the covenant. We need not consider whether the covenant runs with the reversion by virtue of St. 32 Hen. VIII. c. 34, § 2, a question not to be confused with the different one as to the covenants attaching a burden or a right to land at common law irrespective of privity or the mention of assigns, after the analogy of commons or easements, or the yet different one as to the transfer of the benefit of warranties or covenants for title to assigns, when mentioned, being privies in estate with the original covenantees.<sup>2</sup> This covenant is pretty near the line as it has been drawn between covenants that will and those that will not pass under the statute in respect of their nature, assigns are not mentioned, and the plaintiff has not entered; but perhaps none of these objections would be fatal.<sup>3</sup> However this may be, the plaintiff is entitled to his lease and to his heat and light, notwithstanding the assignment, and whether the covenant passes or not he can hold the defendant Parker on his express contract. All the cases which have come under our eye are cases of covenants by lessees, but the reasoning is equally good for covenants by lessors.<sup>4</sup>

In the case of *Jones v. Grover* the covenant is substantially similar to that in the first case. The instrument, although in form a lease for ten years, is not to begin to run until the completion and delivery of the premises. It has been recorded, and there has been no assignment. The plaintiff's title to relief is free from some of the difficulties which have been discussed.

Demurrers overruled.

<sup>1</sup> See *Bullard v. Shirley*, 153 Mass. 559, 560.

<sup>2</sup> *Norcross v. James*, 140 Mass. 188; *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267.

<sup>3</sup> *Spencer's case*, 5 Co. Rep. 16, and note to S. C. in 1 Sm. Lead. Cas. 145, 150-174; *Moore* 159, pl. 300; *Jourdain v. Wilson*, 4 B. & Ald. 266, 268; *Doughty v. Bowman*, 11 Q. B. 444; *Minshull v. Oakes*, 2 H. & N. 793, 808; *Rawle, Covenants* (5th ed.), §§ 313, 318; *Williams v. Bosanquet*, 1 Brod. & Bing 238; *Simonds v. Turner*, 120 Mass. 328.

<sup>4</sup> *Wall v. Hinds*, 4 Gray 256, 266; *Mason v. Smith*, 131 Mass. 510, 511; *Barnard v. Godscall*, Cro. Jac. 309; *Brett v. Cumberland*, Cro. Jac. 521; *Bachelour v. Gage*, Cro. Car. 188; *Pitcher v. Tovey*, 4 Mod. 71, 76; *Auriol v. Mills*, 4 T. R. 94, 98, 99.

(b) *Negative Contracts.*

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DR. MARTIN AND LADY ARABELLA HOWARD, HIS WIFE,  
v. NUTKIN ET AL.

IN CHANCERY, BEFORE THE LORDS COMMISSIONERS GILBERT AND  
RAYMOND, HILARY TERM, 1724.

[*Reported in 2 Peere Williams 266.*]

THE bill was brought against the defendants, the churchwardens, and against the parson and overseers and several of the inhabitants of the town of Hammersmith, to stay the ringing of the five o'clock bell of the town of Hammersmith, which usually had been rung at five of the clock in the morning from Michaelmas to Candlemas, except upon holydays and the twelve days at Christmas.

The case was, the plaintiffs Doctor Martin and Dame Arabella Howard his wife, had a house at Hammersmith, very near the church, and Lady Howard, being of a sickly and weak constitution, was much disturbed and disquieted by the ringing of this bell at five of the clock in the morning, and was about parting with her house and removing to another parish, when it was intimated to her on behalf of the parish that she might purchase her quiet for a reasonable sum to be laid out for the benefit of the parish.

Upon which it was proposed on behalf of the plaintiffs that they should build a cupola to the church, and erect a clock and new bell, provided that during the lives of the plaintiffs and of the survivor of them the five o'clock bell should not be rung; and accordingly, on a Sunday after morning service, notice was given at the church that the vestry would meet upon the occasions of the parish. In consequence of which they did meet; when this proposal was made and agreed to, and an entry being made of it in the parish vestry-book, the same was signed by the parson, churchwardens, overseers, and several of the inhabitants; after which the plaintiffs and the defendants the parson, churchwardens, overseers, and some other of the inhabitants executed articles reciting the proposal and agreement at the vestry, and the plaintiffs thereby covenanted to erect a new cupola, clock, and bell, and the defendants on their parts covenanted that

the five o'clock bell should not be rung during the lives of the plaintiffs or the survivor of them ; after this the plaintiffs caused the timber to be brought into the churchyard for the erecting of the cupola, which was publicly seen, and the plaintiffs were at the charge of erecting the cupola, clock, and bell, and the five o'clock bell was silenced for about two years.

But the defendant, Nutkin, an ale-house keeper, being since chosen churchwarden, a new order of vestry was obtained for the ringing again of the five o'clock bell, which occasioned the plaintiffs to bring their bill to enjoin the ringing of this bell, and on motion, Lord Chancellor Macclesfield granted an injunction to stay the ringing until the hearing.

And now the cause came on before the Lords Commissioners GILBERT and RAYMOND, who decreed that the injunction should continue during the lives of the plaintiffs and the survivor of them ; for that here was a meritorious consideration executed on the plaintiffs' side ; that the churchwardens were a corporation, and might sell the bells or silence them, and make a reasonable agreement beneficial for the parish, and thereby bind the parishioners and their successors as also the succeeding churchwardens ; that the ringing the five o'clock bell did not seem to be of any use to the parish though of very ill consequence to the plaintiff, the Lady Howard, and ample recompense had been made to the parish by the plaintiffs both in the expense of the cupola, clock, and bell, and also of £1,500 laid out in improving the plaintiffs' own house, which otherwise they would have left ; and it moreover appearing that the majority and better part of the parish continued willing to abide by this agreement and protested against the new order.

The court thereupon decreed an injunction against the ringing of this five o'clock bell accordingly.

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MORRIS v. COLMAN.

IN CHANCERY, BEFORE LORD ELDON, C., JANUARY 14, 1812.

[*Reported in 18 Vesey 436.*]

VARIOUS disputes having arisen among the proprietors of the theatre in the Haymarket, a bill was filed, praying an execution of the articles of agreement, an injunction to restrain Mr. Colman from acting as manager, and a reference to the Master for the appointment of a manager.

An injunction was granted, and a reference directed to the Master to inquire whether the defendant, Mr. Colman, had per-

formed the duties of manager, and what he was doing and could do in the discharge of those duties. Upon a motion to dissolve the injunction a question arose upon the validity of a clause in the articles restraining Mr. Colman from writing dramatic pieces for any other theatre, or, as the construction was represented for the plaintiff, giving the Haymarket Theatre a right of pre-emption.

*Mr. Hart* and *Mr. Shadwell* for the defendant Colman, in support of the motion, compared this provision to covenants in restraint of trade, which are void on principles of public policy.

*Sir Samuel Romilly* and *Mr. Bell*, for the plaintiff, contended that this provision was no more against public policy than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged would have been.

The LORD CHANCELLOR. I cannot perceive any violation of public policy in this provision. The case of trade, to which it has been compared, is perfectly distinct. It is well settled upon that principle, that notwithstanding such a covenant restraining trade in general, a man shall be at liberty to engage in commerce; but that has been broken in upon to the extent of giving effect to covenants restraining trade within particular limits; and in partnership engagements a covenant that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged is not only permitted but is the constant course.

If that is so with regard to trade, it is impossible to maintain that theatrical performers, who act only under a license, and are treated as vagrants if not licensed, may not enter into such engagements. The contract is not unreasonable upon either construction; whether it is that Mr. Colman shall not write for any other theatre without the license of the proprietors of the Haymarket Theatre; or whether it gives to those proprietors merely a right of pre-emption. If Mr. Garrick was now living would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for that theatre alone? Why should they not thus engage for the talents of each other? The ground might be supposed that nothing could be made of the theatre without exhibiting the talents of such a man; and in this instance that he may get more to himself and the other proprietors by this contract than he could by hard bargains at other theatres.

I cannot therefore see anything unreasonable in this: on the contrary, it is a contract, which all parties may consider as affording the most eligible, if not the only, means of making this theatre profitable to them all, as proprietors, authors, or in any other character which they are by the contract to hold.

## WILLIAMS v. WILLIAMS.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE 10, 1818.

[*Reported in 2 Swanston 253.*]

THE bill stated that, previously to November, 1817, the plaintiffs and the defendant were concerned as partners in coaches running from Reading to London, and back; that by articles of agreement, dated the 4th of November, 1817, the defendant agreed to sell to one of the plaintiffs his share in the business, with a condition that he should not at any time after November be in any manner concerned in any coach running from Reading to London, or from London to Reading, or in any other coach that might in any manner injure the business then carried on by the plaintiffs; that the defendant had lately begun to run a coach from Pangbourne, about six miles beyond Reading, to London, and from London to Pangbourne, passing through Reading, and running throughout the same road as the coach of the plaintiffs, to the great injury of their business. The bill prayed a specific performance of the agreement, and an injunction.

The allegations of the bill being verified by affidavit, Sir *Samuel Romilly* moved for an injunction.

His Lordship doth order, that an injunction be awarded to restrain the defendant, his servants and agents, from running any coach or coaches from London to Reading, and back again from Reading to London, as in the plaintiffs' bill mentioned, until answer and farther order.

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## CLARKE v. PRICE.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 21, 22, 1819.

[*Reported in 2 Wilson, Chancery, 157.*]

THE bill, filed the 15th of June, 1819, stated that in 1814 the defendant, George Price, Esq., proposed to compose and write reports of cases argued and determined in the Court of Exchequer; and the plaintiffs entered into a treaty with him as to the terms upon which the same should be printed and published; and that on the 27th of April, 1814, the following agreement was signed by him: "Memorandum: It is agreed between George Price, Esq., and William Clarke and Sons, as follows: Mr. Price undertakes to compose and write the cases in the Court of Exchequer, commencing with Easter Term, 1814, and to be published periodically; the said William

Clarke and Sons to be at the charge of all expenses of paper, printing, and advertising, which expenses, when discharged, to divide the profits of the said work equally (that is to say), one moiety to the said George Price, the other to the said William Clarke and Sons; all accounts to be adjusted at Christmas in every year, at the customary trade price and commission. And it is further agreed that Messrs. Clarke shall be at liberty to relinquish the undertaking should they think it advisable."

The bill further stated that in pursuance of the agreement Mr. Price composed and wrote divers reports of cases argued and determined in the Court of Exchequer, and that the plaintiffs printed and published them at their own costs and charges, periodically and in parts; that the first volume consisted of three parts, the first being published in August, 1814, the second in May, 1815, and the third in March, 1816. That on the 2d of March, 1816, a variation in the agreement was made between the plaintiffs and Mr. Price, and that a memorandum thereof was made in writing and signed by Mr. Price, in the words following: "March 2d, 1816. Memorandum of agreement between George Price and William Clarke and Sons: Whereas, by an agreement bearing date the 27th of April, 1814, between the above parties, it was there stipulated that Mr. Price should take the reports in the Exchequer, and Messrs. Clarke should print the same, and divide the profits between the respective parties; and whereas the first volume of the reports in the Court of Exchequer has been printed and published by the said George Price and William Clarke and Sons; and whereas the said George Price is desirous of selling all his copyright and interest in the first volume: In consideration of which the said William Clarke and Sons agree to give, and the said George Price agrees to accept of the sum of £166. And the said George Price further agrees to give any further assignment of the copyright, if required from him by the said William Clarke and Sons." That in pursuance of the second agreement, the plaintiffs duly paid to Mr. Price the £166. That in further pursuance of the agreement of the 27th of April, 1814, Mr. Price continued to write and compose reports of cases argued and determined in the Court of Exchequer; and that before the publication of the first part of the second volume, and on or about the 11th of November, 1816, a further agreement was made between the plaintiffs and Mr. Price, and a memorandum thereof made as follows: "November 11th, 1816. Memorandum of agreement between George Price, Esq., and William Clarke and Sons: Mr. Price agrees to the following terms for writing and composing the second volume of his reports in the Exchequer, sale of his copyright, and interest in the said volume; Messrs.



Clarke, for the considerations above, to pay to Mr. Price, within one month after the publication of each part, the sum of £6 10s. for each sheet of sixteen pages royal octavo, and in the same proportion for any less quantity than a sheet; Mr. Price to be allowed the sum of £2 on each part for corrections; all above that sum to be paid by Mr. Price, and deducted out of the payment for each part; Mr. Price to give a further assignment, if required, at Messrs. Clarke's expense."

The bill further stated, that in pursuance of the agreements, Mr. Price composed and wrote a second volume of reports of cases argued and determined in the Court of Exchequer, and which the plaintiffs, at their expense, printed and published in four parts, the first part on the 20th of January, 1817, the second on the 23d of April, 1817, the third on the 1st of June, and the fourth on the 13th of September, 1817; and that the plaintiffs duly paid the sums of money due to Mr. Price for the copyright of the second volume, according to the three memorandums of agreement. That in June, 1817, the plaintiffs and Mr. Price agreed to make a further variation in the terms of the agreement of the 27th of April, 1814, and on the 19th of June, 1817, the following memorandum was signed: "London, June 19th, 1817. Memorandum: Mr. Price agrees with Messrs. Clarke to receive for his interest in the agreement for the Exchequer reports, dated 27th of April, 1814, commencing at the third volume, the sum of £7 per sheet, and £3 per part for corrections; all above that sum to be paid by Mr. Price, and if under £3 the difference to be paid to Mr. Price until the sale shall exceed a thousand, but not to apply to any reprints above that number of the parts already published or to be; Mr. Price agrees to give any further assignment of the copyright and future interest to Messrs. Clarke, at their expense."

The bill further stated, that in pursuance of the agreements of the 27th of April, 1814, and the 19th of June, 1817, Mr. Price wrote and composed, and the plaintiffs printed and published, at their expense, the third volume, consisting of four parts, and also two parts of the fourth volume, at the times specified in the bill, and that they had paid to Mr. Price the sums which by the agreements were due to him in respect of the third volume, and also divers sums on account of the fourth volume.

The bill further stated, that Mr. Price had made some contract with the other defendants, Brooke and Sweet, by which he had bound himself to write and compose new volumes of reports of cases argued and determined in the Court of Exchequer, and in the Exchequer Chamber, in order and to the intent that the same might be printed

and published by Brooke and Sweet; and the plaintiffs insisted that they were entitled to have an assignment duly made to them, of all the copyright in such of the reports as he had written and composed, and to be the printers and publishers, and to have an assignment made to them of the copyright of all such of the said reports as he shall hereafter write and compose, upon making to him such payments as he is entitled to by virtue of the agreements of the 27th of April, 1814, and the 19th of June, 1817.

The bill prayed, that the defendant, Mr. Price, might be decreed specifically to perform the said agreements expressed in the said memorandum, by permitting the plaintiffs to print and publish the reports of cases in the Court of Exchequer, so long as he should continue to compose and write the same, upon the terms agreed upon in the said memorandums respectively, and delivering to the plaintiffs the manuscripts of said reports for that purpose, and by duly making and executing to the plaintiffs, an assignment of the copyright of such parts of the said work as had been published, and should thereafter be written and composed, the plaintiffs being ready to pay to him such sums of money as should be justly due to him; also praying an injunction to restrain Mr. Price from printing or publishing, or employing the other defendants, or any other person or persons than the plaintiffs, to print and publish the fifth or any subsequent volume or part of the same work, which Mr. Price should thereafter compose and write, and to restrain the other defendants, Brooke and Sweet, from printing and publishing the said work so written and composed, or to be written and composed, or any part thereof.

The answers submitted, that on the true construction of the agreements, Mr. Price was not bound to employ the plaintiffs as the publishers of all future reports to be written by him; that the plaintiffs were informed in October, 1818, of the contract between Mr. Price and the other defendants; that on the first of April, 1819, the work was advertised as being about to be published, and that the defendants had now printed a considerable part of the fifth volume, and had thereby incurred great expense; and that the plaintiffs, having suffered such expense to be incurred, were not entitled to the assistance of the court.

An injunction having been obtained *ex parte*, on the filing of the bill, and on affidavit, a motion was now made to dissolve it.

*Mr. Wetherell, Mr. J. Wilson, and Mr. Price* for the defendants Price and Sweet.

*Mr. Shadwell* for the plaintiffs.

THE LORD CHANCELLOR. The case of *Morris v. Colman* is essentially different from the present. In that case, *Morris, Colman, and*

other persons, were engaged in a partnership in the Haymarket Theatre, which was to have continuance for a very long period, as long indeed as the theatre should exist. Colman had entered into an agreement which I was very unwilling to enforce; not that he would write for the Haymarket Theatre, but that he would not write for any other theatre. It appeared to me that the court could enforce that agreement by restraining him from writing for any other theatre. The court could not compel him to write for the Haymarket Theatre; but it did the only thing in its power; it induced him indirectly to do one thing, by prohibiting him from doing another. There was an express covenant on his part contained in the articles of partnership. But the terms of the prayer of this bill do not solve the difficulty; for if this contract is one which the court will not carry into execution, the court cannot indirectly enforce it, by restraining Mr. Price from doing some other act. This is an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published by the plaintiffs. In *Morris v. Colman*, there was a decree directing the partnership to be carried on; it could not be put an end to; and it was the duty of the parties to interfere. But I have no jurisdiction to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case, say that I will induce him to write for the plaintiffs by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear, that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case.

Injunction dissolved.

The bill was afterwards dismissed, with costs, for want of prosecution.

## KIMBERLEY v. JENNINGS.

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V.C., JANUARY  
28, 1836.

[*Reported in 6 Simons 340.*]

THE bill stated that the plaintiffs carried on the business of factors and merchants, in co-partnership, at Birmingham; that on the 27th of January, 1834, they took into their employment the defendant, Jennings, as their clerk, upon the terms and conditions after mentioned; and, thereupon, the plaintiffs and the defendant duly made and executed an agreement, dated the 27th of January, 1834, and which was as follows: "The said John Richards Jennings, for the considerations herein-after mentioned, doth hire himself to the said James Kimberley and William Kimberley, and the survivor of them, and he doth hereby undertake and agree that he will serve them and the survivor of them, for the term of six years, to commence and be computed from the day of the date of these presents, and work for and be employed by and in the name and on the behalf of the said James Kimberley and William Kimberley, and the survivor of them, in the capacities of a clerk, traveler, and bookkeeper, in the trade or business of factors now carried on by the said James Kimberley and William Kimberley, in Birmingham, aforesaid, and in obtaining orders for and selling all sorts of goods, wares, merchandise, and commodities belonging thereto, and receiving the prices for the same, as they, the said James Kimberley and William Kimberley, or the survivor of them, shall order and direct, and in so doing shall and will employ all his best services and attentions at all times, and shall and will enter and make just and true accounts in the books of the said James Kimberley and William Kimberley, of all goods, wares, merchandises and commodities bought and sold, money, bills of exchange, and promissory notes received and paid, and of all other things whatsoever relating to the said trade or business which shall come or be committed to his care, management or disposal, and from time to time remit, pay and deliver the money, bills of exchange and promissory notes of or belonging to the said James Kimberley and William Kimberley, or the survivor of them, and make, render and give fair and true accounts of all orders taken by him, and of all actings and doings in or relating to the said trade or business, to the said James Kimberley and William Kimberley, or the survivor of them, when and so often as he shall be thereunto requested, and also shall not nor will, during the said term of six years, work for, or for the use or benefit of, or be otherwise engaged or employed by any other person or persons other than the

said James Kimberley and William Kimberley, or the said survivor of them, in the capacities aforesaid, or in any other trade, business, profession or employment whatsoever, without the license or consent of the said James Kimberley and William Kimberley, or the survivor of them, in writing, under their or his hands or hand, for that purpose, first had and obtained; and the said James Kimberley and William Kimberley, for and in consideration of the service of the said John Richards Jennings, and the performance of the agreements of the said John Richards Jennings herein contained, do, and each of them doth, hereby agree with the said John Richards Jennings that they, the said James Kimberley and William Kimberley, and the survivor of them, shall and will, from time to time, during the said term of six years, well and truly pay or cause to be paid to the said John Richards Jennings the salary or wages following, that is to say, during the first two years of the said term, the salary or wages of £150 per annum; during the third and fourth years of the said term, the salary or wages of £160 per annum; and during the fifth and last years of the said term the salary or wages of £200 per annum, without any deduction or abatement whatsoever out of the said respective yearly sums or wages, save and except such as shall be made by virtue of these presents; and, also, shall and will, from time to time during the said term of six years, well and truly pay, or cause to be paid, unto the said John Richards Jennings, all reasonable, usual and necessary traveling expenses. Provided that, in case the said John Richards Jennings shall, during the said term of six years, become and be incapable from illness or indisposition of serving the said James Kimberley and William Kimberley, or the survivor of them, in the capacities aforesaid or otherwise in the said trade or business according to the true intent and meaning of these presents, or shall absent himself from, or neglect the service of the said James Kimberley and William Kimberley, without their, or one of their license or consent, in writing, under their, or one of their hands or hand, for that purpose, first had and obtained, then, and in either of the said cases, it shall be lawful for the said James Kimberley and William Kimberley, and the survivor of them, wholly and absolutely to dismiss and discharge the said John Richards Jennings from their service, and to discontinue the payment of the said salary or wages from thenceforth or else, at their or his own option, so often as the same respectively shall happen, it shall and may be lawful for the said James Kimberley and William Kimberley, or the survivor of them, to retain the said sum or wages, or deduct a proportionate part thereof, for the time that such incapacity or absence or neglect, as the case may be, shall endure, to and for their own use and benefit. Provided always, and it is hereby understood, agreed, and declared, between and by the said parties hereto, that, at the end of the said term of six years, the

said parties hereto shall be and become partners in the said business, upon such terms, conditions and restrictions as shall be mutually agreed upon by the said James Kimberley and William Kimberley and John Richards Jennings. The bill then stated that, for some time after the agreement was made, the plaintiffs employed the defendant to travel for them in various parts of the country, in the way of their business, in selling and obtaining orders for goods and merchandises in which they dealt, and in receiving moneys for the same, subject, however, to such directions as the plaintiffs thought proper, from time to time, to give him; that the defendant, having been in the employ of the plaintiffs nearly twelve months, had become acquainted with their mode of dealing and the manner in which they transacted their business, and became acquainted with their customers on the different roads or journeys whereon they had employed him, and it was, therefore, desirable that they should, if possible, continue him in the discharge of his allotted duties; that, on the 8th of January, 1835, the plaintiffs and Jennings met at Birmingham, and Jennings expressed his desire to the plaintiffs to procure some better terms as to the promised partnership with them, and pressed them to specify what proportion of the trade he should have; but the plaintiffs then refused to comply with such request, and informed the defendant that that subject must be left for arrangement when the term of his servitude under the articles of agreement should expire, and would depend upon his conduct and other circumstances in the meantime; that the defendant left the plaintiffs without coming to any terms, but, on the following day, returned and informed them that he only wanted a memorandum saying that he should have an interest in the trade on the expiration of his servitude; that the plaintiffs, with the view of reconciling the defendant to the due discharge of his duty, and to obviate the inconvenience that would arise from the suspension of his services, were induced, on the 9th January, 1835, to sign and give to the defendant the following memorandum:

“We hereby undertake to give our traveler, John Richards Jennings, a future share in the profits of our trade, as soon as he shall have completed the terms of his engagement with us, being in consideration (in addition to his salary) of his services during his engagement.” The bill then alleged that the defendant, in his subsequent dealings with the plaintiffs’ customers, greatly relaxed in his diligence and efforts to serve the plaintiffs; and, on that account, they, in October, 1835, deemed it expedient to employ him as a clerk and bookkeeper in their counting-house, instead of sending him on journeys, but he refused to be so employed, and quitted their service on the 6th of November, 1835, without their consent; that the plaintiffs always had been, and still were ready to perform their parts of the agreements of January, 1834, and January, 1835;

that the defendant had lately commenced business as a factor and general merchant, in Birmingham, in opposition to the plaintiffs, and contrary to the true intent and meaning of the first agreement; and threatened to engage himself with other factors and merchants, and to act for them as their traveler, either separate from or in addition to the said business on his own account. The bill prayed that the defendant might be restrained, by the decree of the court, and, in the meantime, by the order of the court during the remainder of the term of six years mentioned in the first agreement, from working for or for the use or benefit of, or otherwise being engaged or employed by any other person or persons than the plaintiffs, in the capacities in that agreement mentioned, or in any other trade, business, profession or employment whatsoever, without the consent of the plaintiffs, and, in particular, from carrying on the trade which he was then carrying on, the plaintiffs being ready and willing and thereby offering to perform the two agreements on their parts.

The defendant demurred for want of equity.

*Sir William Horne* and *Mr. Hayter* in support of the demurrer.

*Mr. Knight* and *Mr. G. Richards* in support of the bill.

The VICE-CHANCELLOR. It does not clearly appear to be the meaning of the agreement that, if the event happened that the defendant did not continue during the whole term of six years in the service of the plaintiffs, he should be disabled from engaging in any other service or employment for the remainder of the term. It has been assumed, in the course of the argument, that this part of the agreement is to be taken by itself, and that, whatever might happen during the term, the defendant should not engage in any other employment. But, attending to the whole of the agreement, the true construction of it seems to be that, during such portion of the term as the defendant should continue in the service of the plaintiffs, he should not enter into any other employment; but, if he should be dismissed during the term, then that he might engage himself in the service of other persons. Supposing, however, the meaning of the agreement to be such as I have stated it to be, still it would afford a strong reason against the interference of the court; for it would be what is commonly termed a hard bargain, inasmuch as the agreement is so constructed that if, from illness or any other cause over which the defendant could have no control, he should become incapable of serving the plaintiffs, they have the option either of discharging him, or discontinuing the payment of his salary, and insisting that, for the remainder of the six years, he shall not engage in the service of any other individual. Nothing could be more harsh towards a young man dealing with great traders than that he should be allowed to enter into an agreement which placed him

so entirely in their power. And, although events have happened which have precluded the plaintiffs from availing themselves of this harsh stipulation, still I must look at the agreement as it was originally concocted, in order to see whether, on the whole, it was such as this court would countenance.

Then, at the end of the agreement, there is this stipulation, that, at the end of the term of six years, the parties should become partners upon such terms, conditions and restrictions as should be mutually agreed upon between them. This was an essential and important part of the agreement, and was so considered by both parties; and although the performance of it was to depend on the defendant's good conduct, and the terms of the partnership were to be subsequently arranged, it is plain that he so considered it, from his having expressed his desire to the plaintiffs, at the meeting between them on the 8th January, 1835, to procure some better terms as to the promised partnership, and from his having pressed them to specify what proportion of the trade he was to have, and, further, from his having, on the following day, obtained from them the second agreement, in which they again held out to him the prospect of a future partnership. The whole of the agreement must be taken together; and, though that portion of it which relates to the partnership is so vague and loose that the court cannot execute it, still it is evident that the defendant was looking forward to the time at which he should have a share of the profits; and this court is not at liberty to say that that portion of the agreement on which it cannot act shall be rejected, and that the other part, on which it can act, shall be retained.

It is observable that the bill represents that the plaintiffs are ready and willing to perform the agreement on their parts, but it does not ask for a specific performance; and it is obvious that, if the plaintiffs were required by the defendant to admit him into partnership, they might insist on such terms as would render it impossible that they ever should become partners. The plaintiffs, however, by this offer, show that, in their view, the stipulation at the end of the agreement was material, though they might act in such a way as that, virtually, they should not be bound by it.

Then it was said that the court might execute a negative contract. I admit it. I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant, on the ground that a valuable consideration had been given for it. But here the negative covenant does not stand by itself; it is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership.

In the first place, this agreement cannot be performed in the whole,



and, therefore, this court cannot perform any part of it; in the next place, it is not to be construed as the plaintiffs contend for; and, lastly, it is a hard bargain, and, therefore, this court will not interfere.

Demurrer allowed.

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WHITTAKER AND ANOTHER v. HOWE.

IN CHANCERY, BEFORE LORD LANGDALE, M.R., JANUARY 13, 18, 1841.

[*Reported in 3 Beavan 383.*]

THE plaintiffs in this case moved for an injunction to restrain the defendant from detaining and keeping possession of or destroying certain documents; and also to restrain him from practicing or carrying on the business of an attorney and solicitor. The circumstances which gave rise to the suit and motion were as follows:

"In the year 1831, the plaintiff Mr. Whittaker, being about to procure himself to be admitted an attorney and solicitor, and to form a partnership with the co-plaintiff, Mr. Tatham, desired to purchase the business which was then carried on by the defendant Mr. Howe and by his then partner Mr. Heptinstall, and for these purposes an agreement, dated the 4th of August, 1831, was made and executed between and by the plaintiffs, and Howe and Heptinstall, whereby it was agreed, that Whittaker, upon his admission in Michaelmas Term then next, should become a partner with Howe and Heptinstall for two years, and should give £5,000 for the partnership, and as the consideration for the absolute purchase of all their interest in the business during and after the expiration of the term of two years. And Howe and Heptinstall agreed to put Whittaker into possession of all the profits of the business from the time that the £5,000 should be secured as therein mentioned, but they were nevertheless to continue in business as the co-partners of Whittaker for two years from such time, and were during such two years to attend at the chambers wherein the business should be carried on, and it was agreed that Howe and Heptinstall should carry on, and in all things aid and assist Whittaker in carrying on the same, as they had been accustomed to do (Whittaker, or Whittaker and Tatham, finding the necessary capital). And that Howe and Heptinstall should also respectively use their utmost endeavors to retain their then present clients, and secure the possession of the said business, as the same had been and was carried on by them, to Whittaker, during the term of two years and after the expiration thereof; and further that neither of them, Howe and Heptinstall, should afterwards practice as solicitors or attorneys in any part of Great Britain for the space of twenty years without the consent of Whittaker."

And it was also agreed that the plaintiff Tatham should, from the admission of Whittaker as attorney, become a co-partner with Whittaker for nine years, and receive a fixed portion of the profits, and "that all books and accounts which had been theretofore kept in respect of the said business should be kept at the chambers where the business should be carried on, with liberty for any of the parties to the agreement, or their representatives, to have access thereto."

Mr. Whittaker secured the payment of the £5,000, as required, on the 7th of November, 1831, and he became admitted as an attorney and solicitor. The agreement was acted upon, and the business carried on under the firm of Howe, Heptinstall, and Whittaker.

The money was actually paid in the month of June, 1832, and Mr. Howe received £3,000 as his share of it.

During the progress of the two years, at the end of which Messrs. Howe and Heptinstall were to retire, Mr. Whittaker began to apprehend that even after the expiration of two years it might be very important to him to have the advantage of being assisted by the greater experience and the established character of Mr. Howe, and in May, 1833, he wrote a letter to Mr. Howe, thereby, very earnestly requesting him to continue his assistance in the business after the end of the two years. After some treaty Mr. Howe agreed to do so, in consideration of his receiving £500 a year as a remuneration, which was some time afterwards increased to £700 a year.

Mr. Heptinstall retired from the business altogether at the end of two years. Mr. Howe continued to act under the new arrangement, under which a question arose, whether he was a partner with Whittaker and Tatham. This question did not appear to have arisen out of any dispute as to the emoluments of the business, but seemed rather to be one of liability and feeling, and particularly whether the defendant stood in relation to Messrs. Whittaker and Tatham in the capacity of clerk or in some superior station.

On the 12th of August, 1840, the defendant sent to the plaintiff Whittaker a letter stating, amongst other things, "that all intercourse in the nature of partnership and otherwise must cease at the expiration of the nine years from whence he entered partnership," which occurred on the 7th of November, 1840.

In August, 1840, the dispute as to the partnership still continued. Mr. Howe insisted upon its being dissolved. Mr. Whittaker thought there was no partnership to dissolve, but at last they agreed to sign and publish a notice of dissolution of the partnership, and at the same time Mr. Howe signed an acknowledgment that Mr. Whittaker's signature of the notice of dissolution should not prejudice any question between them as to a partnership having actually subsisted.

About the same time the name of the firm painted on the door of the chambers was altered, and the name of Howe being separated from its former connection with the others was painted on the door separately from them.

On the 25th of December, 1840, in the absence and without the knowledge of Whittaker and Tatham, Mr. Howe removed a great many books, deeds, documents, and papers from the chambers in Lincoln's Inn, where the business was carried on, to his own chambers, amongst which were some of those included in the articles of August, 1831, and others belonging to the clients of the partnership.

Mr. Howe took chambers in the neighborhood, for the purpose and with the intention of carrying on business as an attorney and solicitor, and, as was stated by the plaintiffs' affidavit, he threatened and intended to solicit the clients of plaintiffs' partnership, and to induce or endeavor to induce such clients to take away their business from the plaintiffs' firm, and to employ him, the defendant, in respect of their business, and he intended to make use of the documents and papers which were so as aforesaid surreptitiously obtained by him from the chambers of said partnership, for the purpose of furthering his said designs, and of preventing the plaintiffs from transacting the business of their said clients, and of otherwise embarrassing the plaintiffs in the conduct of such business. It was also alleged by the plaintiffs, that the defendant intended to practice in the name of a third person in such manner as to evade his agreement.

The plaintiffs thereupon filed their bill, and now moved for an injunction "to restrain the defendant Howe from detaining and keeping possession of the books, etc., from the chambers occupied by the plaintiffs," and from permitting the same to remain away from the office of the plaintiffs, etc., and "from practicing or in any manner carrying on business as a solicitor or attorney in any part of Great Britain," etc., and to restrain him from soliciting the clients of the late firm of Howe and Heptinstall, to transfer their business from the plaintiffs to any other solicitor or attorney, or to cease to employ them, and from acting as the solicitor or attorney of any such clients.

*Mr. Pemberton, Mr. Romilly, and Mr. Freeling* in support of the motion.

*Mr. G. Turner and Mr. Bacon, contra.*

THE MASTER OF THE ROLLS. With respect to that part of the motion which applies to the deeds and papers, I shall, on the faith that Mr. Howe will carry into effect the intention which has been declared on his part by his counsel, reserve any order I have to make on this occasion; an opportunity will thus be given of making some communication in the meantime. Finding it necessary therefore to reserve the order I may

have to make on that part of the case, I think it would be better not to make any order whatever at present. I will, however, state my present opinion as far as it is now formed, and will take an opportunity in the meantime of considering the nature of the injunction which I ought to grant.

I confess there is something in all contracts of this nature of which I have entertained some doubt. Where clients rely on the professional skill and knowledge of the individual they have long employed, I have some doubt as to the policy of sanctioning the purchase of their recommendation of the clients to other persons. These doubts have not originated with myself, because I recollect very well their being long dwelt upon, and commented on by Lord Eldon, not only in the case of a solicitor and his clients, but in the cases of medical men and their patients. I perfectly recollect a case in which the professional practice of one physician had been sold to another, wherein the policy of permitting such arrangements was the subject of great discussion and consideration. It is not, however, for me to act upon any doubts I may entertain of that nature, because agreements of this description have been too often sanctioned to be now questioned. [After referring to the painful circumstances of this case, his Lordship said] I think, notwithstanding the able argument in this case, that there must to some extent be an injunction against the defendant with regard to the practice which it seems he now intends to carry on; but as some time must elapse before a final judgment can be pronounced on this motion, I will in the meanwhile read over the affidavits and refer to the authorities, and I will consider the extent of the injunction which must be granted. I trust, that in the meantime Mr. Howe will act *bonâ fide* in accordance with the instructions he has given his counsel with respect to the papers.

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Jan. 18.—Affidavits being now produced as to the delivery up of the papers, etc.,

The MASTER OF THE ROLLS said. In order that I may make an order applicable to the papers and boxes under the present state of circumstances, I think it will be necessary to examine minutely the additional affidavit now produced, and perhaps it may be necessary for the plaintiffs to afford some explanation thereon. In the meantime, I think it my duty to do all that the jurisdiction of the court enables me to do to protect these plaintiffs, and I will proceed to state my opinion as to the injunction I must pronounce.

The motion is for an injunction to restrain the defendant from detaining and keeping possession of, or destroying certain documents, and also to restrain him from practicing or carrying on business as an

attorney and solicitor. [His Lordship stated the agreement between the parties, and the circumstances under which it was entered into, and the subsequent arrangement between the plaintiffs and the defendant, Mr. Howe, and proceeded.] Mr. Howe continued to act under the new arrangement, and a question arose whether, under that arrangement, he was a partner with Whittaker and Tatham, or not. That he was subject to the liabilities of a partner as between the firm and other parties, appears to me evident from the use which was made of his name and the nature of his employment. Whether he was to be called a partner as between himself and Whittaker and Tatham is not very material, because, if a partner, he was to have the fixed sum of £500 and afterwards £700 a year as and for his share of profits, and if not a partner he was to receive the same sum as a remuneration for his services. Nominally, at least, he was a partner, and with that name he was employed as the assistant and adviser of the plaintiffs and not in any inferior capacity.

In August, 1840, the dispute as to the partnership continued. Mr. Howe then insisted on its being dissolved; Whittaker thought there was no partnership to dissolve, but at last they agreed to sign, and did sign and publish a notice of dissolution of the partnership, but at the same time Mr. Howe signed an acknowledgment that Whittaker's signature of the notice of dissolution should not prejudice any question between them as to a partnership having actually subsisted between them. About the same time the name of the firm, painted on the door of the chambers, was altered, and the name of Mr. Howe, being separated from its former connection with the others, was painted on the door separately from them.

In all this I confess that I see nothing in the conduct of Mr. Howe which the plaintiffs are entitled to complain of; it was optional with him whether he would permit his name to continue in the firm or not, or whether he would or not continue to give his personal aid in carrying on the business. He might put an end to his separate agreement for that purpose when he pleased.

But upon a careful perusal of the affidavits, I find nothing upon which I can safely conclude, or from which it appears probable that Mr. Whittaker had in any way released Mr. Howe from the obligations into which he had entered on the 4th of August, 1831; for additional consideration Mr. Howe was to render additional aid in carrying on the business, but the duty for which the former consideration was actually paid was not altered. If Mr. Howe thought that he was at liberty to practice for himself notwithstanding that agreement, I think that he has not shown any sufficient grounds for that opinion, and that whatever his own view might be, it is not justified by the facts which he has stated;

neither does it appear to me to be shown by the evidence now before me, that after August, 1840, he so acted for himself as solicitor, as to acquire a right to do so by the acquiescence and consent of Whittaker. Nevertheless, on the 25th of December, in the absence and without the knowledge of Whittaker and Tatham, Mr. Howe removed a great many documents from the chambers where the partnership business was carried on to chambers of his own, where he now insists he has a right to carry on business for himself, and his defense is that the agreement he entered into is void, or if not void, that it is such that this court cannot specifically perform ; and therefore he, with the consideration in his pocket, has a right to act in violation of the contract for which the consideration was given.

With respect to the validity of the agreement, it is not now made a question whether attorneys and solicitors can lawfully agree to secure their clients to the attorneys and solicitors who succeed them in business. In *Candler v. Candler*,<sup>1</sup> Lord Eldon, referring to *Bunn v. Guy*,<sup>2</sup> said, "I doubted whether professional men could be recommended, not for skill and knowledge in the profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the Court of King's Bench was of a different opinion, though I never could entirely reconcile myself to their doctrine." But the agreement as to this being undisputed, it is alleged to be void as being in restraint of the exercise of trade or profession. In the cases which have occurred I have not observed any distinction taken between trade and profession ; but the distinction between different sorts of trades or professions has been taken, and appears to be material.

In this case a valuable consideration being given, the question is, whether the restraint intended to be imposed on Mr. Howe is reasonable. The words of Chief Justice Tindal in *Horner v. Graves*<sup>3</sup> may be safely adopted. "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party [requires] can be of no benefit to either ; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy."

Now, whatever may be the talents, knowledge, and experience of Mr. Howe, and I am disposed to rate them highly, I cannot say that in my

<sup>1</sup> Jac. 231.

<sup>2</sup> 4 East 190.

<sup>3</sup> 7 Bing. 743.

opinion the public interest will be in any way interfered with or affected by his not being allowed to practice as an attorney and solicitor in Great Britain for twenty years without the consent of Mr. Whittaker.

The question therefore is, whether the restraint ought to be considered as reasonable in this particular case. The business is that of an attorney and solicitor, which, to a large extent, may be carried on by correspondence or by agents, and as to which it has already been decided, that a restraint of practice within a distance of 150 miles was not an unreasonable restraint. It was decided in the case of the surgeon dentist, where the occupation required the personal presence of the practitioner and the patient at the same place, that a restraint of practice within a distance of 100 miles was an unreasonable restraint.

Agreeing with the Court of Common Pleas, that in such cases "no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive," having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in *Davis v. Mason*,<sup>1</sup> "I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line."

At the present, therefore, I cannot come to the conclusion that this agreement is void; and I do not think that this court can refuse to grant an injunction to restrain the violation of a contract or covenant, because there may be some part of the agreement which the court could not compel the defendant specifically to perform.

In the progress of the cause it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received the consideration is, to say the least, so far doubtful that he ought not to be permitted to take the law into his own hands, and carry on his business at his own pleasure, and without regard to the severe injury which he may do to the plaintiffs.

Restrain him from practicing as an attorney or solicitor in any part of Great Britain, either in his own name or in the name of any other person, and from endeavoring to induce any persons who were the clients of Howe and Heptinstall, or of Howe, Whittaker and Tatham, to cease or abstain from employing Whittaker and Tatham as their attorneys or solicitors.

<sup>1</sup> 5 Term Rep. 118.

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NOTE.—An injunction was afterward granted as to the deeds and papers, but which has not yet been drawn up.—REPORTER.

## HILLS v. CROLL.

IN CHANCERY, BEFORE LORD LYNTHURST, C., JANUARY, FEBRUARY,  
JULY, 1845.

[*Reported in 2 Phillips 60.*]

THE defendant being the patentee of certain inventions for manufacturing and purifying gas, an agreement was entered into on the 22d of March, 1841, between him and the plaintiff, whereby, in consideration of £200 paid by the plaintiff to the defendant, it was agreed that the defendant should, for the term of fourteen years, purchase of the plaintiff and of no other person, without the plaintiff's consent in writing, all the acids that he should require for the manufacture of muriate or sulphate of ammonia, paying for the same according to the regular course of trade, at the average price of the day, to be ascertained as therein mentioned; and that he should, during the same period, sell to the plaintiff (unless the plaintiff should refuse to purchase the same) all the muriate or sulphate of ammonia which he should manufacture by his said patent processes at the average price of the day, to be ascertained as therein mentioned. Then followed an express covenant on the part of the plaintiff to deliver to the defendant all the acids he might require for his said manufacture, he paying the plaintiff for the same at the average price of the day, to be ascertained as aforesaid, and to pay the defendant for the said muriate and sulphate of ammonia at the rates aforesaid; and a like covenant on the part of the defendant that he would not during the said term use in his manufacture, or purchase of any other persons to be used therein, any acid except acid to be purchased of the plaintiff without his consent in writing.

After this agreement had been acted on for a considerable time the defendant refused to abide by it any longer, and proceeded to purchase acids for his manufacture from other persons than the plaintiff; whereupon this bill was filed praying a specific performance of the agreement, and an injunction to restrain the defendant from purchasing acids elsewhere than from the plaintiff.

A motion for an injunction having been refused by the Vice-Chancellor of England, it was renewed by way of appeal before the Lord Chancellor (Lyndhurst).

*Mr. Wakefield, Mr. J. Parker, and Mr. Torriano* appeared for the plaintiff.

*Mr. Bethell, Mr. Romilly, and Mr. Welford* for the defendant.

All the authorities cited in *Dietrichsen v. Cabburn* were referred to in the argument.

The LORD CHANCELLOR, in giving judgment, said: There is a stipu-



lation on the part of Hills that he will supply the acids, and there is a stipulation on the part of Croll that he will purchase acids from Hills and from no other person. Has the court any power to compel Hills to fulfill his part of the agreement? Can the court order him to continue the manufacture of acids, or to purchase them elsewhere for the purpose of supplying the defendant? It is clear, I apprehend, that the court has no such power. In the case of *Colman v. Morris*, Mr. Colman was restrained from writing for any other theatre, the court inferring that that would compel him, or have a tendency to compel him, to write for the Haymarket Theatre; but in this case the court has no power to compel the plaintiff to supply the defendant with acids by ordering him not to supply any other person; that is not the agreement, nor was it ever intended that it should be the agreement; therefore it is clear that the court cannot either directly or indirectly compel him to perform his part of the agreement. And it has been laid down again and again, and very recently in a case before Sir Edward Sugden, in Ireland,<sup>1</sup> that unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it. When, therefore, this cause comes to a hearing the court will not have jurisdiction to restrain the defendant from purchasing acids elsewhere, because it will not be able to compel the plaintiff to furnish all the acids that may be necessary for the manufacture carried on by the defendant. If it cannot do this at the hearing, it follows of course that it will not do it in the meantime upon an interlocutory application. The decision of the Vice-Chancellor must therefore be affirmed.<sup>2</sup>

<sup>1</sup> *Gervais v. Edwards*, 2 Dr. & W. 80.

<sup>2</sup> The following observations on this case are suggested by that of *Dietrichsen v. Cabburn* (supr., p. 52).

Considering the sum of money actually paid by the plaintiff at the time of the agreement, and that, for anything that appeared to the contrary, his acids were of the ordinary kind and that the defendant was to purchase them at the ordinary price of the day, there seems to have been some ground for contending (though it is believed that the point was not taken) that the contract amounted to nothing more than a purchase by the plaintiff, for the sum of £200, of the exclusive right of supplying the defendant with acids for his manufacture, and buying of him in return all the ammonia which should be manufactured therefrom, during the term of his patent right, without involving any reciprocal obligation on the part of the plaintiff to continue such course of dealing longer than it suited him to do so.

If such a construction of the contract be admissible, there is of course an end of the argument of non-mutuality. But even supposing that the obligation of the contract was reciprocal, the court appears to have overlooked the distinction between contracts which remain wholly executory and those which have been executed or acted on to such an extent as to give to one of the parties an equity

## ROLFE v. ROLFE.

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V.C., JANUARY  
30, 1846.

[*Reported in 15 Simons 88.*]

IN January, 1833, Francis, William and James Rolfe, tailors and co-partners, having agreed to dissolve their partnership, executed a deed whereby William and James, in consideration of £1,000 paid to each of them, assigned their shares of the business and stock in trade to Francis (who was to carry on the business alone); and covenanted

arising from part performance of the contract, to insist upon an adherence to its terms by the other.

So long as a contract, which is not mutual in point of remedy, rests merely in covenant, the maxim that the court will not enforce a part of an agreement where it cannot compel performance of the whole—in other words, will not give one-sided relief—is undoubtedly true, and applies, it is conceived, as much to the jurisdiction by way of injunction as to that by specific performance; for where the court does interpose by injunction to restrain the violation of a negative term in a contract, it is, in many cases, avowedly done with a view of thereby inducing the defendant to perform some other term which the court has no direct means of enforcing. But it seems perfectly consistent with this that when such a contract has been executed or acted upon so far as to have altered the relation between the parties, and to have given to one of them an equity arising out of those dealings, as distinguished from his original right under the contract itself, the court will, notwithstanding the original non-mutuality of the contract, give effect to that equity, either directly by a decree for specific performance or partially and indirectly by an injunction, according as the nature of the case may admit of the more or less complete measure of relief.

Whether the dealings which may have taken place under a contract not originally mutual in its nature have or have not given to the plaintiff such an equity, and whether, supposing that they have, the jurisdiction of the court can in other respects be safely and properly exercised, is a question of discretion which must be determined by the particular circumstances of each case. And the two preceding cases are authorities, among others, to show that the mere circumstance of a portion of what the plaintiff may have agreed to do remaining executory, and being of such a nature that this court has no means of enforcing it, will not prevent the court from interfering in his behalf if he appear to have so far performed the contract on his part as to render it inequitable for the defendant to withdraw from it. Whether such was or was not the case in *Hills v. Croll*, the writer of these remarks does not presume to offer an opinion; but that the question was one which deserved consideration can hardly be doubted. And it is because that question, and the exercise of discretion connected with it, appear to have been excluded by the view which the court took of the case, that the decision, whether right or wrong in the result, cannot furnish any guide in other cases of a similar kind; and on that account it was not reported until the citation of it in the case of *Dietrichsen v. Cabburn* rendered some notice of it necessary.

—NOTE BY THE REPORTER.

with him that they respectively would not at any time thereafter carry on, practice or engage in the business of a tailor, either alone or with any other person, within twenty miles from the Standard on Cornhill. The deed further witnessed that Francis, in pursuance and performance of the agreement on his part, covenanted with William to employ him as a cutter in the business so long as it should be carried on by him, and William should diligently and faithfully devote his time and attention to it, and to pay him a certain proportion of the profits of the business by way of salary.

After the dissolution of the partnership the plaintiff employed William as a cutter, at the stipulated salary, until shortly before the bill was filed, when William withdrew from his employment, and, as the bill alleged, commenced business as a tailor within the prohibited district in co-partnership with one Willis.

The bill prayed simply for an injunction to restrain William from carrying on the business within the prohibited district, either alone or with any other person.

*Mr. Bethell* and *Mr. Terrell* now moved for the injunction.

*Mr. James Parker* and *Mr. Giffard*, *contra*, said that the court could not enforce the agreement *in toto*; for it could not enforce that part of it which related to the employment of the defendant as a cutter, and, therefore, it ought not to interfere at all: *Kemble v. Kean*,<sup>1</sup> *Kimberley v. Jennings*.<sup>2</sup> Secondly, that the defendant, as appeared by the affidavits in opposition to the motion, was acting not as partner with, but as foreman to Willis, and that his acting in that capacity was not a breach of the agreement.

The VICE-CHANCELLOR said that the bills in the cases cited asked for the specific performance of the agreement; and that the injunctions were sought as only ancillary to that relief; but the bill in the present case asked merely for the injunction. Besides which, the agreement consisted of two distinct parts; one, which was entered into by William, not to carry on the business of a tailor within a certain distance from the Standard on Cornhill, and the other, which was entered into by Francis, to employ William as a cutter, and to pay him a certain percentage on the profits of the business so long as it should be carried on by him, and William should conduct himself diligently and faithfully; that the court certainly would not enforce the latter part of the agreement, not only on account of the nature of it, but because Francis might put an end to it whenever he pleased by ceasing to carry on the business; but nothing was asked as to that part, and only an injunction was asked as to the other part which the court could enforce.

In answer to the objection that William had not broken the agree-

<sup>1</sup> 6 Simons 333.

<sup>2</sup> *Ibid.* 340.

ment because he was acting merely as a foreman, and not as a principal in the business of a tailor, His Honor said that the words of the agreement were that William should not, at any time thereafter, carry on, practice or engage in that business, alone or with any other person or persons; and that as he had engaged with Willis in carrying on the business, he had plainly violated the agreement.

Injunction granted.

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DIETRICHSEN v. CABBURN.

IN CHANCERY, BEFORE LORD COTTENHAM, C., JULY 17, 20, 1846.

[*Reported in 2 Phillips 52.*]

THIS was an appeal from an order of the Vice-Chancellor of England allowing a general demurrer to the bill.

The bill stated that the plaintiff was an extensive vendor of patent medicines, and that from the extent of his business he had, at the date of the agreement after mentioned, great facilities by advertisement on his wrappers, etc., of giving publicity to the medicines sold by him. That the defendant having, in 1840, discovered a receipt for a particular medicine called Cabburn's Antidoloric Oil, he applied to the plaintiff to be his wholesale agent for the sale of it, and that thereupon an agreement in writing was entered into between them, dated 1st October, 1840, whereby the defendant agreed for twenty-one years to employ the plaintiff as his wholesale agent for the sale of the oil, and to supply him with such quantities as he should order at £40 per cent. discount upon the current retail price, and that he would not during that period supply or sell any of the oil to any other person for the purpose of selling it again at a larger discount than £25 per cent. upon such retail price. And in consideration of that agreement on the part of the defendant the plaintiff agreed to continue to act as the wholesale agent of the defendant, and to pay for the oil supplied to him every three months at the price aforesaid.

The bill then stated that after the plaintiff had incurred considerable expense in advertising the oil, whereby it had attained great celebrity and an extensive sale, and though he had in all respects performed the agreement on his part, the defendant became desirous of evading the performance of it as regarded himself, and had, accordingly, supplied divers medicine dealers in various parts of the country with large quantities of the oil at a higher rate of discount than £25 per cent.

The bill charged that the defendant was a wine and spirit merchant,

and that he had not at the date of the agreement, or since, any means of bringing the oil to the notice of the public except through the agency of some person in the plaintiff's line of business. And it prayed an injunction and an account of the profits realized by the defendant from the sales already made by him in violation of the agreement.

*Mr. J. Parker* and *Mr. Glasse* for the appellant.

*Mr. Walker* and *Mr. Bacon* for the respondent.

The LORD CHANCELLOR. The agreement, as stated in the bill, imposed upon the plaintiff no other obligation than that of acting as the defendant's agent, and accounting for and paying to him £60 for every £100 worth of the medicine sold according to the retail price, but upon the defendant it imposed the obligation of so employing the plaintiff and of supplying him with all such quantities of the medicine as he should require, and of not supplying any other person with any of the medicine for the purpose of resale at any higher discount than £25 per cent., the plaintiff's discount being £40 per cent.

The bill alleges that the plaintiff had regularly performed his part of the agreement, but that the defendant had not performed his part, but had supplied other persons for the purpose of resale with the medicine at a larger discount than £25 per cent. It then prays an account of the quantities so supplied to others, and payment of the profits made, and an injunction against such violation of the contract for the future. And the question is, does the bill state a case coming within the jurisdiction of the court? The allowance of the demurrer assumes that it does not; and the ground stated (for I have not had the benefit of seeing a note of the Vice-Chancellor's judgment) is that the court will not prohibit the violation of a negative term in an agreement, unless it has the power of enforcing the positive part of the same agreement.

I cannot but think that there has been some misapprehension of the meaning of the Vice-Chancellor, as applied to this supposed rule; for in the case of *Kimberley v. Jennings*,<sup>1</sup> His Honor, in stating that a violation of a negative term in an agreement will not be restrained in cases in which the positive part of the agreement cannot be enforced, exemplifies it by saying that if the agreement cannot be performed in the whole the court cannot perform any part of it. To the proposition so explained I entirely assent; for it is only applying a well-known rule in cases of specific performance, of which an injunction is in many cases the instrument, and amounts only to this, that if there be such an infirmity in the agreement that it cannot be performed in all its parts, the court will not by an injunction compel the defendant to perform his part of it; and this view of His Honor's opinion is confirmed by the

<sup>1</sup> 6 Sim. 340.

case he put of a consideration actually paid for a negative agreement, in which case he says that an injunction would be granted. I cannot see any difference between a consideration actually paid, and a performance alleged by the plaintiff of all that he had undertaken to do.

The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be confined to cases in which the court has jurisdiction over the acts of the plaintiff; for if that were so it could not interfere to restrain the violation of contracts by tenants, or of duty by agents, as in the case of *Yovatt v. Winyard*,<sup>1</sup> and *Green v. Folgham*,<sup>2</sup> or by an attorney, as in *Cholmondeley v. Clinton*,<sup>3</sup> in none of which cases was there anything to be done by the plaintiff which equity could enforce. Such, also, are cases of injunctions sought by tenants against their landlords, as *Rankin v. Huskisson*,<sup>4</sup> where there was a negative agreement, and *Squire v. Campbell*,<sup>5</sup> where one was attempted to be raised by the exhibition of a plan. In none of these was there any equity to be administered against the plaintiffs, and yet the jurisdiction was assumed; for although in the latter case the injunction was dissolved, that was because I thought no equity was raised by the alleged exhibition of plans, which I was of opinion could not be used for that purpose. The objection now suggested was not raised, or certainly was not the ground of the decision.

Similar to these are cases of injunction to protect legal rights, as patents, copyright, services to mills and others. There is no branch of the equitable jurisdiction requiring more discretion in the exercise of it, but certainly none more beneficial than that of injunction; and I think that the doctrine contended for by the respondent would tend greatly to limit its sphere of action, and deprive many of the benefit of it whose interests require it as much as others.

If the bill states a right or title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement which cannot be otherwise brought under the jurisdiction of a court of equity. In *Martin v. Nutkin*<sup>6</sup> an injunction was granted to restrain the ringing of a church bell, the plaintiff having put a clock in the church in consideration that the bell should not be rung at five in the morning. In *Barrett v. Blagrove*,<sup>7</sup> the proprietor of Vauxhall Gardens obtained an injunction to restrain the lessee of a public house in the neighborhood from selling liquors during the time the gardens were open in violation of his covenant; and, al-

<sup>1</sup> 1 J. & W. 394.<sup>2</sup> 1 Sim. & St. 398.<sup>3</sup> 19 Ves. 261.<sup>4</sup> 4 Sim. 13.<sup>5</sup> 1 My. & Cr. 459.<sup>6</sup> 2 P. W. 266.<sup>7</sup> 5 Ves. 555.

though the injunction was dissolved<sup>1</sup> upon the ground of acquiescence, no objection was made to the exercise of the jurisdiction for want of mutuality.

But I consider the doctrine promulgated by Lord Eldon in *Morris v. Colman*,<sup>2</sup> and in *Clarke v. Price*,<sup>3</sup> as conclusive upon this point. In the former case the defendant was restrained from writing for any other but the Haymarket Theatre, he having entered into an agreement to that effect; but in *Clarke v. Price* there was not any such negative agreement, and that Lord Eldon states to be the ground of his refusing to interfere; if there had been there cannot be a doubt that he would have granted the injunction. It has been said that *Morris v. Colman* was a case of partnership; Lord Eldon does not appear from the report to have proceeded upon any such ground. The present and other cases of the kind are in the nature of partnership, being a joint undertaking for the benefit of the plaintiff and the defendant; and it does not appear why cases of actual partnership should be more favored in the exercise of the jurisdiction by injunction than others.

It being clear that the court will interfere to restrain a departure from the contract of partnership, cases of partnership afford additional instances of the fact that the court is not confined to cases in which it has jurisdiction over the whole contract, the interposition of the court in cases of continuing partnerships having been in many cases considered as very limited.

Looking, therefore, to the whole range of cases in which the court interferes to prevent the breach of a negative agreement, I cannot find any ground for the argument contended for by the respondent; and seeing that the bill alleges sufficient to show that the plaintiff is entitled to the benefit of the negative agreement on the part of the defendant, and that the defendant has violated the agreement, and will, if not restrained, continue to do so, I am of opinion that a case is stated for the interposition of a court of equity and that the demurrer ought to be overruled.

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### LUMLEY v. WAGNER.

IN CHANCERY, BEFORE LORD ST. LEONARDS, C., MAY 22, 26, 1852.

[*Reported in 1 De Gex, Macnaughten and Gordon 604.*]

THE bill in this suit was filed on the 22d of April, 1852, by Benjamin Lumley, the lessee of Her Majesty's Theatre, against Johanna Wagner, Albert Wagner her father, and Frederick Gye, the lessee

<sup>1</sup> 6 Ves. 104.

<sup>2</sup> 18 Ves. 437.

<sup>3</sup> 2 Wils. 157.

of Covent Garden Theatre. It stated that in November, 1851, Joseph Bacher, as the agent of the defendants Albert Wagner and Johanna Wagner, came to and concluded at Berlin an agreement in writing in the French language, bearing date the 9th November, 1851, and which agreement, being translated into English, was as follows :

“The undersigned Mr. Benjamin Lumley, possessor of Her Majesty’s Theatre at London, and of the Italian Opera at Paris, of the one part, and Mademoiselle Johanna Wagner, cantatrice of the Court of His Majesty the King of Prussia, with the consent of her father, Mr. A. Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract : First, Mademoiselle Johanna Wagner binds herself to sing three months at the theatre of Mr. Lumley, Her Majesty’s, at London, to date from the 1st of April, 1852 (the time necessary for the journey comprised therein), and to give the parts following : 1st, *Romeo, Montecchi*; 2d, *Fides, Prophète*; 3d, *Valentine, Huguenots*; 4th, *Anna, Don Juan*; 5th, *Alice, Robert le Diable*; 6th, *An opera chosen by common accord*. Second, The three first parts must necessarily be, 1st, *Romeo*; 2d, *Fides*; 3d, *Valentine* : these parts once sung, and then only she will appear, if Mr. Lumley desires it, in the three other operas mentioned aforesaid. Third, these six parts belong exclusively to Mademoiselle Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement. If Mr. Lumley happens to be prevented by any cause soever from giving these operas he is nevertheless held to pay Mademoiselle Johanna Wagner the salary stipulated lower down for the number of her parts as if she had sung them. Fourth, In the case where Mademoiselle Wagner should be prevented by reason of illness from singing in the course of a month as often as it has been stipulated, Mr. Lumley is bound to pay the salary only for the parts sung. Fifth, Mademoiselle Johanna Wagner binds herself to sing twice a week during the run of the three months; however, if she herself was hindered from singing twice in any week whatever, she will have the right to give at a later period the omitted representation. Sixth, If Mademoiselle Wagner, fulfilling the wishes of the direction, consent to sing more than twice a week in the course of three months, this last will give to Mademoiselle Wagner £50 sterling for each representation extra. Seventh, Mr. Lumley engages to pay Mademoiselle Wagner a salary of £400 sterling per month, and payment will take place in such manner that she will receive £100 sterling each week. Eighth, Mr. Lumley will pay by letters of exchange to Mademoiselle Wagner at Berlin, the 15th of March, 1852, the sum of £300 sterling, a sum which will be



deducted from her engagement in his retaining £100 each month. Ninth, In all cases except that where a verified illness would place upon her a hindrance, if Mademoiselle Wagner shall not arrive in London eight days after that from whence dates her engagement, Mr. Lumley will have the right to regard the non-appearance as a rupture of the contract, and will be able to demand an indemnification. Tenth, In the case where Mr. Lumley should cede his enterprise to another, he has the right to transfer this contract to his successor, and in that case Mademoiselle Wagner has the same obligations and the same rights towards the last as towards Mr. Lumley.

“JOHANNA WAGNER.

“ALBERT WAGNER.

“BERLIN, the 9th November, 1851.”

The bill then stated that in November, 1851, Joseph Bacher met the plaintiff in Paris, when the plaintiff objected to the agreement as not containing an usual and necessary clause, preventing the defendant Johanna Wagner from exercising her professional abilities in England without the consent of the plaintiff, whereupon Joseph Bacher, as the agent of the defendants Johanna Wagner and Albert Wagner, and being fully authorized by them for the purpose, added an article in writing in the French language to the agreement, and which, being translated into English, was as follows :

“Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley.

“DR. JOSEPH BACHER,

“For Mademoiselle Johanna Wagner,  
and authorized by her.”

The bill then stated that the defendants J. and A. Wagner subsequently made another engagement with the defendant F. Gye, by which it was agreed that the defendant J. Wagner should, for a larger sum than that stipulated by the agreement with the plaintiff, sing at the Royal Italian Opera, Covent Garden, and abandon the agreement with the plaintiff. The bill then stated that the defendant F. Gye had full knowledge of the previous agreement with the plaintiff, and that the plaintiff had received a protest from the defendants J. and A. Wagner, repudiating the agreement on the allegation that the plaintiff had failed to fulfill the pecuniary portion of the agreement.

The bill prayed that the defendants Johanna Wagner and Albert Wagner might be restrained from violating or committing any breach

of the last article of the agreement; that the defendant Johanna Wagner might be restrained from singing and performing or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place without the sanction or permission in writing of the plaintiff during the existence of the agreement with the plaintiff; and that the defendant Albert Wagner might be restrained from permitting or sanctioning the defendant Johanna Wagner singing and performing or singing as aforesaid; that the defendant Frederick Gye might be restrained from accepting the professional services of the defendant Johanna Wagner as a singer and performer or singer at the said Royal Italian Opera, Covent Garden, or at any other theatre or place, and from permitting her to sing and perform or to sing at the Royal Italian Opera, Covent Garden, during the existence of the agreement with the plaintiff, without the permission or sanction of the plaintiff.

The answer of the defendants A. and J. Wagner attempted to show that Joseph Bacher was not their authorized agent, at least for the purpose of adding the restrictive clause, and that the plaintiff had failed to make the stipulated payment by the time mentioned in the agreement. The plaintiff having obtained an injunction from the Vice-Chancellor Sir James Parker on the 9th May, 1852, the defendants now moved, by way of appeal before the Lord Chancellor,<sup>1</sup> to discharge His Honor's order.

*Mr. Bethell, Mr. Malins, and Mr. Martindale* in support of the appeal motion.

*Mr. Bacon and Mr. H. Clarke, contra,* in support of the injunction.

THE LORD CHANCELLOR. The question which I have to decide in the present case arises out of a very simple contract, the effect of which is that the defendant Johanna Wagner should sing at Her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal, they in effect come to this, namely, that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

<sup>1</sup> The case was heard by the Lord Chancellor on a representation that it was intended to confine the argument to the legal question alone, which it was said involved an important point of equity jurisdiction, on which the authorities were conflicting.—REPORTER.

I have then to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and commented upon by the defendants in support of their contention. The first was that of *Martin v. Nutkin*,<sup>1</sup> in which the court issued an injunction restraining an act from being done where it clearly could not have granted any specific performance; but then it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods, the defendant having accepted the benefit, but rejected the corresponding obligation, Lord Macclesfield first granted the injunction which the Lords Commissioners at the hearing of the cause continued for the lives of the plaintiffs. That case, therefore, however it may be explained as one of the exceptional cases, is nevertheless a clear authority showing that this court has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance.

The next case referred to was that of *Barret v. Blagrove*,<sup>2</sup> which came first before Lord Loughborough and afterwards before Lord Eldon.<sup>3</sup> There a lease had originally been granted by the plaintiffs, the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler or retailer of wines, or generally any employment that would be to the damage of the proprietors of Vauxhall Gardens; an underlease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by Lord Loughborough. It has been observed in the argument here that in granting the injunction Lord Loughborough said, "It is in the nature of specific performance," and that therefore that case also falls under one of the exceptional cases. When that case came before Lord Eldon he dissolved the injunction, but upon a different ground, namely, on that of acquiescence for many years, and in a sense he treated it as a case of specific performance. As far as the words go, the observations of those two eminent judges would seem to justify the argument which has been addressed to me; in effect, however, it was only specific performance, because a prohibition preventing the commission of an act may as effectually perform an agreement as an

<sup>1</sup> 2 P. W. 266.<sup>2</sup> 5 Ves. 555.<sup>3</sup> 6 Ves. 104.

order for the performance of the act agreed to be done. The agreement in that case being that the house should not be opened for the purposes of entertainment to the detriment of Vauxhall Gardens, the court granted the injunction; that was a performance of the agreement in substance, and the term "specific performance" is aptly applied in such a case, but not in the sense in which it has been used before me.

It was also contended that the plaintiff's remedy, if any, was at law; but it is no objection to the exercise of the jurisdiction by injunction that the plaintiff may have a legal remedy. The case of *Robinson v. Lord Byron*,<sup>1</sup> before Lord Thurlow, so very often commented upon by succeeding judges, is a clear illustration of that proposition, because in that case the defendant, Lord Byron, who had large pieces of water in his park which supplied the plaintiff's mills, was abusing his right by preventing a regular supply to the plaintiff's mill, and although the plaintiff had a remedy at law, yet this court felt no difficulty in restraining Lord Byron by injunction from preventing the regular flow of the water. Undoubtedly there are cases such as that cited for the defendants of *Collins v. Plumb*,<sup>2</sup> before Lord Eldon, in which this court has declined to exercise the power (which in that instance it was assumed to have had) of preventing the commission of an act, because such power could not be properly and beneficially exercised. In that case the negative covenant, not to sell water to the prejudice of the plaintiffs, was not enforced by Lord Eldon, not because he had any doubt about the jurisdiction of the court (for upon that point he had no doubt), but because it was impossible to ascertain every time the water was supplied by the defendants whether it was or not to the damage of the plaintiffs; but whether right or wrong, that learned judge, in refusing to exercise the jurisdiction on very sufficient grounds, meant in no respect to break in on the general rules deducible from the previous authorities.

At an early stage of the argument I adverted to the familiar cases of attorneys' clerks and surgeons' and apothecaries' apprentices and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants; but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefit, and that the prohibition operated upon a concluded contract, and that therefore the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle; it is obvious that in those cases the negative covenant does not come

<sup>1</sup> 1 Bro. C. C. 588.

<sup>2</sup> 16 Ves. 454.

into operation until the servitude is ended, and therefore that the injunction cannot be required or applied for before that period.

The familiar case of a tenant covenanting not to do a particular act was also put during the argument, but it was said that in such a case the jurisdiction springs out of the relation of landlord and tenant, and that the tenant having received the benefit of an executed lease, the injunction operates only so as to give effect to the whole contract; that, however, cannot be the principle on which this court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, this court will not attempt to enforce the execution of the affirmative covenants, either on the part of landlord or the tenant, but will leave it entirely to a court of law to measure the damages; though with respect to the negative covenants, if the tenant, for example, has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done. So far, then, each of the cases to which I have referred appears to me to be in direct contravention of the rules which have been so elaborately pressed upon me by the defendants' counsel.

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference, but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant—the one being ancillary to, concurrent, and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion that if she had attempted even in the absence of any negative stipulation to perform at another theatre, she would have broken the spirit and true meaning of the

contract as much as she would now do with reference to the contract into which she has actually entered.

Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect, too, of the injunction in restraining J. Wagner for singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre; the injunction may also, as I have said, tend to the fulfillment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me; but, after the best consideration which I have been enabled to give to the subject, the conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of *Morris v. Colman*.<sup>1</sup> There Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre, and they were partners in that concern, and by the deed of

<sup>1</sup> 18 Ves. 437.

partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket. He did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. Lord Eldon granted an injunction against Mr. Colman writing for any other theatre than the Haymarket; and the ground on which Lord Eldon assumed that jurisdiction was the subject of some discussion at the bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord Cottenham was mistaken in the case of *Dietrichsen v. Cabburn*,<sup>1</sup> when he said that Lord Eldon had not decided *Morris v. Colman* on the ground of there being a partnership. I agree that the observations which fell from Lord Eldon in the subsequent case of *Clarke v. Price*<sup>2</sup> show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground. In the argument of *Morris v. Colman*,<sup>3</sup> Sir Samuel Romilly suggested a case almost identical with the present. He contended that the clause restraining Mr. Colman from writing for any other theatre was no more against public policy than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged would have been. Lord Eldon, advertising in his judgment to the case put at the bar, said, "If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?" He gives the clearest enunciation of his opinion, that that would be an agreement which this court would enforce by way of injunction.

The late Vice-Chancellor Shadwell, of whom I always wish to be understood to speak with the greatest respect, decided in a different way in the cases of *Kemble v. Kean*,<sup>4</sup> and *Kimberley v. Jennings*,<sup>5</sup> on which I shall presently make a few observations. In the former case he observed that Lord Eldon must be understood in the case of *Morris v. Colman*<sup>6</sup> to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theatre. I must, however, entirely dissent from that interpretation. Lord Eldon's words are perfectly plain; they want no comment upon them; they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theatre beyond the implied engagement

<sup>1</sup> 2 Phil. 52.<sup>2</sup> 2 Wils. 157.<sup>3</sup> 18 Ves. 437.<sup>4</sup> 6 Sim. 333.<sup>5</sup> 6 Sim. 340.<sup>6</sup> 18 Ves. 437.

that he would not perform anywhere else; and I have come to a very clear conclusion that Lord Eldon would have granted the injunction in that case, although there had been no partnership.

The authority of *Clarke v. Price*<sup>1</sup> was much pressed upon me by the learned counsel for the defendants; but that is a case which does not properly belong to their argument, because there was no negative stipulation, and I quite admit that this court cannot enforce the performance of such an affirmative stipulation as is to be found in that case; there the defendant having agreed to take notes of cases in the Court of Exchequer and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and Lord Eldon, when refusing the injunction, in effect said, "I cannot compel Mr. Price to sit in the Court of Exchequer and take notes and compose reports"; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant on the part of the defendant that he would not compose reports for any other person. The expressions in the judgment are: "I cannot, as in the other case" [referring to *Morris v. Colman*<sup>2</sup>], "say that I will induce him to write for the plaintiff by preventing him from writing for any other person"; and then come these important words: "for that is not the nature of the agreement." Lord Eldon, therefore, was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he, therefore, very properly, as I conceive, refused that injunction. That case, therefore, in no respect touches the question now before me, and I may at once declare that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at Her Majesty's Theatre, I should not have granted any injunction.

Thus far, I think, the authorities are very strong against the defendants' contention; but the case of *Memble v. Kean*,<sup>3</sup> to which I have already alluded, is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr. Kean entered into an agreement precisely similar to the present. He agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and the Vice-Chancellor, Shadwell, was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or

<sup>1</sup> 2 Wils. 157.

<sup>2</sup> 18 Ves. 437.

<sup>3</sup> 6 Sim. 333.



actually doing, because the court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the Lord Chancellor's judgment in *Morris v. Colman*,<sup>1</sup> he put that paraphrase or commentary upon it which I have referred to—that is, he says, “Lord Eldon is speaking of a case where the parties are in partnership together.” I have come to a different conclusion, and I am bound to say that, in my apprehension, the case of *Kemble v. Kean* was wrongly decided and cannot be maintained.<sup>2</sup>

The same learned judge followed up his decision in that case in the subsequent one of *Kimberley v. Jennings*.<sup>3</sup> That was a case of hiring and service, and the Vice-Chancellor there virtually admitted that a negative covenant might be enforced in this court, and quoted an instance to that effect within his own knowledge. He said, “I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district. The court would execute such a covenant on the ground that a valuable consideration had been given for it.” He admits, therefore, the jurisdiction of the court if nothing but that covenant remained to be executed. The learned judge, however, adds, “but here the negative covenant does not stand by itself. It is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership. . . . This agreement cannot be performed in the whole, and therefore this court cannot perform any part of it.” Whatever may have been the mutual obligations in that case which prevented the court from giving effect to the negative covenant, I am not embarrassed with any such difficulties here, because, as I have already shown, both the covenants are on the part of the defendants.

The case of *Hooper v. Brodrick*<sup>4</sup> was cited as an instance in which the court had refused an injunction under circumstances like the present; but in that case the lessee of an inn had covenanted to use and keep it open as an inn during a certain time, and not to do any act whereby the license might become forfeited. In point of fact the application was that he might be compelled to keep it open, and the Vice-Chancellor makes this observation: “The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be

<sup>1</sup> 18 Ves. 437.

<sup>2</sup> 6 Sim. 340.

<sup>3</sup> See 2 Story Eq. Jur. § 958 *a*.

<sup>4</sup> 11 Sim. 47.

done, any act which would have put it out of his power or the power of any other person to carry on that business on the premises. It is not, however, shown that the defendant has threatened or intends to do or to cause or permit to be done any act whereby the licenses may become forfeited or be refused, and therefore the injunction must be dissolved." That, therefore, is an authority directly against the defendants, because it shows that if there had been an intention to break the negative covenant this court would have granted the injunction.

The case of *Smith v. Fromont*<sup>1</sup> was also relied upon by the defendants as an instance where the injunction had been refused, but there there was no negative covenant. It was an attempt to restrain by injunction a man from supplying horses to a coach for a part of a road when the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road. Lord Eldon, in refusing the injunction and deprecating the interference of the court in such cases, there said, "The only instance I recollect of an application to this court to restrain the driving of coaches occurred in the case of a person who, having sold the business of a coach proprietor from Reading to London, and undertaking to drive no coach on that road, afterwards established one. With some doubt whether I was not degrading the dignity of this court by interfering, I saw my way in that case, because one party had there covenanted absolutely against interfering with the business which he had sold to the other." That again is a direct authority, therefore, against the defendants, as Lord Eldon expressly says he had interfered in the case of a negative covenant, although he could not interfere on that occasion because there was no such covenant.

Some observations have been made upon a decision of my own in Ireland in the case of *Gervais v. Edwards*.<sup>2</sup> That decision I believe to be right, but it is quoted to show that I was of opinion that this court cannot interfere to enforce specific performance unless it can execute the whole of an agreement. I abide by the opinion I there expressed, and I mean to do nothing in this case which shall in any manner interfere with that opinion. That was properly a case for specific performance, but from the nature of the contract itself there was a portion of it which could not be executed. I said in effect, "I cannot execute this contract which is intended to be binding on both parties; I cannot execute a portion of this contract for one and leave the other portion of the contract unexecuted for the other, and, therefore, as I cannot execute the whole of the contract, I am bound to

<sup>1</sup> 2 Swanst. 330.

<sup>2</sup> 2 Dru. & War. 80.

execute no part of it." That, however, has no bearing on the present case, for here I leave nothing unperformed which the court can ever be called upon to perform.

In *Hills v. Croll*<sup>1</sup> Lord Lyndhurst refused to enforce an injunction to restrain the violation of a negative covenant. It was a case in which A had given to B a sum of money, and B covenanted that he would buy all the acids he wanted for the manufactory of A, who covenanted that he would supply the acids, and B also covenanted that he would buy his acids from no other person. Lord Lyndhurst refused to prohibit B from obtaining acids from any other quarter, both because the covenants were correlative and because he could not compel A to supply B with acids; and if, therefore, he had restrained B from taking acids from any other quarter, he might have ruined him in the event of A breaking his affirmative covenant to supply the acids. That case has never been rightly understood. It is supposed that Lord Lyndhurst's decision was based upon a wrong principle; that he followed the authority of *Gervais v. Edwards* and such cases, and that he improperly applied the rule, which was in that class of cases properly applied, but under the circumstances of the case before him I think the rule was not improperly applied.

The next case which has been so much observed upon was that, before Lord Cottenham, of *Dietrichsen v. Cabburn*.<sup>2</sup> That was a very simple case, and the question upon what principle it was decided formed the subject of discussion before me. A man, in order to obtain a great circulation of his patent medicine, entered into a contract with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent. discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent. He violated his contract and was proceeding to employ other agents with a larger discount than 25 per cent. An injunction was applied for and was granted. It was said that it was properly granted, because it was a case of partnership. This, however, was not the fact; it was not a case of partnership, but was strictly one of principal and agent; and it was only because there was the negative covenant that the court gave effect to it. It is impossible to read Lord Cottenham's judgment without being satisfied that he did not consider it to be a partnership, though he said it was in the nature of a partnership; and in a popular sense it might be so called, because the parties were there both dealing with respect to the same subject, from which each was to have a benefit, but in no legal sense was it a partnership.

<sup>1</sup> 2 Phil. 60.

<sup>2</sup> 2 Phil. 52.

Up to the period when *Dietrichsen v. Cabburn*<sup>1</sup> was decided I apprehend that there could have been no doubt on the law as applicable to this case, except for the authority of Vice-Chancellor Shadwell; but with great submission it appears to me that the whole of that learned judge's authority is removed by himself by his decision in the later case of *Rolfe v. Rolfe*.<sup>2</sup> In that case A, B, and C were partners as tailors. A and B went out of the trade on consideration of receiving £1,000 each, and C was to continue the business on his own account. A entered into a covenant that he would not carry on the trade of a tailor, which he had just sold, within certain limits, and C entered into a covenant that he would employ A as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A from setting up as a tailor within the prescribed limits, and the Vice-Chancellor granted that injunction. It was objected that this court could not grant the injunction when there was something remaining to be performed, for that A had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against C. That case, therefore, was open to a difficulty which does not occur here—in fact, the same difficulty which might have arisen in *Hills v. Croll*<sup>3</sup> before Lord Lyndhurst. But the Vice-Chancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would grant, although he could not give effect to the affirmative covenant to do the act in respect of which no specific performance was asked. His own decisions in *Kemble v. Kean*<sup>4</sup> and in *Kimberley v. Jennings*<sup>5</sup> were pressed upon him, but he observed, "that the bills in the cases cited asked for specific performance of the agreement, and that the injunctions were sought as only ancillary to that relief, but the bill in the present case asked merely for an injunction." He no longer put it on the inability of the court to enforce a negative covenant, but he put it on the form of the pleadings. Whether that form was sufficient to justify his opinion is a question with which I need not deal; but I am very clearly of opinion that the case of *Rolfe v. Rolfe*<sup>6</sup> does remove the whole weight of that learned judge's authority on this subject.

It was said in argument that the injunction prayed in *Rolfe v. Rolfe*<sup>6</sup> was merely ancillary to the relief; but it will be seen that that was not so, and that the prayer extended only to the injunction, and had nothing to do with relief in the shape of specific performance; and the learned judge himself stated that, if it had gone to that

<sup>1</sup> 2 Phil. 52.<sup>2</sup> 15 Sim. 88.<sup>3</sup> 2 Phil. 60.<sup>4</sup> 6 Sim. 333.<sup>5</sup> 6 Sim. 340.<sup>6</sup> 15 Sim. 88.

extent, he, following his former decisions, would not have granted the injunction.

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument; and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the court below. It was, nevertheless, and with some reason, said that although the point of law should be decided in the plaintiff's favor, still he might be excluded from having the benefit of it on the merits of the case.

His Lordship here entered into a minute examination of the statements in the answers and affidavits as to the unauthorized addition of the restrictive clause, and as to the non-fulfillment by the plaintiff of his portion of the agreement. In reference to those points he observed that whether the clause was originally added with or without authority the evidence showed a clear acquiescence on the part of the defendants to its remaining in the agreement; that the operation of the agreement had been in the first instance postponed to suit the convenience of the defendants; and that as to the payment of the £300, although the plaintiff could not have come into a court of equity to enforce the contract without having tendered the amount stipulated to be paid, yet it was distinctly proved that it had in fact been paid to the common agent of both parties for the purpose of being handed to the defendants. His Lordship concluded by saying that, looking at the merits and circumstances of the case, as well as at the point of law raised, he must refuse this motion, with costs.

In the course of the argument, and in order to prove the plaintiff's readiness to perform his part of the contract, an affidavit made by Dr. Bacher was read, which was to the effect that he had written and sent a letter to the defendant J. Wagner, informing her of his having received from the plaintiff the £300, and offering to pay that sum according to her instructions. A letter of the same date as that referred to in the affidavit was admitted to have been received by the defendant J. Wagner, but it was positively denied that it contained any such offer. The letter itself was not forthcoming, and its non-production was not accounted for. No copy was kept by Dr. Bacher.

The Lord Chancellor observed that when the affidavit as to the contents of the letter was made Dr. Bacher could not have known that the letter would not be produced; that the affidavit, therefore, if untrue, was at the imminent peril of exposure by the production of the letter; and that under such circumstances the representation in the affidavit must be taken to be true.

BRETT v. THE EAST INDIA AND LONDON SHIPPING  
COMPANY (LIMITED).

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., MARCH 11, 1864.

[*Reported in 2 Hemming and Miller 404.*]

THIS was a bill for specific performance of an agreement to employ the plaintiff as broker.

It appeared from the statements in the bill that the company was established in the year 1860 for the purpose of running vessels between England and the East Indies and elsewhere.

The company was governed by regulations under the provisions of the Joint Stock Companies act, 1856; and by regulation 78 it was provided that the company should have bankers, solicitors, brokers, secretaries, and also usual and proper officers; and that the directors should appoint all such bankers, solicitors, secretaries, and other officers, and might from time to time change the then existing or any other bankers or solicitors, or dismiss the then existing or any other secretaries or officers, and appoint others in their respective places.

The 10th paragraph of the bill was as follows:

The company were desirous of securing the plaintiff's services, and proposed to appoint him to act as the sole broker of the company for a term of three years, and the plaintiff consented to accept such appointment upon the terms and conditions of the agreement next hereinafter set forth.

The material terms of this agreement (which was dated 25th April, 1860) were as follows:

1st. The said Alfred Brett is to be the sole broker of the said company in England from the date hereof, and to act in all the necessary matters and affairs of the said company appertaining to the business of a ship and insurance broker, on the terms and in the manner hereinafter set forth.

2d. The said Alfred Brett is to engage the freight for the vessels of the said company, subject to the instructions of the shipping committee, and, subject to such instructions, is to enter into all agreements and contracts for and on behalf of the said company for the same, and to be paid a commission by the said company for all gross outward freight at and after the rate of £5 per cent., out of which he, the said Alfred Brett, engages to divide the usual commission with any other broker or brokers engaging freight.

3d. The name Alfred Brett & Co. shall appear jointly with that of the secretary of the company in all advertisements of the company; for passengers the said Alfred Brett shall receive a commission from

the said company of £5 per cent. on passage moneys in those cases only where the passenger has been secured by or through his influence, the said passenger admitting such to be the case.

7th. The said company are to pay or allow to the said Alfred Brett the sum of £4 10s. for entering each ship of the company inwards, and the like sum upon the clearance out of each ship.

8th. The said Alfred Brett is to be allowed or paid by the said company a commission of £12 per cent. for collecting the gross homeward freight of the ships of the said company, payable in England to the said company.

11th. The said Alfred Brett is to effect all the insurance on or in respect of the vessels of the said company on the usual terms of brokers in the city of London; but all discounts in respect of insurances are to be allowed to the company for their own sole use and benefit. The said Alfred Brett is to be paid or allowed by the said company £1 per cent. commission on settlement of all insurance claims as his remuneration for and in respect of the settlement of all losses.

12th. The said Alfred Brett shall use and employ his utmost exertions and diligence in and about the matters and things above contracted for by him.

Lastly. It is hereby mutually agreed between the parties hereto, that all the above terms and conditions are to be subject to the said Alfred Brett transacting and carrying out the business of the said company as such ship and insurance broker as aforesaid to the reasonable satisfaction of the board of directors of the company.

The bill then alleged the due execution of the agreement, and that the plaintiff had "ever since duly and faithfully transacted and carried out the business of the company as ship and insurance broker pursuant to the terms of the said agreement, in all respects to the satisfaction of the board of directors of the company, until prevented from doing so as hereinafter mentioned," and that the plaintiff had "at all times since the date of the said agreement used his best endeavors and influence in the business and on behalf of the company," and that "by dint of the plaintiff's exertions a very considerable carrying business in passengers and freight had been acquired by the company." A slight, but immaterial, variation in the terms of the contract was afterwards introduced by mutual consent; but the bill alleged that, save in that respect, the contract was still of full force and effect.

The company had recently issued advertisements for passengers and freight in the *Standard* and *Daily Telegraph*, in which the name of the secretary appeared, but that of the plaintiff did not, in which

the public were directed to apply for freight or passage to Grindlay & Co., "or to the managing agents of the company, Messrs. Bond & Mackelvie, 9 Mincing Lane, E. C., and in Plymouth to Mr. H. T. Waring."

The bill further alleged that the publication of those advertisements was the first intimation that the plaintiff had had that the company did not intend to carry out the said agreement, and that the object of the directors in issuing these advertisements was to deprive the plaintiff of the benefit of the agreement, and that the company threatened and intended to persist in issuing such advertisements.

The bill prayed—

1st. Specific performance of the agreement.

2d. An injunction to restrain the company from issuing any advertisements not containing the name of the plaintiff in the manner stipulated for by the agreement.

3d. Damages.

An interlocutory injunction was obtained *ex parte* in the terms of the 2d paragraph of the prayer.

The defendants demurred.

*Mr. James*, Q.C., and *Mr. Druce* for the demurrer.

*Mr. Locock Webb* (*Mr. Rolt*, Q.C., with him) for the bill.

VICE-CHANCELLOR SIR W. PAGE WOOD. I am of opinion that the plaintiff's case fails. The only difficulty I have felt in this matter was whether, taking all the authorities into consideration, the terms of the 3d clause of the agreement, which relates to the advertisements in which the plaintiff's name is to appear as broker, did not bring the case within the authority of *Lumley v. Wagner*, and this was the only consideration which led me to grant the injunction.

If the question of advertisements stood alone, that would be so; but I must look at the whole substance of the case presented by the bill, and that case comes shortly to this: the bill avers that there has been a breach of contract, by the non-employment of the plaintiff as broker; but there is no averment of any continuing contract, which might have raised a doubt in the case. If there were a mere omission of one term in a contract, which was in other respects being acted on, as, for instance, if the plaintiff were in a position to say, "the company are still employing me as their sole broker, and yet they do not put my name into their advertisements as they have contracted to do," there might be some ground for his contention; but here it is averred that the directors mean to deprive the plaintiff of the benefit of the said agreement; that is to say, they are going to break the contract, and do not mean to continue the plaintiff as broker.

The court cannot, therefore, hold that this is a bill for specific per-



formance of the contract as a whole, to which contract this question of advertisements is a mere adjunct. The court cannot compel the defendants to advertise as their agent a person whom they do not employ as agent. The principal being gone, the adjunct must fall along with it. *Lumley v. Wagner* was the converse case; in that case the contract was still subsisting, and Middle. Wagner broke a negative term of it. It is clearly absurd to say that they must issue advertisements containing the plaintiff's name as their broker, when it is obvious that they cannot be compelled to employ him as such.

I assume it as clear that the rest of the bill must fail; that is well settled by all the authorities; the case is, in that respect, on all fours with *Pickering v. The Bishop of Ely*.

Allow this demurrer, with costs.

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JOSEPH PEABODY AND OTHERS, EXECUTORS, v. JOHN R. NORFOLK AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1868.

[*Reported in 98 Massachusetts Reports 452.*]

BILL IN EQUITY, filed January 5, 1867, by Francis Peabody, the testator of the present plaintiffs, against John R. Norfolk only; and subsequently amended by a supplemental bill so as to include James P. Cook as a defendant.

The bill set forth that, for many years prior to the filing of the same, Peabody was secretly engaged in making experiments, inventing and adapting machinery, and originating and perfecting a process, to manufacture gunny cloth from jute butts, and at last succeeded in perfecting machinery and a process to do so profitably, such a manufacture having never before been attempted, so far as he knew; that thereupon he built a large factory on Bridge Street in Salem to carry on such manufacture with such machinery and process, and filled it with such machinery, and invested a large sum in the building, and the machines, material, and business; that, both in all his experiments, and in the construction of the machines for the factory and the setting up and running of the same, he employed Norfolk, who was a machinist, to give his whole time and skill for a salary; that, in the course of this employment, Norfolk became confidentially possessed of knowledge of the machinery and process, well understanding that such knowledge was to be kept wholly secret; and that, at the solicitation of Norfolk while so employed, Peabody made a written agreement with him, dated June

24, 1865, which was annexed in full to the bill, and the material parts whereof were as follows :

“ Said Norfolk agrees to serve the said Peabody as the engineer of his jute factory in Bridge Street so far as he is required to do so by said Peabody, and particularly for that part which relates to the running and construction of the engines and boilers, and of the machinery used in the manufacture of the goods, also in the construction and repairs of the buildings that are required ” ; and “ agrees that he will not give any parties information, directly or indirectly, in regard to the machinery, or any portions of it,” which had been used in the experiments, or should be used in the factory, but “ will consider all of said machinery as sacred to be used only for the benefit of said Peabody or his assigns, and that by all the means in his power he will prevent other persons from obtaining any information in regard to it such as would enable them to use it.”

“ Said Peabody on his part agrees to pay the said Norfolk the sum of \$1,000 annually in monthly installments of \$83.33 each, to be received in full compensation for above described services, provided the said Norfolk shall render his services acceptable to said Peabody as he has heretofore done, and that said Peabody or his assigns or agents shall continue the business of manufacturing jute goods in said mill in Bridge Street or elsewhere.”

The bill further alleged that on January 1, 1867, Norfolk left his said employment, and had made arrangements with persons unknown to Peabody to build another factory for the manufacture of gunny cloth from jute butts, and to furnish those persons with machinery to be built on the models of the machinery of Peabody, and impart to them Peabody's secret process of manufacturing, and aid and assist them in manufacturing by that process ; and that he had taken from the possession of Peabody the original drawings, or copies thereof, of said machinery, and intended to use them in carrying out his said arrangements.

The prayer of the bill was for an injunction to restrain Norfolk from carrying out any such arrangements, or communicating to any person any knowledge of said machinery and process derived by him in the course of his said confidential employment ; and to oblige him to return to Peabody said drawings or copies. Upon this bill an injunction was issued in conformity with its prayer.

On June 8, 1867, Peabody filed a supplemental bill, reciting said prayer and the issue of the injunction, and alleging that he had learned for the first time, since the service of the injunction on Norfolk, that James P. Cook was one of the persons with whom Norfolk had made his said arrangements ; and further, that Cook and his associates, knowing the relations between Peabody and Norfolk, and knowing the fact

of the injunction, were nevertheless proceeding to build machinery to manufacture gunny cloth from jute butts by Peabody's secret process ; that Cook was pretending to build the machinery in his own name, upon information, models and drawings obtained from Norfolk before or about the time of the service of the injunction, but that, in fact, long before he ever made any arrangements with Norfolk on the subject, he had notice of all Peabody's relations with and claims on Norfolk ; and that, although Norfolk was falsely pretending to obey the injunction, yet in fact he was one of Cook's present associates in the building of such machinery.

The prayer was for an injunction on Cook similar to that issued against Norfolk.

To this supplemental bill Cook filed a general demurrer ; and the questions arising thereon were reserved by Foster, J., for determination by the full court.

*J. A. Gillis* for the defendant Cook.

*W. C. Endicott* for the plaintiffs.

GRAY, J. It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. If he adopts and publicly uses a trade-mark, he has a remedy, either at law or in equity, against those who undertake to use it without his permission. If he makes a new and useful invention of any machine or composition of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it, and thus affording to all persons the means of ultimately availing themselves of it, obtain letters patent from the government securing to him its exclusive use and profit for a term of years. If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it ; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.

In the earliest reported case of this class, Lord Eldon indeed refused to grant an injunction against imparting, in violation of an agreement, the secret, not only of a patent which had been obtained and had expired, and which the whole public was therefore entitled to use ; but also that of making a certain kind of pills, for which no patent had

been procured; and stated, as a reason for the latter, that, if the art and method of preparing them was a secret, the court could not, without having it disclosed, ascertain whether it had been infringed.<sup>1</sup> But the same learned Chancellor afterwards considered the general question as still an open one, whether a court of equity would restrain a party from divulging a secret in medicine, which was not protected by patent, but which he had promised to keep; and in such a case dissolved an injunction of the Vice-Chancellor, upon the sole ground that the defendant made affidavit that the secret was not derived from the plaintiff.<sup>2</sup> And in a later case he unhesitatingly granted an injunction against one who by the terms of his agreement with the plaintiff was not to be instructed in the secret, and who had obtained a knowledge of it by a breach of trust.<sup>3</sup>

Sir John Leach decreed, in one case, specific performance of an agreement by a trader to sell the good will of a business and the exclusive use of a secret in dyeing; and, in another, an account of the profits of a secret for making a medicine against a son of the inventor, holding it in trust for his brothers and sisters.<sup>4</sup>

In a more recent case, Morison, the inventor and sole proprietor of a medicine, for which no patent had been obtained, entered into partnership with Moat, to whom he communicated the secret of making the medicine, but did not make the secret a part of the assets of the partnership, and reserved it to himself as against all other persons, and Moat covenanted not to reveal it to any person whomsoever; by subsequent agreement Morison's sons and a son of Moat were admitted as partners in the business; and the secret was surreptitiously obtained from Moat by his son. After the death of both the original parties, on a bill brought by Morison's sons, who were also legatees of the secret, against Moat's son, Vice-Chancellor Turner, in an elaborate judgment reviewing all the English authorities, granted an injunction restraining the defendant from using the secret in any manner in compounding the medicine; and refused to restrain him from communicating the secret, simply for want of any allegation or evidence of an intention to communicate it.<sup>5</sup> The defendant appealed; but the order was affirmed; and Lord Cranworth, delivering the opinion of the court of appeal, said: "The principles that were argued in this case are principles really not to be called in controversy. There is no doubt whatever, that when a party who has a secret in trade employs persons under a contract

<sup>1</sup> *Newbery v. James*, 2 Meriv. 446.

<sup>2</sup> *Williams v. Williams*, 3 Meriv. 157.

<sup>3</sup> *Yovatt v. Winyard*, 1 Jac. & Walk. 394.

<sup>4</sup> *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Green v. Folgham*, Ib. 398.

<sup>5</sup> *Morison v. Moat*, 9 Hare 241.

express or implied, or under duty expressed or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer."<sup>1</sup>

Mr. Justice Story states the doctrine in the broadest terms, that "courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests."<sup>2</sup> In this court, it is settled that a secret art is a legal subject of property; and that a bond for a conveyance of the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action at law, and requires the obligor not to divulge the secret to any other person.<sup>3</sup> In *Jarvis v. Peck*,<sup>4</sup> such a bond was held valid in equity. And by the Gen. Sts. c. 113, § 2, this court has not only jurisdiction in equity of suits for enforcing and regulating the execution of trusts, or for the specific performance of written contracts by and against either party and his representatives and assigns, but also full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law.

The contract between Peabody and Norfolk was, on the part of Norfolk, to serve Peabody as engineer in his jute factory so far as required, and particularly in the construction and running of the machinery, and not to give any third person information directly or indirectly in regard to any portion of the machinery, but to "consider all of said machinery as sacred to be used only for the benefit of said Peabody or his assigns, and by all means in his power prevent other persons from obtaining any information in regard to it such as would enable them to use it"; and, on the part of Peabody, to pay Norfolk an annual salary "in full compensation for the above described services," provided he should render his services acceptable to Peabody as he had theretofore, and Peabody or his assigns should continue the business of manufacturing jute goods. The "above described services" clearly include, not only the affirmative promise to serve as an engineer, but the negative promise not to disclose the secret, and to do his best to conceal it; and the salary is a legal and sufficient consideration for all the agreements of Norfolk.

The plaintiffs do not ask for specific performance of Norfolk's promise to serve as engineer. It is therefore unnecessary to consider whether that promise is limited in point of time or determinable at pleasure, or

<sup>1</sup> 21 L. J. (N. S.) Ch. 248.

<sup>2</sup> 2 Story Eq., § 952.

<sup>3</sup> *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen 373, 374.

<sup>4</sup> 10 Paige 118.

is capable of being specifically enforced. Whatever may be the limit or effect of his obligation to serve, he is bound by his contract never to disclose the secret confidentially imparted to him during the term of his actual service. And this part of his agreement may be specifically enforced in equity, even if the other part could not.<sup>1</sup>

The bill alleges that the invention and the process of manufacture have been kept secret, and that the secret is the property of the original plaintiff and of great value to him, and was confidentially imparted to Norfolk; and on demurrer these allegations must be taken to be true. Although the process is carried on in a large factory, the workmen may not understand or be intrusted with the secret, or may have acquired a knowledge of it upon the like confidence. A secret of trade or manufacture does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value. Even if, as is argued in support of the demurrer, the process is liable to be inspected by the assessor of internal revenue or other public officer, the owner is not the less entitled to protection against those who in, or with knowledge of, violation of contract and breach of confidence, undertake to disclose it or to reap the benefit of it. The danger of divulging the secret in the course of a judicial investigation affords in our opinion no satisfactory reason why a court of equity should refuse all remedy against the wrongdoers.

The supplemental bill alleges, and the demurrer admits, that Cook, with notice of the relations between Peabody and Norfolk, has made arrangements to have the secret communicated to him by Norfolk, and together with him to use it for their own benefit. Upon such a state of facts, Cook has no better equity than Norfolk.

The executors of the will of the original plaintiff succeed to his rights, and appear on the allegations of the bills to be entitled to the relief prayed for.<sup>2</sup>

Demurrer overruled.

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### MONTAGUE v. FLOCKTON.

IN CHANCERY, BEFORE SIR R. MALINS, V.C., MAY 25, 1873.

[*Reported in Law Reports, 16 Equity Cases 189.*]

THIS was a motion on behalf of the plaintiff, Henry James Montague, the lessee and manager of the Globe Theatre in London, for an injunction to restrain the defendant, Charles Poston Flockton, from acting or causing his name to be advertised as about to act at any place other

<sup>1</sup> *Lumley v. Wagner*, 1 De Gex, Macn. & Gord. 604.

<sup>2</sup> *Morison v. Moat*, above cited.

than the plaintiff's theatre, or otherwise than for the plaintiff's benefit, for a period of nine months from the 2d of October, 1872, and in particular from acting at an intended dramatic performance at the Crystal Palace.

In August, 1871, an engagement was proposed to the defendant on behalf of the plaintiff that the defendant should perform, upon certain terms specified, at the Globe Theatre. To this proposal the following answer was returned by the defendant, dated the 16th of August, 1871, and addressed to Mr. Edward English, the plaintiff's agent :

"DEAR SIR: I accept the engagement for the Globe Theatre under the management of H. J. Montague, Esq., at a weekly salary of five pounds, and, if required, to go into the provinces, traveling expenses paid and 20 per cent. on my London salary. Line of business, old men and character business; to commence on or about the 2d October, 1871. For the season of not less than nine months' duration. A fortnight's rehearsal to be given prior to opening, subject to the rules and regulations of the theatre.

"(Signed) C. P. FLOCKTON."

During the pendency of the last mentioned agreement, namely, on the 2d of March, 1872, the plaintiff and the defendant entered into another agreement, which was accepted by the defendant in these terms :

"I hereby accept the renewal of my engagement with H. J. Montague, Esq., for his next season on the same terms as at present existing between us.

"(Signed) C. P. FLOCKTON."

It appeared that in May, 1872, a notice was posted in the greenroom of the Globe Theatre to the effect that the season would close on the 4th of June, on which day all pending engagements would terminate; and the house was accordingly closed upon that day.

A company was then formed by the plaintiff for certain theatrical performances in the provinces, in which the defendant took part, and these performances commenced on the 4th of June and terminated on the 28th of September, 1872.

The next London season at the Globe Theatre commenced in October, 1872, and the defendant, Mr. Flockton, played at the theatre as he had previously done till the 10th of March, 1873, when he requested the plaintiff to allow him to perform at the Regent's Park Theatre, which was to be opened in May. Upon this occasion, according to the plaintiff's statement, the defendant said, "I only ask you to lend me, and I shall finish my engagement with you afterwards." The plaintiff

declined to accede to the defendant's request on the ground that he should require his services for the next piece that was to be brought out. On the 2d of April the defendant wrote the following letter to the plaintiff :

"DEAR SIR : As you are aware my engagement with you terminated on the 2d of December last, pursuant to our agreement bearing date the 2d of March, 1872, I am desirous to close my connection with your theatre, and therefore now give you four weeks' notice in pursuance of such my desire."

The matter was then placed by the plaintiff in the hands of his solicitors, Messrs. Lumley, who wrote to the defendant stating that he had taken a wrong view of the terms of the contract, which did not in fact terminate until nine months after the commencement of the season, in October, 1872 ; that the defendant was causing Mr. Montague considerable inconvenience and loss by not attending the rehearsal of a new play soon to be produced, although every reasonable notice had been given him ; and they called upon him to be in attendance the following morning at eleven o'clock to rehearse the part assigned him.

This summons not being attended to by the defendant, the plaintiff was obliged to engage another actor, Mr. Palmer, to perform the part assigned to the defendant.

The plaintiff then discovered that the defendant was negotiating for an agreement to act at a new theatre in course of erection in London, before the expiration of the term alleged to be comprised in the agreement of the 2d of March, 1872, and on the 28th of April, 1873, the plaintiff also discovered that the defendant was advertised as intending to act on the 3d of May at the Crystal Palace in the part of Polonius in Hamlet, and consequently this bill was filed for an injunction in the terms already stated.

It was alleged by the defendant that according to the prevailing custom the manager had the right of closing the season by notice, and that he had done so. The plaintiff alleged that the notice did not close the season. There was conflicting evidence on this point.

*Mr. Glasse, Q.C., and Mr. E. Cutler* for the plaintiff.

*Mr. Hemming* for the defendant.

SIR R. MALINS, V.C., after reading the letter of the defendant, dated the 16th of August, 1871, accepting the engagement to perform for the plaintiff during the season of at least nine months, continued :

The first question is, what is the meaning of that contract? It has been argued that it was an engagement for the season, and that it left the performer at the mercy of the proprietor to terminate the season whenever he thought fit. It is said that Mr. Montague having put up a



notice in the greenroom of the theatre in the month of May, 1872, notifying that the season's engagements would terminate on the 4th of June then next, that that has put an end to the contract. My opinion is that if an actor engages himself for the season he leaves himself at the mercy (within reasonable limits of construction) of the proprietor of the theatre to fix what the season is. But that is not the meaning of this contract; because, while the proprietor, Mr. Montague, engages Mr. Flockton for the season, there is a stipulation which is for the protection of the performer, that that season is not to be one month, two months, or three months as the proprietor may think proper, but that whenever he may choose to terminate his season, that season, for the purpose of paying the actor, is not to be less than nine months. In my opinion it was absolutely impossible, provided Mr. Flockton performed his part of the contract, for Mr. Montague to evade performing his part of it by paying the stipulated salary for a period of not less than nine months.

This contract then, being, as I am bound to assume, understood in the only way it could be understood by each of the parties, was commenced in or about the month of October, and matters went on satisfactorily on both sides, as I must assume, because in the month of March, five months after the contract had been commenced, and while Mr. Flockton was still performing for Mr. Montague, a proposal was made by Mr. Montague and was accepted by Mr. Flockton in these terms: "I hereby accept the renewal of my engagement with H. J. Montague, Esq., for his next season on the same terms as at present existing between us." Now what is the meaning of "the next season"? I am perfectly clear that it was a repetition of the old contract; it was to be the next season commencing in October, 1872, lasting for not less than nine months. It follows that for the season beginning in 1872 and ending in 1873 Mr. Montague, accepting these terms, is bound to pay Mr. Flockton for nine months, and Mr. Flockton is equally bound to perform for Mr. Montague, if Mr. Montague requires him to do so. I am surprised that by any ingenuity Mr. Flockton should have persuaded himself that the meaning of that contract was, as he stated in his letter, that the next season was not the London season but the country season. The thing is, in my opinion, perfectly absurd. It has nothing to do with the country season; because the original contract was this—he is to have £5 a week, if required to go into the provinces, assuming, therefore, that he may be required to go, he will agree to do so, and in that case he is to have his traveling expenses paid, and 20 per cent. additional upon his London salary. The original contract is for a London engagement, with the privilege on Mr. Montague's part of requiring him to go into the provinces, where he would be entitled

to 20 per cent. additional, and all traveling expenses paid. Therefore, when he says the next season it is subject to the same stipulation ; it is for the London theatre, with the right on the part of Mr. Montague to require him to go into the provinces upon those terms. The contention of Mr. Flockton that the next season commenced in the month of June and ended in the month of September is, in my opinion, simply ridiculous. I totally differ from it and I am clear that it meant the next season commencing in October and terminating at the earliest at the end of nine months.

Then let us see what was the view of the parties themselves, and how this was acted upon. If it were according to Mr. Flockton's view, how did it happen that he commenced acting for Mr. Montague again in the month of October last, and continued uninterruptedly and amicably, as I understand, to act for him down to the month of April? The object of it is evidently that which is stated by the plaintiff in his affidavit filed the 6th of March ; and as it is not contradicted by Mr. Flockton, I must take it to be perfectly accurate. Mr. Montague says : " On or about the 20th day of March, 1873, I was in my dressing-room at the Globe Theatre with a friend, and the defendant came in and asked me if I would allow him to go and play a very fine part at the Regent's Park Theatre, which it was proposed to open in the month of May, and he added " (now here is an admission of the whole case), " 'Of course you will lend me for a time only ; then I will come back and finish my engagement.' I said in reply, 'I am sorry, my dear Flockton, I cannot, as I hope to have you in my next piece.' On my saying that he walked away rather annoyed." That was on the 20th of March. Then what is the next thing he does ? I am satisfied from the evidence that there being a piece then in preparation it was the intention of Mr. Montague that Mr. Flockton should take a part in it ; but, unfortunately, before it came out Mr. Flockton, on the 2d of April, adhering to this most unjustifiable view of the contract, writes to Mr. Montague this letter : " As you are aware my engagement with you terminated on the 2d of December last, pursuant to our agreement bearing date the 2d of March, 1872, I am desirous to cease my connection with your theatre, and therefore now give you four weeks' notice in pursuance of such my desire." Now he knew perfectly well that Mr. Montague was not aware of any such thing as the termination of the agreement in December, for he knew that the conversation of the 20th of March which occurred between them took an entirely different view of the case, and after making that admission himself to Mr. Montague, I cannot conceive that anything could be more unjustifiable than that Mr. Flockton should say, " As you are aware my engagement with you terminated on the 22d of December last." That was objected to by Mr. Montague,

who, I think, acted in perfect good faith. He remonstrated, and finding his remonstrances were not attended to, he applied to his solicitors. So far from Mr. Montague not performing his part of the contract or being desirous to avoid employing Mr. Flockton in his new piece, as was suggested, Messrs. Lumley wrote a letter to this effect: "Mr. Montague states further that you are even now causing him considerable inconvenience and loss by your not attending to the rehearsal of a new play soon to be produced, although every reasonable notice has been given you, and we now call upon you to be in attendance to-morrow on the stage to rehearse the part assigned to you, at 11 o'clock, at which hour the company assemble for the purpose of rehearsal." Therefore it is Mr. Flockton who is now repudiating his contract. He is called upon to perform it but he adheres to his refusal, and seeks an engagement, first at the Regent's Park Theatre, and secondly at the Crystal Palace. Now, unless theatrical managers are to be completely at the mercy of their performers, the performers are not to be suffered to break their engagements whenever they think fit. I can readily believe if Mr. Flockton had requested Mr. Montague to allow him to perform the part of Polonius in Hamlet at the Crystal Palace that his request would have been acceded to, and this suit would not have been instituted; but that was not all that Mr. Flockton wanted. In setting his contract at defiance, it is perfectly clear his object was not simply to perform at the Crystal Palace, but also to perform at the Regent's Park Theatre, either because he could get a better salary or be enabled to play a higher class of characters, which perhaps to an actor is as strong an inducement as any money that can be given to him. But he is, in my opinion, entirely wrong.

If he is put upon his contract he is bound to perform for Mr. Montague for the season; and I am glad to hear from his counsel, *Mr. Hemming*, that Mr. Flockton expresses his willingness, if the court puts a different construction upon it to his own, to submit to the opinion of the court and perform his part of the contract.

Now that being the effect of the agreement between the parties, that is, that Mr. Flockton has bound himself for the whole of the season which commenced in October last for nine months, which, on the one hand, obliges Mr. Montague to pay him his salary for nine months, and obliges Mr. Flockton, on the other hand, to perform for Mr. Montague for the same period, it is said, in order to avoid this, that he is not bound, because there is no negative stipulation in the contract. I certainly am under the impression that in the case of *Lumley v. Wagner*,<sup>1</sup> if there had been no negative stipulation the court would have interfered; and I gather this particularly from the passage in Lord St.

<sup>1</sup> 1 D. M. & G. 604.

Leonards' judgment<sup>1</sup> where he says : "The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract ; it is, in effect, one contract, and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction and according to the true spirit of the agreement the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre." It happened that that contract did contain a negative stipulation, and, finding it there, Lord St. Leonards relied upon it ; but I am satisfied that if it had not been there he would have come to the same conclusion and granted the injunction on the ground that Mdlle. Wagner, having agreed to perform at Mr. Lumley's theatre, could not at the same time be permitted to perform at Mr. Gye's. But however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point. It appears to me, on the plainest ground, that an engagement to perform for nine months at Theatre A is a contract not to perform at Theatre B or at any other theatre whatever. How is a man to perform his duty to the proprietor of a theatre if, when he has engaged himself to perform for him, he is to go away any night that he may be wanted to another theatre ? I must treat Mr. Flockton as if he were the greatest actor in the world, and as if wherever he went the public would run after him ; and according to this, if a proprietor engages an actor to perform for him, he is not, because he is only wanted for three nights in the week, to be at liberty to go and perform at any other theatre during the other three nights, and thereby take away the advantage of the contract which he has entered into with his employer. That, in my opinion, is utterly inconsistent with the proper construction of the contract. There is no doubt whatever that the proper construction of these contracts is that where a man or woman engages to perform or sing at a particular theatre for a particular period, that involves the necessity of his or her not performing or singing at any other during that time.

That does not rest upon my opinion only, because it was acted upon in *Webster v. Dillon*.<sup>2</sup> In that case there was, it seems, no argument on the part of the defendant. I suppose they did not argue it because they found they could make nothing of it. The defendant Dillon, an actor, having agreed to perform at Sadler's Wells Theatre in certain characters for twelve successive nights, proposed to perform during the same period at another theatre. Mr. Swanston applied for the injunction, and Vice-Chancellor Sir W. Page Wood "thought the words of Lord

<sup>1</sup> 1 D. M. & G. 618.

<sup>2</sup> 3 Jur. (N.S.) 432.

St. Leonards were sufficiently strong to justify his making the order, and he granted an injunction restraining the defendant from acting at any other place than the plaintiff's theatre during the ordinary hours of performance there of twelve consecutive nights, commencing on the 20th of April, the plaintiff undertaking to abide by such order as to damages as the court might direct." He fully adopts there the principle that it is not necessary to have a negative covenant in order to prevent the performance at another theatre. In *Fechter v. Montgomery*<sup>1</sup> I think all men must concur in the reasonableness of the views of the Master of the Rolls. Mr. Fechter had engaged Mr. Montgomery, who had been a provincial actor, and desired to appear on the London boards to perform Shakespeare's characters, and Mr. Fechter had kept Mr. Montgomery for five months idle, but he paid him his salary. Mr. Montgomery's object was to be occupied; he did not want to be kept idle, he wanted to show his talents to London audiences, and it being clear that Fechter had kept him five months perfectly idle, and for all that appeared was likely to keep him idle for another five months; Mr. Montgomery would not submit to it and broke his engagement. Mr. Fechter then filed a bill for an injunction, and, in my opinion, the Master of the Rolls could not have come to any other conclusion than that Mr. Fechter had broken his part of the contract and therefore he would not enforce it as against Montgomery. The contract there did not contain any negative stipulation that he would not perform except for Mr. Fechter. The Master of the Rolls in that case says: "But having regard to the situation of the parties, having regard to the nature of a contract of this description, and having regard also to the previous letter of the 21st of June, 1862, written to Mr. Barnett, and the conversation which took place prior to this agreement being entered into, with respect to which conversation there does not appear to me to be much difference on either side, I am of opinion that it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery, during a reasonable time, to act at this theatre, and that it was an agreement on the other side that he (Mr. Montgomery) should not perform elsewhere without the consent of Mr. Fechter; there was a mutuality in the agreement entered into on both sides; on the one side, that he should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side, that he should not act elsewhere unless with the permission of the plaintiff." There are, therefore, Sir W. Page Wood when Vice-Chancellor, and the Master of the Rolls, Lord Romilly, taking precisely the same view, that an engagement to act at one theatre is a prohibition against acting at any

<sup>1</sup> 33 Beav. 22.<sup>2</sup> 33 Beav. 26.

other. There is also the whole principle involved in the case of *De Mattos v. Gibson*,<sup>1</sup> which was with regard to a totally different subject undoubtedly, namely, the chartering of a ship. The ship was chartered for a particular voyage, and the charterer proposed to sell her and employ her in a totally different manner. There the court decided that there was a contract that she should not be employed for any other purpose and granted an injunction against her being so employed accordingly. I think, therefore, that it is decidedly established, and I should desire, as far as my opinion is of value on the subject, that it should be considered my opinion that a man agreeing to act in one particular theatre during the season is party to a contract that he will act there and not anywhere else. A negative contract is as necessarily implied as if it had been plainly expressed. Then the result is : here is a contract entered into for value. It is said by Mr. Flockton that the plaintiff has refused to perform his part of the contract, and has also refused to allow him to perform. That is explained in the affidavits. It is not attempted to be answered. It is perfectly clear that in consequence of Flockton having absented himself and given the notice of the 2d of October, when this new piece was about to be brought out, Mr. Montague was obliged to apply to another actor, a Mr. Palmer, to act in the place of Mr. Flockton, and that in consequence of the default of Mr. Flockton to perform his contract he has brought this trouble upon himself. Mr. Montague very properly said : "I have engaged Mr. Palmer ; I cannot turn him out. You have brought this upon yourself, and while this piece lasts I cannot employ you to perform in it." But if he had not done that I am perfectly clear that he would have continued to employ him there, and that the circumstance of his not being employed is entirely in consequence of his attempting to repudiate his own contract.

Under these circumstances, I am clearly of opinion that Mr. Montague has established that Mr. Flockton is under an engagement to perform for him, and, being under that engagement, is not at liberty to perform at any other theatre whatever without his permission. I think it is a matter of very great importance for actors to understand that entering into a contract to perform at Theatre A obliges them to perform there alone, and that they cannot be permitted to perform anywhere else so long as the other party performs his part of the agreement.

I am, therefore, of opinion that Mr. Montague is entitled to the injunction.

*Mr. Hemming* asked that the injunction might not be extended to prevent Mr. Flockton from fulfilling the engagement he had already entered into to perform once more at the Crystal Palace.

<sup>1</sup> 4 De G. & J. 276.

The VICE-CHANCELLOR recommended Mr. Montague to concede this request as a favor.

*Mr. Glasse* said that Mr. Montague would not object to the defendant's performing once more at the Crystal Palace.

The VICE-CHANCELLOR thereupon granted the injunction in the terms of the prayer, but so as not to interfere with Mr. Flockton's playing one more day at the Crystal Palace.

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THE SINGER SEWING-MACHINE COMPANY v. THE  
UNION BUTTON-HOLE AND EMBROIDERY  
COMPANY ET AL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST  
CIRCUIT, SEPTEMBER, 1873.

[*Reported in 1 Holmes 253.*]

THE bill alleged that the defendant company was, in 1866, the owner of certain patented inventions embodied in a machine for making button-holes, and owned a factory, etc., for making the machines; and that, being desirous to bring the same into notice and to secure a market, they made a contract with the complainant, then a corporation of established reputation and large business in this country and in foreign countries, by which the complainant was to be the sole and exclusive agent for the sale of these machines, excepting in France and the city of Boston, and was to supply the market and to use certain means and facilities at its command for this purpose; and the defendant company was to furnish the complainant with machines, as called for, up to the full capacity of the factory, at a certain agreed price to be paid monthly in cash. It further charged that the complainant had bought and paid for one thousand machines, and had succeeded, with much labor and expense, exceeding the profit obtained, in selling these machines; and that a market had been made mainly, if not wholly, by its exertions; that the defendant company now neglected and refused to deliver any more machines, though requested; and were taking measures to dissolve their association for the purpose of avoiding their contract with the complainant, and in pursuance of that intent had conveyed the patents to the defendant Wood, as trustee for a voluntary and unincorporated body of persons unknown, called the Button-hole Sewing-Machine Company; that said Wood had been the treasurer of the defendant company, and was fully informed of the complainant's rights. The prayer of the bill was for a decree for specific performance; and an injunction against the transfer of the patents by Wood,

and against the dissolution of the defendant company, and the manufacture and sale of the machines excepting in conformity with the contract.

The agreement between the complainant and defendant companies contained this clause: "That the agency aforesaid shall continue so long as the patent or patents for said machine have been or may be granted or extended, provided that the Singer Manufacturing Company shall fairly and reasonably conduct such agency, and shall continue to supply the market with machines as aforesaid, and shall not engage in selling any other button-hole machines than those manufactured by the Union Button-hole and Embroidery Machine Company; but in case the Singer Manufacturing Company shall fail to carry out their agreements as herein expressed, the forfeiture of such agency shall be considered the only penalty for such failure."

*E. Merwin* for complainant.

*H. G. Parker, E. S. Mansfield* for defendants.

LOWELL, J. There is no dispute that the two companies, complainant and defendant, made the contract A annexed to the bill, by which the former is to have the exclusive right of selling the patented machines, excepting in two excepted localities; that the defendant Wood had full knowledge of the contract, and that the defendants are about to carry out a course of action which will have a strong tendency, to say the least, to defeat the contract. In such a state of things a court of equity readily grants an injunction until the merits of the case can be inquired into, because, if it refuses to interfere at first, rights may be acquired and innocent third persons may become interested in the property in a way that will embarrass the final action of the court, and perhaps work injustice to those innocent persons. It is the direct opposite of a case in which the court is asked to interfere with existing rights upon the strength of some supposed paramount title, and to break up an established order of things. Here the defendants are breaking the established order, and are the actors in fact, and the court is asked to keep things as they are and were agreed to be, until the full evidence is taken. "It is certain," said a learned lord chancellor, speaking of a case of this kind, "that the court will in many cases interfere and preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means to form, any opinion as to such rights." He then cites several authorities, and continues: "It is true that the court will not so interfere if it thinks there is no real question between the parties; but, seeing there is a substantial question to be decided, it will preserve the property until the question can be disposed of. In order to support an injunction for such a purpose, it is not



necessary for the court to decide upon the merits in favor of the plaintiff,"<sup>1</sup>

The decision of this motion, then, depends upon whether the complainant has made such a reasonable *prima facie* case for the relief, or some substantial part of the relief, which it seeks, that it is fairly entitled to maintain the *status quo*. Upon the matters of fact I find that they have such a case.

The two points of law are not without difficulty. The relief asked is specific performance and injunction. It is argued with great ability by the defendants, that the complainant is not entitled to specific performance, and that, therefore, it cannot have an injunction which is merely auxiliary. Granting the premises, I am not prepared to concede the conclusion. If the court cannot order a contract for the making of button-hole machines to be specifically performed by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction would not be granted to restrain the breach of any contract, unless the contract were of such a character that the court could fully enforce the performance of it on both sides. Upon this ground there were many decisions refusing to interfere with contracts for personal services, however flagrant might be the breach of them. *Kemble v. Kean*,<sup>2</sup> *Kimberly v. Jennings*,<sup>3</sup> *Baldwin v. Society for Diffusion of Knowledge*,<sup>4</sup> in which the courts refused to restrain actors and authors from violating their engagements, because they could not oblige them specifically to keep them. But all these cases were overruled by one of the ablest chancellors who has adorned the woolsack, in *Lumley v. Wagner*.<sup>5</sup> In that case a singer had agreed to sing at the plaintiff's theatre for three months, and not to sing at any other, and the court enjoined her from performing at a rival establishment, though it was clear and was admitted that the court could not oblige her to sing for the plaintiff. This case was fully in accord with *Morris v. Coleman*,<sup>6</sup> which had been disregarded or explained away in many of the intervening cases. It is now firmly established that the court will often interfere by injunction when it cannot decree performance. Thus it is said that the writ may issue to restrain the use of a ship contrary to an agreement for charter, though the agreement was not personally binding on the defendant, who was a mortgagee. *De Mattos v. Gibson*,<sup>7</sup> that a tenant may be restrained from doing any thing which will prevent the demised premises being used as an inn, though he cannot be forced to keep the inn as he had covenanted to

<sup>1</sup> *Great Western Railway Co. v. Birmingham Railway Co.*, 2 Phil. 602.

<sup>2</sup> 6 Sim. 333.

<sup>3</sup> 6 Sim. 340.

<sup>4</sup> 9 Sim. 393.

<sup>5</sup> *De G., M. & G.* 616.

<sup>6</sup> 18 Ves. 437.

<sup>7</sup> 4 De G. & J. 276.

do. *Hooper v. Broderick*,<sup>1</sup> that where two railway companies had made an agreement for the use by each of the road of the other, the court might enjoin the obstruction of such use by one of the parties, though it could not enforce full performance of the whole agreement.<sup>2</sup> The case of *Lumley v. Wagner*<sup>3</sup> has been followed in numerous cases concerning actors, authors, and publishers.\* The case of *Fechter v. Montgomery*,<sup>5</sup> sometimes cited as opposed to these decisions, is not so at all; the decision there was that the actor had the right to renounce his engagement because the manager had not fulfilled his part of the contract.<sup>6</sup> *Dietrichsen v. Cabburn*<sup>7</sup> has much resemblance to the case at bar. The defendant owned a patent medicine, and appointed the plaintiff his wholesale agent for the sale of it, and agreed to supply him with all the medicine he should order at forty per cent. discount from the current retail price, and covenanted not to sell to any one else at a greater discount than twenty-five per cent. above that current price. On demurrer, the Lord Chancellor, overruling the Vice-Chancellor, sustained the bill which sought to enjoin the defendant from selling to any one else at less than the agreed discount, and for an account. It is plain, I think, that the decision would have been the same if the defendant had agreed not to sell to any one else on any terms. This case virtually overruled *Hills v. Croll*,<sup>8</sup> decided a year earlier. (See the able note of the reporter at the end of the last-mentioned case.) These are but a few of the decisions, though they are among the most important of them.

This is certainly a subject upon which it is almost impossible to reconcile the decisions, and of such inherent difficulty that I know of no other in which the appellate courts have so often reversed the decisions below. I have examined a great many of the cases, and some apparent contradictions may be understood by recollecting that the granting or refusing an injunction is scarcely ever a matter of strict right, and that any attempt to lay down precise and invariable rules on the subject must necessarily fail. There are many cases in which injunctions have been refused in behalf of the employed, when, upon the precedent of *Lumley v. Wagner*, and that class of cases, they would have been granted to the employers. This seems unequal. The explanation, such as it is, appears to be, partly, that courts of equity are unwilling to

<sup>1</sup> 11 Sim. 47.

<sup>2</sup> *Great Northern Railway Co. v. Manchester Railway Co.*, 5 De G. & Sm. 138.

<sup>3</sup> 1 De G., M. & G. 616.

<sup>4</sup> *Webster v. Dillon*, 5 W. R. 867; *Stiff v. Cassell*, 5 Jur. N. S. 348.

<sup>5</sup> 33 Beav. 22.

<sup>6</sup> See also *Slee v. Bradford*, 4 Giff. 262; *Rolfe v. Rolfe*, 15 Sim. 88.

<sup>7</sup> 2 Phil. 52.

<sup>8</sup> 2 Phil. 60.

force upon any one an agent or servant who is personally disagreeable, if the relation between the parties is at all a personal or confidential one; and partly, that, on the part of the agent or servant, the remedy at law is usually adequate, both from the nature of the contract and the standing of the parties.<sup>1</sup> There are other cases which I can reconcile with those I have above cited, only on this ground, that where the subject-matter or business is of public importance, such as the management of a railway, the courts will not risk a total stoppage of the business by injunction when they cannot go forward and regulate the whole matter by a decree for specific performance.<sup>2</sup>

I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it. It seems to me that this case comes easily within this rule. The court cannot, perhaps, superintend the performance of a contract to manufacture machines, but it can restrain the defendants from selling in violation of their agreement.

The case may also be looked at in another view, which was presented in the complainant's argument. This is not only an agreement between the parties, that certain things shall be done by them, but it is also the grant of an exclusive license (excepting for France and Boston) to the complainants to sell the patented machines. And it has never yet been doubted that the court could restrain all persons, whether they were acting with or without notice, and whether bound by contract or not, from trespassing on such a title.

But it is said to be fatal to the complainant's case that the contract is not a mutual one. This want of mutuality is found in the article which limits the penalty for a forfeiture on the complainant's part to a mere loss of the agency. This is said to be equivalent to an agreement that the complainant may renounce at any time; and so it is argued that only one party is bound to this agreement. It is no doubt true, in general, that where only one side is bound to an agreement which remains wholly executory, a court of equity will not usually interfere to enforce the agreement against the party who is bound. The simplest case of this kind is where an infant is one party to a contract for the

<sup>1</sup> See *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411; *Johnson v. Shrewsbury Railway Co.*, 3 De G., M. & G. 914.

<sup>2</sup> *Peto v. Brighton Railway Co.*, 11 W. R. 874; *Johnson v. Shrewsbury Railway Co.*, 3 De G., M. & G. 914.

sale of land. The reason given is, that the party who is not bound would enforce the contract if for his advantage, and repudiate it if the contrary.<sup>1</sup> The doctrine is often invoked in that class of cases. But there are innumerable cases where the party seeking performance is no longer bound to any thing, having paid the consideration in the outset, or performed his part, or where the plaintiff does not rest on a contract wholly executory, to which this doctrine does not apply. I have some doubt of its application to this case. Supposing the stipulation to mean, what the defendants contend it does, that the complainant may renounce at any time, which may be doubted, still, if the defendants, for valuable considerations, have given the complainant an exclusive license until it forfeits it, I do not see why a court of equity should not protect that license by its injunction, as usual, so long as it is not forfeited. A very strong case was cited from 10 Wall., in which the Supreme Court refused to decree the specific performance of a contract for quarrying marble, etc., on the ground, among several others, that the plaintiff had the right to give up the arrangement on a year's notice. I cannot think that the court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Every thing must depend upon the nature and circumstances of the business. In many of the cases that I have cited, the plaintiff had it in his power to end the contract. It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable. In the note which I have above referred to in the case of *Hills v. Croll*, the learned reporter thinks it quite clear that a contract by the defendant to buy all his acid of the plaintiff, so long as the plaintiff chose to deal with him, would be valid, and would be enforced by injunction. In *Rolfe v. Rolfe*,<sup>2</sup> the Vice-Chancellor notices the fact, that the plaintiff could stop his own business when he chose, and thereby deprive the defendant of the employment agreed on, yet he restrained the defendant in the meantime from working for a stranger.

The remedy by injunction is a very elastic and adaptable one, and there is no sort of difficulty in granting it, until, by a change of circumstances, it shall appear that it ought to be dissolved. A bill may be retained for that purpose for any number of years that may be requisite. The argument, to be sound, must go this length, that, after the complainant has ordered a thousand machines, and paid for them, and is selling them in all the countries of the world excepting France, there is

<sup>1</sup> *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

<sup>2</sup> 15 Sim. 88.

no adequate remedy against the defendants' underselling in all those markets. I do not mean to be understood that this point would not apply to an injunction bill as well as to one for specific performance, nor that it is not a doubtful one. But the contract contains in itself, as we have seen, not only executory agreements on both sides, but a present grant, for value, of the exclusive right to sell; and my present impression is, that such a grant is good, and is to be enforced, so long as it lasts, whether the remainder of the contract is mutual or not, provided the whole contract, including the grant, is not so unequal as to be void in a court of equity, which, as at present advised of the facts, I see no reason to hold.

It seems to me, therefore, that the complainant's case has a sufficient appearance of justice to require the court to keep things as they are, by restraining all conduct which will put it out of the power of the defendants to fulfill their contract, until the facts and law can be fully ascertained.

Injunction ordered.

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### FOTHERGILL v. ROWLAND.

IN CHANCERY, BEFORE SIR GEORGE JESSEL, M.R., NOVEMBER 4,  
1873.

[*Reported in Law Reports, 17 Equity Cases 132.*]

DEMURRER. The plaintiffs in this case, Richard Fotherill and Ernest Thomas Hankey, were ironmasters, carrying on the Aberdare Ironworks. The defendant, Richard Rowland, was lessee of the Newbridge Colliery.

The bill alleged that the plaintiffs had for some time been accustomed to purchase coals of the defendant, Rowland, and that at the time of making the agreement hereinafter mentioned there was a subsisting contract, under which Rowland was supplying the plaintiffs from 1871 to the 4th of January, 1872, with a quantity of coal from the said colliery:

That at the time of the making of the agreement of the 6th of December, 1871, the Newbridge Colliery was only opened upon one seam of coal, called the "No. 3 seam," and was only partially opened on that seam; that Rowland was anxious to extend the openings in the seam, and had made representations to that effect to the plaintiffs, and that he (Rowland) was short of capital for extending his works, and that, with a comparatively small outlay, the colliery would produce nearly 300 tons of coal a day, and that if a siding could be had on the Taff Vale

Railway, near the Taff Vale Ironworks, he (Rowland) would be able to deliver the coals with greater facility and a considerable reduction of costs.

That the plaintiffs were then in a position to consume at the ironworks a much larger quantity of coal than they had previously taken, and were disposed to make an arrangement with Rowland to supply him with capital to enable him to extend his colliery, and also to make an arrangement with the Taff Vale Railway Company for the construction of a siding, provided that Rowland would enter into a contract of sale to the plaintiffs of all the coal which the said colliery would produce, for a lease of five years, provided that the quantity then supplied should not be less than a stated minimum.

That negotiations for an arrangement upon this footing resulted in an agreement, come to at a meeting between the plaintiffs and Rowland on the 6th of December, 1871, by which they agreed that Rowland should sell to the plaintiffs, and that the plaintiffs should buy the whole of the get of the coal of the No. 3 seam of the said colliery for five years, the quantity not to be less than that then delivered to the Taff Vale Ironworks, unless the coal should fail, at 6s. per ton, provided that the Taff Vale Railway Company would provide a siding to which Rowland should forthwith make a road, and that the plaintiffs should lend to Rowland £1,000 to aid him in opening the colliery, and that this agreement was reduced to writing in the form of a pencil memorandum signed by Rowland, and about the same time the plaintiffs agreed with Rowland that, besides the coal of the said No. 3 seam, another vein should be included in the contract, and at the option of the plaintiff, Fothergill, any other vein of coal within the colliery should be included.

That the said agreements were reduced to writing by a memorandum in the form of a letter of the 4th of January, 1872, addressed to Rowland and confirmed by him in writing, and another memorandum subscribed thereto of the 5th of January, 1872, which were as follows :

“DEAR SIR: I have been excessively occupied since our interview last month, and have not found time to sit down and write in detail that which we mutually agreed upon beyond the simple sale of coal described in the pencil memorandum we drew up together in the following terms :

“ ‘ 6 Dec., 1871.

“ ‘ Sold R. F., Esq., M.P., the whole of the get of the No. 3 coal out of the Newbridge Colliery property for five years, the quantity not to be less than at present delivered to his Taff Vale works, unless the coal should fail, at 6s. per ton payment as usual.’

"To which I desire now to add that we arranged, when so required, that you would deliver the said coal into our wagons on a siding of the Taff Vale Railway at such a reduction in price as you could obtain off the cost in comparison with the delivery into the Taff Vale works, provided that the Taff Vale Railway Company would provide such siding (which you had not been able to obtain), and to which you would forthwith make a road; in reference to which I am glad to inform you that I have seen Mr. Fisher, and obtained his consent to his company providing the needful siding, a most valuable concession in prospect of the possibly very large quantities of coal you talked of flooding me with. I also promised to lend you £1,000, to aid you in opening and developing the said colliery at the rate of £5 per cent. per annum interest, to be taken in such proportions monthly as you require in exchange for your acceptances at six months' date, all which please confirm, and I remain,

"Yours faithfully,

"RICH. FOTHERGILL."

"5th Jan., 1872.

"It is understood between us that besides the No. 3 coal named herein that the Forest Vach Vein is included in the foregoing contract, and, further, that any other vein of coal worked shall be included at the option of Mr. Fothergill or representatives.

"RICH. FOTHERGILL.

"RICHD. ROWLAND."

That in part performance of the said agreement Rowland had commenced to deliver coal from the said colliery to the ironworks; that the plaintiffs had advanced to him the sum of £1,000, which he had employed in extending the colliery; and that the siding was constructed by the Taff Vale Railway Company under the arrangement made with them by one of the plaintiffs.

That after January, 1872, coal of the description yielded by the colliery increased very much in value, and that Rowland had appealed to the plaintiffs to make some modification in the contract, which they had refused, though they had made an allowance by way of gift to the amount of one-third of the contract price; but that no variations in the contract had been assented to by the plaintiffs.

That coal of the description yielded by the colliery had advanced from 6s. to 13s. per ton.

That the plaintiffs had discovered that Rowland, in violation of the terms of his agreement, was selling coal from the said No. 3 seam to other persons than the plaintiffs; and that the deliveries were greatly below the minimum quantities specified in the contract.

That in August, 1873, the plaintiffs discovered that Rowland had entered into an agreement with the defendants, Spickett, Price, Bassett, and Meyer, for the sale to them of the colliery; and that such agreement was entered into for the purpose of evading the performance on the part of Rowland of the agreement between the plaintiffs and himself, and of depriving the plaintiffs of their rights in the premises.

The plaintiffs prayed, first, for an injunction to restrain the defendants from selling, assigning, or disposing of or interfering with the colliery, except subject to the agreement between the plaintiffs and Rowland; and from selling, disposing of, or interfering with any coal gotten or to be gotten out of the said colliery, except for the purpose of the performance of the agreement; and, secondly, that it might be declared that the plaintiffs were entitled to the whole of the get of the seam of coal No. 3, and of the Forest Vach Vein of the colliery, and also, at the option of the plaintiffs, to the whole of the get of any other seam of coal worked at the colliery during the period of five years, upon the terms of the said agreement embodied in the memoranda of the 6th of December, 1871, and the 4th and 5th of January, 1872.

The defendants demurred to the bill.

*Sir R. Baggallay*, Q.C., and *Mr. Crossley* for the defendants, Spickett, Price, and Bassett.

*Mr. Fischer*, Q.C., and *Mr. Freeling* for the defendant, Meyer.

*Mr. Roxburgh*, Q.C., and *Mr. Gazdar* for the defendant, Rowland.

*Mr. Fry*, Q.C., and *Mr. Marten* for the plaintiffs, in support of the bill.

SIR G. JESSEL, M.R. I feel no doubt whatever on the question, therefore I think it is my duty to give a decision. I never did approve, when at the bar, and I do not approve now, when on the bench, of the practice of not deciding a substantial question when it is fairly raised between the parties and argued, simply because it is raised by demurrer. It is a great benefit to all parties to have the question in the case speedily and cheaply determined, and the practice of demurring ought, if possible, to be encouraged.

The question is one which I am sorry to have to decide against the plaintiffs. No honest man, whether on the bench or off it, can approve of the conduct of the defendants. The first defendant, Rowland, has entered into a contract *bonâ fide* for valuable considerations to sell a quantity of coal to be raised from his mine to the plaintiffs. He has received the advantages of the contract, and because coal has risen in value and he can get a better price elsewhere, he does not choose to perform his contract. Such conduct ought not to meet with the approval of anybody. Then the question I have to determine is, whether the plaintiffs have come to the right court to obtain that which the law



will undoubtedly give them, namely, compensation in some shape or other for the loss they have sustained by this breach of contract. It appears to me, as the law now stands, a court of equity cannot give them any relief.

The first question is, what is the contract for? In my view of the contract it is one for the sale of coals—that is, coals gotten, the get of coal, the severed chattel, and it has no relation whatever to a contract for real estate. That point really was not argued by Mr. Fry, although Mr. Marten did touch upon it. I think it must be assumed, therefore, to be a simple contract for the sale of a chattel of a very ordinary description not alleged to be a peculiar coal or coal that cannot be got elsewhere. On the contrary, as I read the bill, there is coal that can be got elsewhere of the same description, only at a higher price. The result is that the plaintiffs will incur an amount of damage to be measured by the market price which they may have to pay for the coal of the same description as the coal agreed to be supplied by the defendant Rowland.

It is said, however, that, although you can ascertain the market price as regards all the past non-delivery, you cannot ascertain exactly the market price as to future deliveries. To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years (which is the case here, for there are three years unexpired of the contract) is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing, therefore I do not think it is a case in which damages could not be ascertained at law.

That being so, what is there to distinguish this from any ordinary contract for the sale of goods? We have been told it has some connection with the colliery. I suppose coals must necessarily have connection with a colliery, and it happens that the person who sold the coal to be produced from a given colliery was also at that time the owner of the colliery. I apprehend there is no difficulty about entering into a contract for the sale of coal coming from a particular colliery by persons not owners of that colliery. That is the common practice. The coals not being delivered, and there being no means of obtaining their delivery, without compelling the defendant Rowland to raise them, it has been admitted before me that this is a contract of which you cannot obtain a specific performance in a court of equity.

Therefore, any relief to be obtained by the plaintiffs in the shape of compensation must be obtained at law, and I do not understand that the plaintiffs, coming here for an injunction which they ask, are

willing to abandon their claim to compensation at law in the shape of damages.

Then it is said, assuming this contract to be one which the court cannot specifically perform, it is yet a case in which the court will restrain the defendants from breaking the contract. But I have always felt, when at the Bar, a very considerable difficulty in understanding the court on the one hand professing to refuse specific performance because it is difficult to enforce it, and yet on the other hand attempting to do the same thing by a roundabout method. If it is right to prevent the defendant Rowland from selling coal at all—he not having stipulated not to sell coal, but having stipulated to sell all the coal he can raise to somebody who has promised valuable consideration—why is it not right to compel him to raise it and deliver it? It is difficult to follow the distinction, but I cannot find any distinct line laid down or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked (and I am sure I should have obtained from one or more of the learned counsel engaged in the case every assistance) for a definition. I have not only not been able to obtain the answer, but I have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions—that the rule is that the court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the court at all, or something of that kind.

That being so, and not being able to discover any definite principle on which the court can act, I must follow what Lord St. Leonards says, in *Lumley v. Wagner*,<sup>1</sup> is the proper conduct for a judge in not extending this jurisdiction. I am not, however, entirely without assistance from authority, because it appears to me that this very case has been put, though only by way of illustration, by a very great judge, Lord Cottenham, in *Heathcote v. North Staffordshire Railway Company*,<sup>2</sup> where he says, “If A contract with B to deliver goods at a certain time and place, will equity interfere to prevent A from doing anything which may or can prevent him from so delivering the goods?” That is the exact case I have to deal with, because I have decided that the contract is a contract for the delivery of goods. Finding the *dictum* of Lord Cottenham express on the subject, and the plaintiffs’ counsel not

<sup>1</sup> D. M. & G. 604.

<sup>2</sup> 2 Mac. & G. 112.

having been able to produce to me any authority in which there has been such an injunction granted on the sale of goods or any chattel, in a case in which specific performance could not be granted, I think I shall do right in following that authority; and I say, although I say it with much regret, that it is a case in which equity can afford no relief.

With regard to the question of costs, I think it is undesirable to take the technical admission of the facts of the bill, when a person files a demurrer, to be an admission of the truth of the facts against him for the purpose of costs. If there is no remedy at all at law I think the rule that the costs should follow the result too valuable a one to be tampered with. On these grounds I allow the demurrer, with the usual consequences.

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A petition of appeal was presented against this decision, but the case was compromised before it came to a hearing.

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AUGUSTUS DALY v. FANNY MORANT SMITH AND CHARLES SMITH.

IN THE SUPERIOR COURT OF THE CITY OF NEW YORK, SEPTEMBER, 1874.

[*Reported in 38 New York Superior Court Reports 158.*]

BEFORE FREEDMAN, J., at Special Term, September, 1874.

Motion for injunction.

*A. Oakey Hall* for the motion.

*William D. Booth* opposed.

FREEDMAN, J. This is a motion on the part of the plaintiff for the continuance, during the pendency of the action, of an injunction, heretofore granted, preliminarily restraining the defendant Fanny Morant Smith from performing as an actress upon the stage of the Union Square Theatre.

The papers on which the motion is based show, among other things, that on February 11, 1874, a contract in writing was entered into between the plaintiff and Fanny Morant Smith, by which the latter covenanted and agreed among other things to act, to the best of her ability, in theatrical performances on the stage of plaintiff's theatre, during the seasons of 1874, 1875 and 1876, all such parts and characters as the plaintiff might direct, and that she would not act at any other theatre or place in the City of New York, from the day of the

date of said contract until the determination thereof, without the written consent of the plaintiff. The plaintiff then avers a breach of said contract on her part, by accepting an engagement to play during the ensuing season of the Union Square Theatre, and allowing her appearance at that place to be publicly advertised, and after setting forth various alleged equities, which it is claimed, on his part, entitle him to an injunction, and which will be noticed hereafter, he prays that she may be enjoined from continuing the breach. The sole object of the action, in which her husband has been joined as a party defendant, is to have her thus restrained by the decree of this court, and it is clear, therefore, that unless an action for that purpose alone can be maintained, the court is without jurisdiction to restrain her during the pendency thereof.

The very first question to be considered, therefore, is whether the action will lie as brought. It is conceded by both sides that the action could not be maintained for the strict performance of the whole contract, if it had been brought in that form, and that in such case there would be no power in the court to compel, either by order or final decree, the defendant to act.

The question, whether or not a court of equity will interfere by injunction to prevent a breach of a contract for personal services, or whether the complainant must look to his damages at law as his sole redress, has been frequently, and on several occasions quite elaborately, discussed both in England and in this country. On a cursory reading the authorities may seem somewhat conflicting, but a careful perusal of them in the light of the facts before the court on the several occasions, can leave no doubt as to the existence of the power.<sup>1</sup>

So upon the principle, can I conceive of no reason why contracts for theatrical performances should stand upon a different footing than other contracts involving the exercise of intellectual faculties; why actors and actresses should by the law of contracts be treated as a specially privileged class, or why theatrical managers who have to rely upon their contracts with performers of attractive talents to carry on the business of their theatres should, with the large capital necessarily involved in their business, be left completely at the mercy of their performers. On the contrary, I am of the opinion that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements, and that whenever the court has not proper jurisdiction to enforce the whole engagement, it should, like in all other cases, operate to bind their consciences, at least as far as they can be bound, to a true and faithful performance. As pointed out by Judge J. F. Daly, in *Hayes v. Willio*,<sup>2</sup> and his remarks upon this point are entitled to respect,

<sup>1</sup> A portion of the opinion has been omitted.—ED.

<sup>2</sup> 11 Abb. Pr. N. S. 167.

notwithstanding the fact that his decision has been reversed upon another point, the resort to actions at law for damages for a sudden desertion of the performers in the middle of their season will, in most cases, fail to afford adequate compensation ; and it is not always that the manager is deprived of his means of carrying on his business, but that his performers, by carrying their services to other establishments, deprive him of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him irreparable injury. If, therefore, such a manager comes to a court of equity and makes proof of these facts and circumstances, showing also that the contract upon which he relies is a reasonable one, that he is in no wise to blame for its breach by the defendant, and that he has no adequate remedy at law, upon what principle of justice or of common sense is he to be told that he must, nevertheless, seek his remedy at law, and take the chance by proving his damages by legal evidence before a jury. Of what benefit would even a verdict be to him in case the defendant is wholly insolvent ? Is it not an old and fairly settled principle of equity jurisprudence, that just because there is in such a case no adequate remedy at law, it is the office and the duty of equity to step in to prevent a failure of justice ? In the language of Lord Chancellor St. Leonards, a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

Suffice it, therefore, to say, that upon principle as well as upon authority, I am fully persuaded that this court does possess the power and jurisdiction which has been invoked by the plaintiff. At the same time, I am well aware that there is no branch of equitable jurisdiction which requires more discretion in the exercise of it than the one that has been here considered. It remains, therefore, to be seen whether the plaintiff shall have the benefit of it on the merits of his case.

The plaintiff shows that the defendant, Fanny Morant Smith, is a distinguished actress and a great artistic acquisition, both in name and dramatic service, to any theatre ; that, therefore, for several seasons past he considered it important to secure her professional services for his theatre, and did secure them, that the last contract for such seasons expired in the month of June last ; that before the expiration of that contract, to wit, on the 11th of February last, the new contract was entered into under which the present controversy has arisen ; that the last named contract covers the seasons of 1874, 1875 and 1876, each season to commence on or about September 1 of each respective year, and to terminate on or about June 15 of the following year, and that by it Fanny Morant Smith, in consideration of a weekly salary of one hundred and thirty dollars, to be paid to her during the first season, and a like salary of one hundred and thirty-five dollars to be paid to her

during the second and third seasons, payment to be made on Monday, at noon, of each week, bound herself to act to the best of her ability in the performances to be given during the said seasons, all such parts and characters as the plaintiff might direct, and to conform to and faithfully obey certain rules of plaintiff's theatre, referred to in, and made part of said contract, and not to act at any other theatre in the City of New York, from the date of said contract until the determination thereof, without the written consent of the plaintiff. The contract also shows that each week is to include such rehearsals as may be ordered by the plaintiff, without any extra payment therefor. The plaintiff further shows that he made such contract, as the defendant Fanny Morant Smith well understood at the time, because of his desire, first to secure her dramatic service, secondly her name, and thirdly to prevent her acting elsewhere in New York without his permission, and obtaining *éclat* for a rival theatre ; that the latter is always an essential reason with managers, and is well understood by every actor and actress, as it was understood by the defendant ; that relying on said contract, he announced her in all the daily papers in the City of New York, and widely throughout the United States, as a member of his company for this year's season, to commence August 25 ; that a rehearsal for the performance to be given on that day was ordered for Saturday, August 15, that she was notified to attend the same, but that she refused ; that he has substantially selected and prepared those plays which are to be presented up to the close of the said season, and in doing so has relied on her services, and has managerially distributed and prepared many parts for her to perform therein ; but that in violation of her contract and against plaintiff's express prohibition, she entered into an engagement to play during the ensuing season at the Union Square Theatre, a rival to plaintiff's theatre, and that with her consent she is publicly announced to appear there. And finally, the plaintiff shows that it will be impossible to replace her by any other artist at this date, inasmuch as engagements are made in the spring ; that he will therefore be irreparably damaged and injured in his business, not only by her departure, but also by her appearance and performance at the rival establishment, and that a computation of the damage thus resulting to him in loss or receipts and otherwise will be utterly impossible in an action at law.

None of these allegations have been denied, or attempted to be denied, by the defendant, Fanny Morant Smith, except the allegation that the plaintiff has selected parts for her, and in respect to that, she only avers generally, that she has no knowledge, and does not believe the fact to be as stated by the plaintiff, which can not be held to amount to a denial, especially as she admits to have been summoned to a rehearsal, and to have refused not only to attend, but even to look at the

*rôle* assigned to her. Nor has the force of any of the said allegations of the plaintiff been weakened by any allegation on her part, unless it be by the allegations that she notified the plaintiff some time after the execution of the contract of her intention and desire to cancel the same, and that she is pecuniarily able, to the extent of twenty thousand dollars, in real estate, to respond in any damages he may recover against her at law. Upon the whole case, as made by the plaintiff, the facts, thus averred by her, even if true, are quite unimportant. So, when the contract is scrutinized in its entirety, and with due regard to its nature and the situation, and the prior dealings of the parties, nothing can be found in it which could be construed into a hardship upon her. Even the fact that the prohibition runs from the date of the contract, and not from the commencement of the regular season of 1874-1875, is not an unreasonable circumstance in this case, however unreasonable and inequitable it might be in others. It has been conceded by both sides, that the defendant, Fanny Morant Smith, is not only a great actress, but that she is also a shrewd lady of great business capacity, and mature age and judgment, and it is therefore safe to assume that, in the light of her past experience with the plaintiff, she made the best bargain for herself that could be got under the circumstances. Nor does she claim that the contract is void on grounds of public policy, as being in restraint of trade. On the contrary, the learned counsel who represents her admits that such is not the fact.

The plaintiff has, therefore, made a case as strong as *Lumley v. Wagner*, in all respects, and in some respects even stronger, and he is entitled to his injunction, unless the defendant, Fanny Morant Smith, establishes an affirmative defense.

Upon full consideration of all the questions arising in this case, as presented by the affidavits of the parties, I am entirely satisfied, not only, that the plaintiff has made out a case which calls strongly for the interposition of the equity powers of this court, but also that the defendant, Fanny Morant Smith, has no defense on the merits. This brings me to the last question involved. The parties evidently foresaw that differences might arise between them during the life of the contract, and so careful were they, that they provided even for the contingency which has arisen in this case. The contract says, that if the defendant, Fanny Morant Smith, should refuse to fulfill her part, and should attempt to perform at any other theatre before the termination of her agreement with the plaintiff, the plaintiff may, by legal process or otherwise, restrain her from so performing, on payment to her during such restraint of a sum equal to one-quarter of the salary to be paid to her under the contract in lieu of the said, or any other salary under the agreement during the period covered. I refrained from noticing this

clause at an earlier stage, because parties can not confer jurisdiction by stipulation. But as the jurisdiction exists, as I have already shown, wholly irrespective of the clause, it was competent for the parties to agree upon the terms of restraint in a proper case, and as this is a proper case for an injunction, irrespective of said clause, I have no inclination to interfere with the arrangement which the parties saw fit to make. The plaintiff evidently considered that, though in case of disagreement, he could not compel the defendant, Fanny Morant Smith, to act, it was worth about thirty-three dollars a week to him to keep her from constituting an attraction for a rival establishment, and she, having agreed to it, has no cause of complaint, for her restraint is not predicted by the court upon the existence of the clause. By the terms of the contract, restraint and payment are mutually dependent on each other, and the restraint is not to extend beyond the limits of the City of New York, and a contract to this effect is therefore presented, which the court can completely and effectually enforce. No previous payment or tender is necessary to the maintenance of the action.

The motion of the plaintiff for the continuance of the injunction during the pendency of the action is therefore granted, with ten dollars cost, but on condition that the plaintiff pay to the defendant, Fanny Morant Smith, during such continuance, one-quarter of the salary to which she would be entitled under the contract in case of performance, such payment to be made to her, or her order, as she may direct, in weekly installments, payable on Monday of each week, and that he also pay to her or her order, forthwith, such sum as may have accrued since the granting of the preliminary injunction contained in the order to show cause herein.<sup>1</sup>

<sup>1</sup> The defendant's counsel insists that, inasmuch as there is no negative stipulation in the contract by which the defendant agreed not to appear elsewhere, the court cannot interfere. But, as was shown in *Daly v. Smith*, *supra*, the court is bound to look to the substance and not to the form of the contract. As the defendant had agreed to appear in seven performances in each week (exclusive of Sundays) which the plaintiff's company might give in New York, it was not possible for her to perform elsewhere in New York without a violation of her contract with the plaintiff, and a negative clause was unnecessary to secure to the plaintiff exclusively the services of the defendant.—Freedman, J. *Duff v. Russell*, 60 N. Y. Supr. Ct. Reports 80-83.

The judgment in *Duff v. Russell*, granting an injunction restraining the defendant from singing, was affirmed on appeal, on the opinion of Freedman, J., in 133 N. Y. 678.—ED.



## JONES v. NORTH.

IN CHANCERY, BEFORE SIR JAMES BACON, V.C., FEBRUARY 26, 1875.

*[Reported in Law Reports, 19 Equity Cases 426.]*

DEMURRER. The statements in the bill were in effect as follows :

On the 17th of December, 1874, the Corporation of Birmingham issued an advertisement inviting tenders for contracts for the supply of 40,000 tons of stone for macadamizing the causeways of the borough. A form of specification of the work required to be performed, together with a form of tender, was also issued. The plaintiff was the owner of the Hailstone Quarry, at Rowley Regis, in Staffordshire, and his quarry furnished stone fit and proper for the purposes referred to in the specification. The defendants (carrying on business as the Rowley Hall Colliery Company) were the owners of another quarry in the same district, also furnishing stone of a quality available for the purposes of the specification. Messrs. Fitzmaurice & Co. and Palmer & Lee were owners of other quarries in the neighborhood of Birmingham furnishing stone available for the specification. When the specification and form of tender were issued the price at which tenders should be sent in became a matter of serious moment to the plaintiff, the defendants and the other two firms. Under these circumstances an arrangement was come to between the plaintiff, the defendants, Fitzmaurice & Co. and Palmer & Lee that the plaintiff should purchase from the defendants 10,000 tons of stone, and that in consideration of his doing so the defendants should not send in any tender to the Birmingham Corporation, nor supply the corporation with any stone during 1875; and that the plaintiff should also purchase from Fitzmaurice & Co. 10,000 tons, and from Palmer & Lee 6,000 tons, and that the plaintiff and the two last mentioned firms should each send in tenders at different prices, the prices named in the plaintiff's tender being the lowest. In accordance with these arrangements the plaintiff entered into contracts with the defendants and with Fitzmaurice & Co. and Palmer & Lee to take the above-mentioned quantities of stone, 26,000 tons in all. In this way it was apprehended that the corporation (though not binding themselves to do so by the terms of the specification) would, in all probability, fix upon the lowest tender, and thus the 40,000 tons would be supplied by the plaintiff, and through him by the contracting firms; the prices as between the plaintiff and the other three firms for the quantities of stone to be furnished by them being so arranged as to secure to each of them a fair share of the profit arising from the supply to the corporation under their specification.

On the footing of the agreement the plaintiff, on the 30th of Decem-

ber, 1874, sent in a tender to the Birmingham Corporation for 40,000 tons of stone.

On the 27th of January, 1875, the plaintiff received a note from an officer of the corporation that the Public Works Committee had accepted the offer of the Rowley Hall Company (the defendants) for the supply of stone—in breach, as the bill alleged, of their contract with the plaintiff, and notwithstanding the said agreements and the heavy liability which the plaintiff had thereby been induced to bring himself under as well to the defendants as to Fitzmaurice & Co. and Palmer & Lee for the purchase of large quantities of broken stone, the purchase of which was wholly useless, and would, in fact, be a dead loss to the plaintiff unless the agreement between himself and the defendants be duly acted upon and observed.

Under these circumstances the plaintiff had filed his bill against Messrs. North & Wright to restrain them from supplying any rough or broken Rowley ragstone to the Birmingham Corporation, either directly or indirectly during 1875, and from supplying during such period any other stone or material, or doing any act whereby the corporation might be supplied with stone in manner and for the purposes required and referred to in and by the specification.

To this bill the defendants had demurred for want of equity.

*Mr. Jackson, Q.C.*, and *Mr. E. Ward* for the demurrer.

*Mr. Kay, Q.C.*, and *Mr. Ince*, for the plaintiff, were not called upon.

SIR JAMES BACON, V.C. There is nothing to justify this demurrer. The case is very plain and, on one side at least, a very honest one. Several gentlemen, who are owners of quarries, agree that they will sell to one of them a quantity of stone, in view of his tendering to the Corporation of Birmingham for what the corporation wants, and the present defendants sell by the bought and sold note (which is set out) a quantity of stone to the plaintiff. Upon it being pointed out to the defendants that what is called the bought and sold note does not specify that they shall not supply the Corporation of Birmingham, they enter into a written engagement, which becomes part of the contract for the purchase and sale, that they will not supply the corporation during the year 1875. How are they to escape from that contract? Is there any ground on which this court can withhold from the plaintiff the protection to which that contract entitles him? I am aware of none. The grounds which have been argued first of all are that the corporation should be parties. Why? The corporation, whatever the form of the contract between them and the defendants, could not enforce specific performance of it. If the defendants so involved themselves as that they are unable to perform their contract with the corporation, the corporation require no assistance, and are entitled to none from this court, because by an

action at law they can at once inflict upon the defendants the penalty which they have most justly incurred by entering into a contract with them totally in violation of the good faith which they owed to the plaintiff. The suggestion that the plaintiff's position would not be bettered by granting the injunction is one to which I cannot listen for a moment. The plaintiff does not ask the court to better his position. All that he asks is that the defendants should not violate their plain contract to the plaintiff's prejudice. What ground of demurrer can there be in that? <sup>1</sup>

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## DONNELL v. BENNETT.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, FEBRUARY 8, 1883.

[*Reported in Law Reports, 22 Chancery Division 835.*]

By an agreement dated the 15th of December, 1882, and made between the plaintiff, J. Donnell, a manure manufacturer, of the one part, and Cormack, a fish curer and fish smoker, of the other part, it was agreed that Cormack should sell and that the plaintiff should buy all parts of fish not used by Cormack in his business of a fish curer and fish smoker at the price of 23s. per ton for the space of two years from the 31st of December, 1882, and in consideration thereof Cormack further agreed that he would not sell during the said space of two years any fish or parts of fish to any other manufacturer whatever, and the plaintiff further agreed that he would take and pay for all fish or parts of fish which Cormack should deliver to him at the said price of 23s. per ton delivered at the plaintiff's works.

It was admitted that the defendant never delivered any fish or parts of fish under the contract to the plaintiff, but that he entered into a contract with the defendant, Bennett, to deliver all the parts of fish which he did not require in his business to Bennett; it was also admitted that the plaintiff had suffered damage by this breach of contract, and that the defendant, Bennett, had paid Cormack considerable sums of money to induce him to break his contract with the plaintiff, in order that Bennett might obtain the substantial monopoly of all the refuse of fish in Grimsby or the neighborhood.

This was an action by the plaintiff against Bennett and Cormack as co-defendants asking for an injunction to restrain Cormack from selling

<sup>1</sup> A portion of the opinion discussing the validity of the contract has been omitted.—ED.

any fish to Bennett or any other manufacturers except the plaintiff, and to restrain Bennett from buying any such fish from Cormack.

*H. A. Giffard*, Q.C., and *Hall* for the plaintiff.

*Cozens-Hardy*, Q.C., and *Williamson* for the defendants.

FRY, J. The question which arises is by no means an easy one. It is difficult because of the state of the authorities upon the point. It appears to me that the tendency of recent decisions, and especially the cases of *Fothergill v. Rowland*,<sup>1</sup> and of the *Wolverhampton and Walsall Railway Company v. London and North Western Railway Company*,<sup>2</sup> is toward this view—that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me.

Now several cases have been cited by the plaintiff as authorities in favor of his contention. In the first place there is the case of *Dietrichsen v. Cabburn*,<sup>3</sup> in which undoubtedly the court enforced by way of injunction a stipulation not to sell except in a particular manner, and there the whole contract was one which could not have been performed specifically by the court. Still more, in *Lumley v. Wagner*\* the court enforced by way of injunction a portion of a contract the whole of which could not have been enforced by way of specific performance; and Lord St. Leonards in considering that case discussed the question whether an injunction ought to be granted in some cases in which specific performance cannot be granted, and he determined that question plainly in the affirmative. He made these observations:<sup>6</sup> “Wherever this court has not proper jurisdiction to enforce specific performance it operates to bind men’s consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe,

<sup>1</sup> Law Rep. 17 Eq. 132.

<sup>2</sup> Ibid. 16 Eq. 433.

<sup>3</sup> 2 Ph. 52.

<sup>4</sup> 1 D. M. & G. 604.

<sup>5</sup> 1 D. M. & G. 619.

had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other ; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity." It is plain, therefore, that Lord St. Leonards did not adopt the view which has occurred to me as that towards which the more recent cases have been tending.

That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to show that in cases of this description where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract.

Then it is said by Mr. Cozens-Hardy that in all those cases the negative contract enforced was but a part of a larger contract, and that it was a separable part of that larger contract, and that those cases do not apply to a case like the present, in which, as he suggests, the negative contract is co-extensive with the positive contract.

Upon that argument two inquiries arise. In the first place, is it true to say that the negative contract is in the present instance co-extensive with the positive ? In my judgment it is not. The affirmative contract is that the vendor will sell all his fish refuse for two years to the purchaser. The negative contract is that during two years he will not sell any refuse fish to any other manufacturer whomsoever ; leaving it open to him so far as regards the negative contract, either not to sell at all, or to sell to some person other than a manufacturer. But in the next place one must inquire whether the authorities support any such distinction as that which has been urged by Mr. Cozens-Hardy. It appears to me that they do not.

In *Lumley v. Wagner*<sup>1</sup> the contract was that Mdlle. Wagner would sing three months at Her Majesty's Theatre in London. The negative contract was that she would not "use her talents in any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley." It is quite true that the contract contains certain stipulations as to how many nights she should be required to sing, but it appears to me to be evident that the substantial contract, the affirmative contract was that she would sing there for three months. Of course she could not be always singing, and therefore the contract must state necessarily some limits as to how often she was to sing, but when she did sing during the three months she was to sing at Her Majesty's Theatre ; the negative terms were that during the three months she would not sing anywhere else than at Her Majesty's Theatre.

<sup>1</sup> 1 D. M. & G. 604.

It appears to me that those two contracts are substantially co-extensive. But further than that it is to be borne in mind that Lord St. Leonards does not dwell on the distinction which is now sought to be drawn, and so far as I am aware no trace of it is to be found in the earlier authorities.

But then comes the case of *Catt v. Tourle*,<sup>1</sup> before the Lords Justices, in which *Hills v. Croll*<sup>2</sup> was referred to. Now *Hills v. Croll* was a case which contained an affirmative and negative contract, and Lord Justice Giffard expressly said that if that case is to be taken as laying down that the court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply. If it is taken as going that length, it is contrary to the case of *Lumley v. Wagner*,<sup>3</sup> and must be considered as overruled.

It appears to me, therefore, that that point which has been urged upon me does not receive any sanction from the earlier authorities.

I have come to the conclusion, therefore, upon the authorities, which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty, because I find it hard to draw any substantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation which implies a negative. I find it exceedingly difficult to draw any rational distinction between the case of *Fothergill v. Rowland*<sup>4</sup> and the case now before me. But, at the same time, the courts have laid down that, so far as the decisions have already gone in favor of granting injunctions, the injunction is to go.

It appears to me that this case is within the earlier decisions, and although I should be far from sorry if the Court of Appeal were to take a different view, I think I am bound here by the authorities, and therefore I grant the injunction till the hearing of the cause.

Solicitors for plaintiff, *Bower, Cotton & Bower*.

Solicitors for defendants, *Williamson, Hill & Co*.

<sup>1</sup> Law. Rep. 4 Ch. 654.

<sup>3</sup> 1 D. M. & G. 604.

<sup>2</sup> 2 Ph. 60.

<sup>4</sup> Law Rep. 17 Eq. 132.

THE WM. ROGERS MANUFACTURING COMPANY AND  
ANOTHER v. FRANK W. ROGERS.IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, FEBRUARY  
17, 1890.*[Reported in 58 Connecticut Reports 356.]*

SUIT for an injunction to restrain the defendant from leaving the employment of the plaintiffs or engaging in other business, in violation of a contract ; brought to the Superior Court in Hartford County.

The plaintiffs were the Wm. Rogers Manufacturing Company and the Rogers Cutlery Company, both joint stock corporations located in Hartford, and carrying on business under one management, the manager being William H. Watrous. On the 17th of March, 1879, the following contract was entered into between Watrous, acting as agent of the plaintiff companies, and the defendant :

" 1. That said companies will employ said Rogers in the business to be done by said companies, according to the stipulations of said agreement, for the period of twenty-five years therein named, if said Rogers shall so long live and discharge the duties devolved upon him by said Watrous, as general agent and manager of the business to be done in common by said companies, under the directions and to the satisfaction of said general agent and manager ; it being understood that such duties may include traveling for said companies, whenever in the judgment of said general agent the interests of the business will be thereby promoted.

" 2. The said companies agree to pay said Rogers for such services so to be rendered, at the rate of \$1,000 per year for the first five years of such services, and thereafter the same or such larger salary as may be agreed upon by said Rogers and the directors of said companies, said salary to be in full during said term of all services to be rendered by said Rogers, whether as an employee or an officer of said companies, unless otherwise agreed.

" 3. The said Rogers, in consideration of the foregoing, agrees that he will remain with and serve said companies under the direction of said Watrous, as general agent and manager, including such duties as traveling for said companies, as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies, as said companies may desire to have him perform at the salary hereinbefore named, for the first five years, and at such other or further or different compensation thereafter, during the remainder of the twenty-five years, as he, the said Rogers, and the said companies may agree upon.

"4. The said Rogers during said term stipulates and agrees that he will not be engaged, or allow his name to be employed in any manner, in any other hardware, cutlery, flat ware or hollow ware business, either as manufacturer or seller, but will give, while he shall be so employed by said companies, his entire time and services to the interests of said common business, diminished only by sickness and such reasonable absence for vacations or otherwise as may be agreed upon between him and said general agent."

The complaint set out the foregoing contract, and a contract of March 14th, 1879, between the plaintiff companies, by which they agreed for twenty-five years to do certain business on their joint account and under one management, the defendant then being secretary of the Rogers Cutlery Company, one of the plaintiffs. The complaint then proceeded as follows :

After the execution of said last named contract, in order to make it desirable to the defendant to become and continue permanently interested in and connected with the new business thereafter to be severally done by said corporations under the control of said Watrous as general manager thereof as proved in said contract, and to prevent him from allowing his name to be used in conflict therewith, and as a consideration for the performance of his own contract additional to those named therein, the said Watrous, in and by another contract with the defendant dated March 17th, 1879, conveyed to the defendant the equitable interest and ownership in one hundred and sixty shares of the capital stock of the Rogers Cutlery Company aforesaid, upon the terms and conditions named in the agreement ; and the defendant has since, and prior to the date of this complaint, received upon said shares of stock \$2,995.99 in dividends, and still remains entitled to the receipt of continued dividends thereon and to full conveyance of said shares according to the terms of said contract.

In accordance with said agreement the defendant entered the service of the plaintiffs, and therein has continued until the present time as the secretary of each of said companies and in the discharge of the duties therein so as aforesaid agreed by him to be performed, and from the date thereof to the present time the provisions of said agreement (except as hereinafter stated) have been executed both by the plaintiffs and the defendant ; the salary of the defendant has by mutual agreement been raised to \$2,000 per annum, and the services of the defendant, by reason of his familiarity with the plaintiffs' business and knowledge of their customers, acquired by his said employment since said 14th day of March, 1879, have become and now are of special value to the plaintiffs ; and the plaintiffs desire that the defendant should continue in



their employ and faithfully keep and perform all the obligations of said agreement.

The plaintiffs are informed and believe, and therefore aver, that the defendant secretly and with intent that the fact should not be known to the plaintiffs, now is and for some time past has been conspiring and negotiating with sundry persons and corporations to the plaintiffs unknown, but all of whom, as the plaintiffs believe, are their competitors in business, with the purpose and intent of engaging, in connection with such persons and corporations, in the manufacture and sale of cutlery and silver-plated flat and hollow ware, and with the intent and purpose of allowing his name to be used and employed in connection with such business as a stamp on such silver-plated ware, and with the further intent of using in the interest of and for the advantage of such persons all his knowledge and information of the plaintiffs' business and of their customers which he has obtained by virtue of his employment as aforesaid. And the plaintiffs further say that the defendant threatens to leave their employ and to engage with such other parties in the business of manufacturing and selling cutlery and silver-plated flat and hollow ware, and to allow his name to be used and employed in connection with such business as a stamp upon such silver-plated goods and otherwise ; all of which would be in violation of the defendant's agreement with the plaintiffs, and would deprive the plaintiffs of all the benefits and advantages secured to them by said agreement and to which they are justly entitled. And the plaintiffs aver that such conduct and doings of the defendant would occasion great and irreparable loss and damage to the business of the plaintiffs, and the use of defendant's name as a stamp or trade-mark on said cutlery, silver-plated flat and hollow ware as aforesaid, would cause the same to so resemble the similar goods made and sold by the plaintiffs and stamped with the plaintiffs' stamps and trade-marks, of which the most prominent part is the word "Rogers," as that the same would be liable to be mistaken for those of the plaintiffs, and would be liable to be sold and would be sold as and for goods made and sold by the plaintiffs, and thereby great and special loss and damage would be done to the plaintiffs in their business, for which there would be no adequate remedy at law. And they aver that the defendant has little if any property, and substantial damages, if recovered, could not be enforced at law.

The plaintiffs claim an injunction restraining the defendant from leaving the employment of the plaintiffs, and in any manner engaging in any other hardware, cutlery, flat ware or hollow ware business, and from allowing his name to be employed in any manner in any such other business than that of the plaintiffs.

The defendant demurred to the complaint, assigning the following grounds of demurrer :

1. The contract therein set up is one-sided and unequal in that, among other things, it does not bind the plaintiffs for any definite time.

2. It sets up an affirmative engagement not a proper subject for equitable relief, and therefore the negative relief prayed for cannot be afforded.

3. The contract set up is not a contract for the employment of services involving special skill and training, nor for services involving the exercise of high powers of mind peculiar to the defendant.

4. An injunction against the defendant as prayed for would be mischievous and against public policy.

The case was heard before FENN, J., and the complaint held insufficient and judgment rendered for the defendant. The plaintiffs appealed.

*F. Chamberlin*, with whom was *E. S. White*, for the appellants.

*C. R. Ingersoll* and *F. L. Hungerford* for the appellee.

ANDREWS, C. J. Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance.<sup>1</sup> A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service.

The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation.<sup>2</sup>

The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured

<sup>1</sup> 2 Kent's Com. 258, note b; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Sanquirico v. Benedetti*, 1 Barbour 315; *Haight v. Badgeley*, 15 id. 499; *De Rivafinoli v. Corsetti*, 4 Paige 264.

<sup>2</sup> 3 Wait's Actions & Defenses 754; *Marble Company v. Ripley*, 10 Wallace 340; *Burton v. Marshall*, 4 Gill (Md.) 487; *De Pol v. Sohlke*, 7 Robertson (N. Y.) 280; *Kemble v. Kean*, 6 Simons 333; *Baldwin v. Society for Diffusion of Knowledge*, 9 id. 393; *Fothergill v. Rowland*, L. R. 17 Eq. 132.

party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages.<sup>1</sup>

The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling for said companies whenever in the judgment of said general agent the interests of the business will be thereby promoted"; and also "including such duties as traveling for said companies as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies as said companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the contract it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs, however, insist that the negative part of the contract, by which the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flat ware or hollow ware business, either as a manufacturer or seller, fully entitles them to an injunction against its violation. They aver in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; and they say such use would do them great and irreparable injury. If the plaintiffs owned the name of the defendant as a trade-mark they could have no difficulty in protecting their ownership. But they make no such claim; and all arguments or analogies drawn from the law of trade-marks may be laid wholly out of the case.

There is no averment in the complaint that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture; nor any averment that

<sup>1</sup> 2 Story's Eq. Jur., § 958 *a*; 3 Wait's Actions & Defenses 754; Pomeroy's Eq., § 1343; *California Bank v. Fresno Canal Co.*, 53 Cal. 201; *Singer Sewing Machine Co. v. Union Button Hole Co.*, 1 Holmes 253; *Lumley v. Wagner*, 1 De G., M. & G. 604; *South Wales R. R. Co. v. Wythes*, 5 id. 880; *Montague v. Flockton*, L. R. 16 Eq. 189.

such use, if it exists, is of any value to them. So far as the court is informed the defendant's name on such goods as the plaintiffs manufacture is of no more value than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out, so that the court might pass upon them. In the absence of any allegation of such facts we must assume that none exist.

The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have not shown facts which bring the case within any rule that would require an employee to be enjoined from disclosing business secrets which he has learned in the course of his employment and which he has contracted not to divulge.<sup>1</sup>

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

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## WHITWOOD CHEMICAL COMPANY v. HARDMAN.

IN THE COURT OF APPEAL, MARCH 2, 1891.

[*Reported in Law Reports, 2 Ch. (1891) 416.*]

APPEAL from Mr. Justice Kekewich.<sup>2</sup>

By an agreement, dated the 25th of September, 1885, between the plaintiffs and the defendant, it was provided that the defendant, a manufacturing chemist, should be the manager of the plaintiffs' works at Normanton for five years, at a salary of £300 per annum, with a commission of  $7\frac{1}{2}$  per cent. on the dividends; and it was further provided that the defendant should give due diligence to the performance of his duties, conduct himself with propriety, and conform to the reasonable requirements of the board of directors. The agreement contained no provision as to exclusive service or in restriction of the defendant's employment at the end of the term.

By an agreement, dated the 24th of July, 1889, it was agreed that the

<sup>1</sup> Peabody v. Norfolk, 98 Mass. 452.

<sup>2</sup> The opinion of Mr. Justice Kekewich has been omitted.—Ed.

defendant should be manager for the remainder of an extended term of ten years from September, 1885, at the same salary and with the same commission. This agreement contained the following clause: "The said manager shall give the whole of his time to the company's business, he shall give due diligence to the performance of his duties, and shall conform to the reasonable requirements of the board of directors, and he shall reside within two miles from the company's said works." The agreement contained no negative contract by the defendant.

The plaintiffs were incorporated in 1883 for the purpose of working a license, dated the 25th of September, 1885, from Hardman's Patent Carbonization Process Company, Limited, under letters patent for improvements in the carbonization of coal and coal shale, and in the treatment of coal gas for obtaining benzole, solvent naphtha and other products. Hardman, the patentee, was the defendant's brother.

The license granted an exclusive right to work the patent within an area of ten miles from the company's works at Normanton.

One of the directors of the plaintiff company stated in an affidavit that it had recently come to the knowledge of the company that the defendant was in communication with a firm of colliery proprietors, whose colliery was distant about a mile from the company's works, with a view to setting up a rival establishment at or near the colliery for carbonizing coal, in which the defendant was to invest a large sum as capital, and to be a director.

It was proved that the defendant had written to one of the directors that it was practically impossible for him to work any longer with the company, and that for the benefit of both parties it would be advisable that the agreement should be cancelled, and that he was willing to leave at once, or at a month, or at the end of the half-year terminating on the 31st of March, 1891; and also that he had written to another of the directors that he had "decided to instruct a new company" about to be formed for carbonizing coal, and likewise to assume the position of a director, and take up one-third of the capital thereof.

It was alleged that the defendant had had special opportunities of mastering all the details of the patent processes and their successful application, both in the service of the patentee himself, and in that of the plaintiff company, and by the use of their property and resources.

The defendant admitted that he had been actively engaged in forming a company to work the proposed new business, but stated that the plaintiffs' process was widely known, and that he himself had gained his own skill, knowledge, and experience while with his brother, the patentee; and that he had learned nothing whatever whilst with the plaintiffs regarding the patent, and the working thereof, which he did not know before.

The plaintiffs brought this action, and claimed an injunction to restrain the defendant from setting up any business, or entering into any agreement, or making any engagement with any person or company other than the plaintiffs, by which the whole of the defendant's time would cease to be devoted to the business of the plaintiffs, or by which the defendant would be prevented from carrying out the agreement of the 24th of July, 1889, and in particular from assisting in the formation of, and from becoming a director, manager, or agent of any company or partnership then or thereafter to be formed for the purpose of carrying on a similar business and manufacture to those carried on by the plaintiffs during the residue of the term specified in the agreement. The plaintiffs then moved for an injunction in the terms of their claim until the hearing of the action or further order. The motion was heard before Mr. Justice Kekewich on the 6th of February, 1891.

*Marten*, Q.C., and *Archibald Brown* for the appellant.

*Warmington*, Q.C., and *Dibdin* for the plaintiffs.

LINDLEY, L.J. (without calling for a reply, stated the facts of the case, and continued):

The object of the plaintiffs in this action is to obtain an injunction to restrain the defendant from doing that which he either is doing, or, according to the plaintiffs, is about to do. It is alleged against him that, in violation of the agreement that he should give the whole of his time to this company, he is either giving some of his time, or about to give some of his time, to a rival company; and the plaintiffs, very naturally, desire to stop that course of action on his part. They are not disposed to let him go before the end of the ten years; and they take the view that, without their consent, he is not at liberty to release himself from the obligations into which he has entered by the agreement, and, to that extent, they appear to me to be right enough. If he is committing a breach of the agreement, he is doing that which is wrong in point of law; but that is not the question. The question is as to the plaintiffs' remedy. Now there are various remedies. There is the remedy of dismissal, there is the remedy of an action at law, and there is the remedy by injunction. The plaintiffs are not disposed to avail themselves of the first two remedies. They do not want to dismiss the defendant, and they do not want to bring an action against him—they want an injunction. They asked the court below for an injunction in terms which are different from those in which the learned judge has granted it. Their motion was that the defendant might be restrained from setting up in business, or entering into any agreement or engagement with any person or company other than themselves, by which the whole of the defendant's time would cease to be devoted to their business, or by which the defendant would be prevented from carrying out

his agreement with them. The question is, whether an injunction in those terms, or substantially in those terms, ought to be granted, having regard to the principles upon which the court acts in cases of this description. The first point to observe is, that there is no negative covenant at all, in terms, contained in the agreement on which the plaintiffs are suing—that is to say, the parties have not expressly stipulated that the defendant shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give “the whole of his time” to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in *Lumley v. Wagner*,<sup>1</sup> and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had had their attention drawn to certain specific points, and that they had come to an agreement upon those specific points. In this case, we are left more or less in the dark about that, because, as I have said, there is nothing that shows that anything definite was in the minds of these parties beyond this, that the defendant was to give the whole of his time to the plaintiffs’ business.

Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum*; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the performance of a personal service, and, as a rule, the court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley v. Wagner*<sup>2</sup>—that is to say, where a person has engaged not to serve any other master, or not to perform at any other place, the court can lay hold of that, and restrain him from so doing; and there are observations, in which I concur, made by Lord Selborne in the *Wolverhampton and Walsall Railway Company v. London and North Western Railway Company*,<sup>3</sup> to the effect that the principle does not depend upon whether you have an actual negative clause, if you can

<sup>1</sup> 1 D. M. & G. 604.<sup>2</sup> 1 D. M. & G. 604.<sup>3</sup> Law Rep. 16 Eq. 433.

say that the parties were contracting in the sense that one should not do this, or the other—some specific thing upon which you can put your finger.

But there is this to be considered. What are we to say in this particular case? What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley v. Wagner*, and every case except *Montague v. Flockton*.<sup>1</sup> The principle is that the court does not decree specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle. I cannot see that there is. Reliance was placed on *Montague v. Flockton*, in which also there was no negative clause. I pass by the prior case, before Wood, V.C., *Webster v. Dillon*,<sup>2</sup> because it was not argued, and the defendant did not appear; but in *Montague v. Flockton*, Malins, V.C., did go to the length of restraining an actor from performing at a rival theatre, although there was no stipulation on his part, in terms, that he would not do so; and, with great deference to the learned judge, I must say I think he arrived at that conclusion owing to a misunderstanding of *Lumley v. Wagner*. I cannot read the decision of Malins, V.C., without seeing that he was under the impression that Lord St. Leonards in *Lumley v. Wagner* would have granted the injunction, even if the negative clause had not been in the contract. This was a mistake. Lord St. Leonards was very clear and explicit on that subject. He said distinctly he would not have done it in the absence of that negative clause, but he did go on to say in other parts of his judgment that in the absence of that negative clause there would have been a breach of the agreement. That is true enough, and Malins, V.C., I think, was under the impression that Lord St. Leonards intended to intimate not only that there would be a breach of the agreement, but that the remedy of injunction would be granted in the absence of that negative clause, which is not in accordance with the judgment in *Lumley v. Wagner*,<sup>3</sup> as I understand it. Apart from *Montague v. Flockton*,<sup>4</sup> there is no case which warrants the injunction which the learned judge in this case has made, and we must therefore fall back and see if we can find any principle upon which he has acted. Now, unquestionably, if the principle were that the court would decree specific performance of

<sup>1</sup> Law Rep. 16 Eq. 189.

<sup>2</sup> 3 Jur. (N. S.) 432.

<sup>3</sup> 1 D. M. & G. 604.

<sup>4</sup> Law Rep. 16 Eq. 189.



all contracts, that would carry it; but the principle being the other way as regards contracts of service, it lies upon the plaintiffs to show that there is some recognized exception in this particular case, and that they fail to do.

I agree with what the late Master of the Rolls, Sir G. Jessel, said about there being no very definite line. I agree, also, at what Lord Justice Fry has said more than once, that cases of this kind are not to be extended. I confess I look upon Lumley v. Wagner rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction. I am assuming that the defendant either has broken his agreement, or intends to do so if he can. I assume that he is wrong, but I say, assuming that, the remedy is not that which the plaintiffs claim, *i.e.*, by injunction, but by damages, when the agreement is broken.

KAY, L.J. I think, with great deference to the learned judge of the court below, that he has been rather carried away by his desire to do justice, and to prevent what he seems to have regarded as a wrong contemplated by the defendant in this case, and he has not given quite sufficient consideration to the difficulty which this court always feels when it is asked to interfere by injunction in order to perform part of a contract, the whole of which it could not perform if the suit had been for specific performance.

The facts have been very explicitly stated by Lord Justice Lindley, and I will not repeat them.

The truth is that this contract contained no negative term whatever, it contained only a term that the defendant should while he was manager for the plaintiffs, for a certain period of ten years, give them the whole of his time—I am not giving the very words, but that is the substance of it. Now what the plaintiffs are seeking to do is, not really to obtain specific performance of that term, they do not want to prevent, by any order of this court, his employing part of his time for some other purpose, but they apprehend that he is about to employ part of their time which should be occupied by him in the management of their

business in founding a company to carry on a rival business, and acting as a director of that company, and they want the injunction, not because he is taking away part of his time from their service, but because they apprehend that the time which he is so taking away is going to be employed in carrying on a rival business to their detriment.

That is quite plain if we look to the writ in this action. [His Lordship referred to the writ, and continued]: Therefore what they have tried to do is this, to prevent his setting up a rival business, by obtaining the assistance of the court for specific performance of that part of the agreement which expresses that he shall give the whole of his time to their business. There are two answers to the case they make, one is this—that the defendant never has contracted in any way that he will not set up a rival business. He has not contracted that he will not become a director of a rival company, nor that he will not form a rival company, and if he does it out of business hours, it is, as I understand, admitted that no injunction ought to be granted against him.

Now, first of all, let me consider whether the court has ever gone so far as to grant such an injunction as the learned judge has granted in this case. I am aware of no case in which it has done anything of the kind. The nearest are the cases of *Montague v. Flockton*,<sup>1</sup> and *Webster v. Dillon*.<sup>2</sup> Of these, *Webster v. Dillon* was a case which was not argued, it was an *ex parte* injunction, for the defendant was not represented at all; and it seems to have passed without any argument or discussion of the authorities whatever. In *Montague v. Flockton*, Malins, V.C., gave a considered judgment, and he certainly did, although there was no negative clause in the agreement, restrain an actor who had contracted to act for the plaintiff from acting for another person during the term for which he had contracted so to act for the plaintiff. But it is quite plain to my mind that the whole judgment proceeded upon some misapprehension of the decision of Lord St. Leonards in the well-known case of *Lumley v. Wagner*,<sup>3</sup> because Malins, V.C., says this: ‘I certainly am under the impression that in the case of *Lumley v. Wagner*, if there had been no negative stipulation the court would have interfered; and I gather this particularly from the passage in Lord St. Leonards’ judgment where he says, ‘the agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is, in effect, one contract, and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three

<sup>1</sup> Law Rep. 16 Eq. 189.

<sup>2</sup> 3 Jur. (N.S.) 432.

<sup>3</sup> 1 D. M. & G. 604.

<sup>4</sup> Law Rep. 16 Eq. 198.

months at one theatre must necessarily exclude the right to perform at the same time at another theatre.'” And something more may be added to the same effect from the judgment in *Lumley v. Wagner*,<sup>1</sup> for Lord St. Leonards is reported to have said: “I am of opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.” But the Vice-Chancellor omitted to observe that further on Lord St. Leonards, after considering the cases of *Clarke v. Price*<sup>2</sup> and *Morris v. Colman*,<sup>3</sup> says expressly: “I may at once declare, that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at Her Majesty’s Theatre, I should not have granted any injunction.” That case, certainly at the time it was decided, was understood to have carried the power of the Court of Chancery in granting injunctions to the extreme limit to which it could go. The contract there was one which the court could not specifically perform. It could not compel Miss Wagner to sing. Lord St. Leonards distinctly disclaims any power in the court of equity to do anything of the kind. He makes it clear that he granted the injunction upon the express agreement on her part that she would not during a certain time sing for anybody else, and that if those negative words had not been there, he could not have granted the injunction. He says so in so many words. I quite agree that there have been cases—they are very few and *De Mattos v. Gibson*<sup>4</sup> is perhaps the most striking of them—in which there have been injunctions granted although there were no negative words. The decision in *De Mattos v. Gibson* was, as stated in the headnote to the report, “The court will not affirmatively enforce a charter-party, but it is implied in such a contract, that if the charterer provides a cargo, the ship shall not be employed for any other purpose; and a mortgagee, with notice of a prior charter-party effected with the mortgagor, will be in general restrained from doing anything to prevent its performance.” There was a charter-party with the absence of any negative covenant, and the court, although it felt the difficulty of granting specific performance of the charter-party, did go so far as to say that an injunction could be granted to prevent the use of the ship, during the time which was covered by the charter-party, for other purposes. It is possible that there may be other cases, but those cases are very rare. They are certainly to be followed with extreme caution, and I do not know, with the exception of the two cases of Webster

<sup>1</sup> 1 D. M. & G. 604.<sup>2</sup> Ibid. 618, 622.<sup>3</sup> 2 Wils. C. C. 157.<sup>4</sup> 18 Ves. 437.<sup>5</sup> De G. & J. 276.

*v. Dillon*,<sup>1</sup> and *Montague v. Flockton*,<sup>2</sup> of any case whatever in which that very extraordinary jurisdiction of granting a partial specific performance by way of injunction, where the court could not enforce the whole of the contract, has ever been exercised in the case of hired servants.

However, what strikes me in this case is that if the court could possibly interfere in the way in which the learned judge has interfered, by injunction, I do not see any contract of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it possibly be argued that an injunction could be obtained to prevent his serving some one else during that engagement? Yet if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind. We must tread with very great caution such a path as that which this application invites us to pursue; and, as I think this case goes very far beyond any case which has been decided with consideration up to this time, I certainly am very strongly disinclined to support this decision; I am all the more disinclined to support it, because one cannot help seeing that the mode in which this injunction is granted is really the only mode in which the court could possibly have granted such an injunction. The court has implied a negative in the contract to give the whole of his time, and has therefore granted an injunction to prevent his giving any of his time to any other purpose. It is not really wanted, *bona fide*, for that purpose, but it is wanted to prevent him from setting up a rival business which he has contracted not to do.

I therefore think that this decision must be reversed, and the appeal allowed.

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CEPHAS C. DILLS v. JOHN F. DOEBLER, JR.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, NOVEMBER  
21, 1892.

[Reported in 62 Connecticut Reports 366.]

SUIT for an injunction; brought to the City Court of the city of Hartford, and heard before MARKHAM, J. Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is fully stated in the opinion.

<sup>1</sup> 3 Jur. (N. S.) 432.

<sup>2</sup> Law Rep. 16 Eq. 189.

*G. G. Sill* for the appellant.

*T. E. Steele* for the appellee.

ANDREWS, C.J. The plaintiff and defendant, in June, 1890, entered into a contract for the lease of certain rooms in the city of Hartford, and the practicing of dentistry therein, the eighth paragraph of which contained these clauses :

"And the said Doebler, in consideration of the premises, does further covenant and agree to and with the said Dills, that he, the said Doebler, will not, at any time within ten years after the termination of this contract, engage in or carry on directly or indirectly within the limits of fifteen miles of said Hartford, the business or profession of a dentist, or any branch of the same, either as principal, employee, agent, or partner, or in any manner or form, or in any capacity whatever : provided, and it is hereby understood and agreed by and between the parties hereto, that in the event of the said Dills' failure to retain said rooms for said practice by reason of the said Dills-Hinckley lease, then, and in that event, this section of the contract becomes void by said Doebler paying to said Dills \$500, and giving bond in like sum that he, the said Doebler, will not use the term 'Associate Dentists' in connection with announcing or advertising a future practice of dentistry in said Hartford. . . . And it is further mutually understood and agreed by and between the parties hereto that the said Doebler may be at liberty to practice dentistry in said Hartford at any time after the termination of this contract, by the paying to said Dills of \$1,000, and giving such bond as is hereinbefore alluded to in reference to the term 'Associate Dentists.'"

The contract was lawfully terminated on the 19th day of April, 1892. Since that time the defendant has opened a dentist office in the city of Hartford, and has been engaged in the business of dentistry there on his own account. He has not paid the \$1,000, nor any part of it to the plaintiff, and has refused so to do, nor has he given the bond mentioned in the contract. It did not appear that he had used or attempted to use the term "Associate Dentists" in connection with announcing or advertising such business, or that he threatened to do so. The plaintiff complained to the City Court in Hartford, praying that the defendant be enjoined, and that court granted an injunction against him, his servants and agents, commanding him and them that they should not be engaged in or carry on directly or indirectly, within the limits of fifteen miles of the city, the business or profession of a dentist, for the period of ten years from the 18th day of April, 1892.

An examination of the agreement between these parties makes it evident that they were contracting upon the theory that the defendant was to resume the practice of dentistry in Hartford upon his own accord

when the contract should be terminated. He was of course to pay for the right so to resume. The section quoted in its earlier part spoke of a termination of the contract by reason of the failure of the plaintiff's title to the rooms. In such event it is entirely certain that the defendant would have the right to engage in dentistry upon paying \$400, for it is provided that the section was then to become void. The latter part of the section speaks of the termination of the contract from any other cause. Then the defendant is required to pay \$1,000 in order "to be at liberty to practice dentistry in said Hartford." In the one case the defendant was to pay \$400, in the other \$1,000. But in respect to his liberty to resume business on his own account there is no distinction. In either case the contract stipulates for damages and not for the removal of competition. The contract presents an alternative. It virtually says to the defendant, "If you enter into the business of dentistry in Hartford after the termination of this agreement, you must pay to the plaintiff the damages named."

The language used indicates this thought ; and there is nothing in the relation of the parties, or in the business of dentistry, nor in the surrounding circumstances, to indicate otherwise. Presumably there are many dentists in the city of Hartford. Lessening their number by one could not benefit the plaintiff in any perceptible degree. Nor would the defendant, by practicing there, be likely to injure the plaintiff at all seriously. The plaintiff, having contracted to take damages, must seek his remedy in a court of law.

The brief of the plaintiff's counsel suggests that the defendant is insolvent, and that the plaintiff could not collect the damages if he should obtain a judgment therefor. There is no finding to that effect. And if it were so that fact could not give to a court of equity the right to issue an injunction. It is the contract itself which gives to or takes away from the court its jurisdiction ; not the wealth or poverty of the party defendant.<sup>1</sup>

As the defendant has not attempted to use the term "Associate Dentists" there is no occasion to consider that feature of his contract.

The judgment of the City Court is erroneous and it is reversed.

In this opinion CARPENTER, TORRANCE, and FENN, JJ., concurred ; SEYMOUR, J., concurred in the result, but died before the opinion was written.<sup>2</sup>

<sup>1</sup> *Nessle v. Reese*, 19 Abbott's Pr. Reps. 240; S. C., 29 Howard's Pr. Reps. 382.

<sup>2</sup> A portion of the opinion has been omitted.—ED.

## BURNEY v. RYLE &amp; COMPANY.

IN THE SUPREME COURT OF GEORGIA, MARCH TERM, 1893.

[Reported in 91 Georgia Reports 701.]

BEFORE Judge MARSHALL J. CLARKE. Fulton County. April 29, 1893.

*Hines, Shubrick & Felder* for plaintiff in error.

*Arnold & Arnold*, by brief, *contra*.

LUMPKIN, Justice. The plaintiff in error, Burney, under a contract with one Crawford, the manager of the Massachusetts Benefit Association, an insurance company, had certain rights to transact business in the State of Georgia as the agent of that association. By a written contract he sold and assigned to the defendants in error all his right, title and interest in and to the contract with Crawford above mentioned. The assignment also contained the following covenant: "I hereby bind myself to remain with the said firm of D. M. Ryle & Co., as special agent in the State of Georgia, for one year from this date, and to give my entire time and attention to the benefit of the Mass. Benefit Association by procuring applications for insurance for said company, and such other duties as may be agreed upon by us." Ryle & Co. filed an equitable petition alleging that Burney had violated his contract with them, and was continuing to do so, by wholly abandoning his duties as solicitor for the Massachusetts company, and had begun business on his own account for the Connecticut Indemnity Association, which was an insurance company of a similar kind and a rival in business. They prayed, among other things, that he be enjoined from further breaking the contract by continuing to represent the Connecticut company, and from soliciting or writing risks in the State of Georgia for any other than the Massachusetts company, during the year covered by his contract with them. An injunction was granted, forbidding the defendant "to solicit, or receive, or transact business for any insurance company other than the Mass. Benefit Association until July 15, 1893." This action of the court is the error complained of.

It does not appear from the allegations of the petition, or from the evidence, that Burney, as an insurance agent, was in any way remarkable, or that he had shown himself to be such a specially skillful, successful or expert person in this business that it would be difficult or impracticable to supply his place by another agent equally competent to render such services as his contract required of him. For this reason the injunction, in our opinion, should have been denied. No doubt there are cases in which a court of equity will enjoin the breach of a contract, and compel one to abstain from performing personal services

for other persons which he was bound to render exclusively to the plaintiff. "But the services to be performed must be individual and peculiar because of their special merit or unique character; for, otherwise, the remedy at law would be adequate. But where the services involve the exercise of powers of mind, as of writers or performers, which are peculiarly and largely intellectual, they may form the class in which the court would interfere upon the ground that they are individual and peculiar. Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market as in case of an ordinary contract of employment between an artisan, a laborer or a clerk, and their employer."<sup>1</sup> The same doctrine is laid down in 3 Pom. Eq. Jur. § 1343, in which the following language is used: "Where a contract stipulates for special, unique or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique and extraordinary qualifications—as, for example, by an eminent actor, singer, artist, and the like—it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person." There is nothing in the record before us to authorize the conclusion that Burney had extraordinary or even unusual qualifications for the business which he undertook to transact, and, therefore, under the rule laid down by the eminent text writers, from whom the above quotations are made, the present case is not a proper one for injunction.

There has been considerable discussion of the question as to whether or not an injunction would be granted in any case of this kind unless the stipulations not to render services to others were in form expressly negative. In the case at bar there was in the contract no express negative covenant by Burney not to render services to others than the plaintiffs. In *Whitwood Chemical Co. v. Hardman*,<sup>2</sup> a recent and thoroughly well-considered case, it was held that, in the absence of any negative stipulation in that behalf, the plaintiffs were not entitled to an injunction to restrain the manager of certain chemical works (who had agreed to give to their business, during a specified term, the whole of his time) from giving, during the term, a part of his time to a rival company. To those who may wish to further investigate this question, the opinion of Kekewich, J., from whose judgment an appeal was taken and whose decision was reversed, and also the opinions of Lindley, L.J., and Kay,

<sup>1</sup> 2 Beach on Mod. Equity Jur. § 772.

<sup>2</sup> L. R. (1891) 2 Ch. Div. 416.



L.J., will be found decidedly interesting. And in the same connection it will be profitable to examine Kerr on Injunctions.<sup>1</sup> The elaborate and well-prepared note of Mr. Abbott appended to the case last cited is a valuable contribution to the law pertaining to this subject.

We deem it unnecessary, however, to enter into a further discussion of the question whether an express negative covenant in a contract of the kind under consideration is essential to the proper granting of an injunction, because, treating the contract in the case at bar as if it had contained such covenant, the injunction should nevertheless have been refused for the reason stated in the beginning of this opinion.

Judgment reversed.

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DAVIS v. FOREMAN.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION,  
AUGUST 9, 1894.

[*Reported in Law Reports, 3 Chancery* (1894) 654.]

By an agreement in writing, dated the 1st of June, 1892, and made between the defendant, Joseph Foreman (therein called "the employer"), and the plaintiff, Francis William Davis (therein called the "manager"), the employer agreed to hire and employ the manager as his manager, to take care of, conduct, and manage the business of a carrier, then and lately carried on by the employer at 6 High Street, Chatham, and the manager thereby agreed to serve the employer well, diligently, and faithfully to the utmost of his power as his manager, and take upon himself the care, conduct, and management of the business as from the first of June, 1892, until the agreement should be determined by notice or otherwise. The remuneration of the manager was to be all profits which the business should earn over and above the sum of £15 each calendar month, which the employer was to be entitled to draw from the profits of the business, together with interest on the sum of £1,000 at the rate of 5 per cent. per annum, and after payment of these two sums the manager was to be entitled to all further profits. When the employer should have received from the business or from the manager the net sum of £1,000 payable by installments of £15 a month from the 1st of June, 1892, after payment of all necessary and incidental expenses and rent, and also interest at the rate of £5 per cent. per annum as above provided, the employer was forthwith to re-

<sup>1</sup> 445 *et seq.*; *Singer, etc., Co. v. Union, etc., Company*, 1 Holmes 253, and *McCaull v. Braham*, 16 Fed. Rep. 37.

tire from the business, and execute all necessary assurances of the business, with the plant, good-will, vans, horses, and effects unto the manager absolutely as his property ; but the manager was not to have any rights of ownership in regard to the business and plant until the said sum of £1,000 and interest had been received by the employer. Clause 7 of the agreement was as follows: "The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business £15 each and every month, and the said interest as aforesaid ; but in the event of the said business failing to realize the said sums, then this agreement and the service hereby created may be determined by either party giving to the other three calendar months' notice for that purpose."

The business was carried on under the agreement until the 3d of April, 1894, on which day the defendant gave to the plaintiff a notice of that date, purporting to determine the agreement and the service thereby created.

The plaintiff then brought this action, claiming (*inter alia*) an injunction to restrain the defendant from acting upon the notice, and excluding the plaintiff from the management of the business, and from the premises whereon the same was carried on, and from dismissing the plaintiff from his employment under the agreement, or determining the agreement otherwise than in accordance with the terms thereof and upon grounds provided therein.

This was a motion on behalf of the plaintiff for an interlocutory injunction to the effect lastly stated. Evidence was adduced upon both sides on the question whether or not the defendant, in the events which had happened, was justified by the terms of the agreement in giving the notice of the 3d of April, 1894 ; but his Lordship directed that in the first instance the question should be argued whether, assuming that the giving of the notice was justified, an injunction ought to be granted.

*Warmington*, Q.C., and *James Bacon* for the plaintiff.

*Marten*, Q.C., and *Ribton*, for the defendant, were not called upon.

KEKEWICH, J. In many cases of this class the arguments and judgments have been hampered by the consideration how far the contract could properly be enforced by injunction, when as a whole it would not be a proper subject of a decree or judgment for specific performance. I have nothing to do with that here. In many cases, too, there has been a very instructive inquiry how to draw the line between those contracts which are expressly negative and those which only imply the negative in the affirmative form. Mr. Justice Fry, in *Donnell v. Bennett*, states the difficulty which he entertained, and which many other judges have

entertained, in drawing any substantial or tangible distinction. I have really nothing to do with that, because here I have in clause 7 of this agreement a stipulation which, in point of form, is not affirmative at all, but is distinctly negative. There, however, to my mind the description of the stipulation as negative ceases to be accurate. It is, I think, distinctly affirmative and positive in substance, and the negative part of it is a mere form. In that respect this agreement differs entirely from that in *Lumley v. Wagner*,<sup>1</sup> where there was a distinct engagement by the defendant (which is set out on p. 606 of the report) that she would not use her talents at any other theatre than the plaintiff's. What the court there had to consider was not the engagement of the defendant, and how far that could be enforced, but whether she could with propriety remove her services from the plaintiff and transfer them to another theatre. The court has declined to extend the principle of *Lumley v. Wagner*. The matter has been gone into time after time by different judges, and Vice-Chancellor Malins, in *Montague v. Flockton*,<sup>2</sup> applied what he and some others conceived to be the principle of *Lumley v. Wagner*; but the Court of Appeal, in the recent case of *Whitwood Chemical Company v. Hardman*,<sup>3</sup> have held that the Vice-Chancellor acted as he did in misapprehension of the real decision in *Lumley v. Wagner*. Again, there is a well-known case in another branch of practice and experience, but coming within the same lines, of *De Mattos v. Gibson*,<sup>4</sup> where the negative stipulation was not expressed, but was implied, and the court granted an injunction. It seems, however, to be perfectly settled that an agreement for personal service cannot be enforced otherwise than by an action for damages, though it may possibly be enforced in certain exceptional cases, not to be extended, where there is a strictly negative stipulation. In the case which I have already referred to of *Donnell v. Bennett*, Mr. Justice Fry says: "If . . . the breach of the contract is properly satisfied by damages, then the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases." I do not find that that has been adopted in the other cases, but they are quite consistent with it. Now, having regard to the principle expounded by the Court of Appeal in *Whitwood Chemical Company v. Hardman*,<sup>5</sup> and recognized again in the case of *Ryan v. Mutual Tontine Westminster Chambers Association*,<sup>7</sup> which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which,

<sup>1</sup> 1 D. M. & G. 604.

<sup>3</sup> [1891] 2 Ch. 416.

<sup>6</sup> [1891] 2 Ch. 416.

<sup>4</sup> 4 De G. & J. 276.

<sup>2</sup> Law Rep. 16 Eq. 189.

<sup>5</sup> 22 Ch. D. 837.

<sup>7</sup> [1893] 1 Ch. 116.

as I have said, though negative in form is positive in substance? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words, give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind, I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of *Lumley v. Wagner*,<sup>1</sup> which is not to be extended, to a case of this character. The motion must therefore be refused; the costs to be the defendant's in any event.

Solicitors: *Halses, Trustram & Co.*, agents for *Greathead & Goldie*, Rochester; *W. A. E. Headley*, agent for *A. Booth Hearn*, Chatham.

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E. L. WILKINSON, APPELLANT, v. H. C. COLLEY.

IN THE SUPREME COURT OF PENNSYLVANIA, OCTOBER 1, 1894.

[*Reported in 164 Pennsylvania State Reports 35.*]

ARGUED April 10, 1894. Appeal, No. 359, Jan. T., 1894, by plaintiff, from decree of C. P. Luzerne Co., Feb. T., 1892, No. 2, dismissing bill in equity. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Bill to restrain defendant from practicing as physician within certain limits.

The case was referred to G. R. Bedford, Esq., as Master.

From the record it appeared that on February 6, 1888, plaintiff and defendant entered into the following contract in writing and under seal:

"Whereas, each of the parties aforesaid are practicing physicians at Lehman township and the vicinity adjacent thereto. The said H. G. Colley, in consideration of two hundred dollars, to him in hand paid by the said E. L. Wilkinson, that the said H. G. Colley shall and will not practice as a physician at Lehman or in that adjacent country within eight miles of Lehman Centre, for the term of ten years from the date hereof, except in case of accident or other cause of extreme necessity, then in such case said H. G. Colley may render assistance as a physician, but the compensation for such medical assistance is to go to the

<sup>1</sup> 1 D. M. & G. 604.

said E. L. Wilkinson. The said H. G. Colley further agrees to use his influence in favor of said E. L. Wilkinson, and, if necessary, to remain at Lehman for a period of three months from the date hereof in order to prevent opposition to said E. L. Wilkinson; the said H. G. Colley further agrees that he shall not manufacture or have put on sale any medical preparation or compound during the period named in this contract. And for the true performance of all and every the covenants and agreements aforesaid the said H. G. Colley bindeth himself in the penal sum of four hundred dollars firmly by these presents."

The circumstances under which the breach of the contract occurred appear by the opinion of the Supreme Court.

The Master recommended that the bill should be dismissed. Exceptions to the Master's report were dismissed by the court, and the decree entered dismissing the bill.

Errors assigned were dismissal of exceptions and entry of decree, quoting them.

*Q. A. Gates* for appellant. A physician may agree not to practice in a certain place, or in a certain place for a certain time, and the agreement will be binding.<sup>1</sup>

When a man has bound himself by his covenant to do or not to do a certain thing, and has fixed a certain sum which he will pay upon the breach of his covenant, he is not absolved thereby from a specific performance of his agreement, and when the justice of the case requires such specific performance, equity will enforce it.<sup>2</sup>

Unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms can neither be added to nor subtracted from by parol evidence.<sup>3</sup>

Under the answer in this case, the burden of proof comes upon defendant, as he sets up new matter not responsive to the bill; he is in the same situation as though he was in a court of equity as plaintiff seeking to have the written contract reformed.<sup>4</sup>

The contract having been violated and damages demanded in the bill, it was the duty of the Master to award to plaintiff, not only the injunction prayed for, but a judgment for damages sustained.<sup>5</sup>

<sup>1</sup> McClurg's Ap., 58 Pa. 51; Hall's Ap., 60 Pa. 458; Palmer v. Graham, 1 Pars. 476; Gillis v. Hall, 7 Phila. 422.

<sup>2</sup> Moore v. Colt, 127 Pa. 289; Keck v. Bieber, 148 Pa. 645.

<sup>3</sup> Wodock v. Robinson, 148 Pa. 503; Irvin v. Irvin, 142 Pa. 271; Stull v. Thompson, 154 Pa. 43; Halberstadt v. Bannan, 149 Pa. 51; Clarke v. Allen, 132 Pa. 40; Zeigler v. McFarland, 147 Pa. 607; Martin v. Berens, 67 Pa. 459.

<sup>4</sup> Story's Equity, § 15; 3 Greenl. Ev., § 290; Shea's Ap., 121 Pa. 302; Smith v. Ewing, 151 Pa. 256; Bank v. Hartman, 147 Pa. 558; Bank v. Thompson, 144 Pa. 393.

<sup>5</sup> Waters v. McElroy, 151 Pa. 549.

*W. H. McCartney* for appellee. In each case we must look at the language of the contract, the intention of the parties as gathered from its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case.<sup>1</sup>

The plaintiff has an adequate remedy at law for the breach of the agreement.<sup>2</sup>

Opinion by MR. JUSTICE DEAN, Oct. 1, 1894.

The bill in this case was for an injunction to restrain defendant from practicing as a physician within eight miles of Lehman Centre, in Luzerne County, for a period of ten years from 6th of February, 1888.

It appeared from the bill, answer and testimony, that Dr. Colley, the defendant, had been a practicing physician at Lehman Centre from 1876 until 6th February, 1888. Dr. Wilkinson, the plaintiff, was a younger man, and had commenced the study of medicine with Colley in spring of 1883, when only twenty-two years of age; afterwards, in March, 1885, he graduated from the College of Physicians and Surgeons at Baltimore. He then returned to Lehman Centre and formed a partnership with Colley in the practice of medicine. At the expiration of a year the partnership was dissolved and Wilkinson continued in the practice for himself down to the 6th of February, 1888; Colley also practicing for himself until July, 1886. Three years before he had sold out his practice to one Dr. Hise, stipulating verbally that at the end of three years he would cease practicing. Hise's purchase included, besides Colley's practice, his property in Lehman Centre, valued at \$1,525, and Hise for the same consideration sold to Wilkinson. Colley, at the end of the three years, stopped practicing about three months, then, disregarding his agreement with Hise, commenced again, and continued to February, 1888. On the 6th of that month he and Wilkinson entered into another agreement, this time in writing, whereby, in consideration of two hundred dollars, Colley covenanted: 1. That he would not practice as a physician at Lehman Centre, or within eight miles thereof, for a period of ten years. 2. That he would use his influence in favor of Wilkinson, and remain at Lehman for three months, so as to prevent opposition. 3. That he would not manufacture or put

<sup>1</sup> *Streeper v. Williams*, 48 Pa. 450; *Clements v. R. R.*, 132 Pa. 445; *Kelso v. Reid*, 145 Pa. 606; *Keck v. Bieber*, 148 Pa. 645; *Bigony v. Tyson*, 75 Pa. 157.

<sup>2</sup> *Graham v. Bickham*, 4 Dal. 149; *Shreve v. Brereton*, 51 Pa. 175; *Moore v. Colt*, 127 Pa. 294; *Clements v. R. R.*, 132 Pa. 445; *Sedgwick on Damages*, § 424; *Clark's Ap.*, 62 Pa. 447; *Gray v. R. R.*, 1 Grant 412; *Richards' Ap.*, 57 Pa. 105; *Hilliard on Injunctions*, 271; *Adams's Equity*, 485; 2 *Story's Equity*, § 925.

on sale any medical preparation or compound during the ten years. 4. And for the true performance of the covenants of the contract, bound himself in the penal sum of four hundred dollars.

Wilkinson paid the full consideration, and Colley removed to Columbia County, but in less than four years returned to Lehman Centre, and commenced again to practice medicine there. Wilkinson notified him that he was violating his contract, and requested him to stop practice, but Colley persisted; even sent cards to a large number of Wilkinson's patients, inviting their patronage. Thereupon Wilkinson filed this bill, averring the facts as stated, and praying for an injunction.

The answer of Colley admits the execution of the agreement, and the payment of the consideration; admits that he resumed practice in Lehman, and the manufacture and sale of medicine; but sets up a parol understanding or agreement with Wilkinson, that he was to return if he paid back the consideration, and averring the four hundred dollars designated as a penalty in the agreement is liquidated damages, and further averring his readiness and ability to pay the same.

When the bill was filed, a preliminary injunction was awarded, which was afterwards, in an opinion filed by Presiding Judge Woodward, dissolved, and the case sent for hearing to a Master, who, on the authority of the opinion already filed, dissolving the injunction, reported against the plaintiff; on exception being filed, they were overruled by the court, and the bill dismissed at costs of plaintiff. From this decree plaintiff appeals.

The decree of the learned judge of the court below is based upon two conclusions. 1. That the penal sum of four hundred dollars in the contract is to be treated as damages liquidated by the parties. 2. That the plaintiff has an adequate remedy at law for the breach of the contract.<sup>1</sup>

As to the second proposition held by the learned judge, that plaintiff has an adequate remedy at law, his decision is grounded mainly on the interpretation that the contract stipulates for liquidated damages. As we do not concur with him in this view, the question remains, whether, treating it as a penalty, in equity the plaintiff is entitled to a specific performance of the contract. That plaintiff could maintain an action at law for damages, for breach of the contract, there is no doubt. But it is a well-settled rule, that although the action at law will lie, yet if there is an utter uncertainty in any calculation of damages from the breach of the covenants, and the measure of damages is largely conjectural, equity will intervene because of the inadequacy of the remedy. The plaintiff claimed damages to the amount of one hundred dollars per month, up to the hearing of the case before the Master, and offered

<sup>1</sup> Only so much of the opinion is given as deals with the second question.—ED.

evidence to establish this claim. But there was no full hearing on the merits of this branch of the case, nor any finding of fact by the Master, and we pass no opinion on this evidence. It remains open, for further proceedings in the court below, to determine the amount of damages sustained by plaintiff, between the return of defendant to Lehman Centre and the issuing of this injunction. We only determine that from the very nature of this contract an action at law is a wholly inadequate remedy for its persistent violation during the ten years, and therefore equity will specifically enforce performance of it by injunction.<sup>1</sup>

Therefore the decree of the court below dismissing the bill is reversed at costs of appellee, and the bill reinstated; it is further ordered that an injunction issue directed to defendant, restraining him from practicing as a physician at Lehman Centre, and within eight miles thereof, until the 6th day of February, 1898, and from manufacturing or putting on sale any medical preparation during the same time.

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E. C. FRALICH v. ANDREW DESPAR, APPELLANT.

IN THE SUPREME COURT OF PENNSYLVANIA, NOVEMBER 12, 1894.

[*Reported in 165 Pennsylvania State Reports 24.*]

ARGUED NOV. 1, 1894. Appeal, No. 227, Oct. T., 1894, by defendant, from decree of C. P. No. 2, Allegheny Co., July T., 1894, No. 232, for plaintiff on bill in equity. Before GREEN, WILLIAMS, MITCHELL, DEAN, and FELL, JJ. Affirmed.

Bill for injunction to restrain defendant from disclosing trade secrets and from manufacturing goods.

The following opinion was filed by EWING, P. J.:

"The defendant, Andrew Despar, on the 5th day of January, 1886, entered into articles of agreement with the plaintiff, in the form of an affidavit, as follows:

"I, Andrew Despar, of the city of Pittsburg, State of Pennsylvania, in the employ of E. C. Fralich, a manufacturer of oils, axle, mill and star grease, also of said city of Pittsburg, do solemnly swear that if said E. C. Fralich makes known to me the ways and secrets of manufacturing and stilling of different kinds of oils, and of the different kinds of greases manufactured by him, that I will not use such knowledge or secrets for my own gain, nor will I ever, so long as I may live, divulge or make known in any way the knowledge I may

<sup>1</sup> Palmer v. Graham, 1 Parsons 476.



receive while in his employ, or any part of said secret, either of mixing in oils or otherwise.' With signature, seal, and jurat.

"The plaintiff, some twelve years before, had bought the business and good-will and property from his father-in-law, Captain Frisbee, for a full consideration therefor, and had an established business and trade in manufacturing the articles in question, using some of the secrets of manufacture in part obtained from one Gilbert Frisbee, who was familiar with the entire process, and the plaintiff and his son being the only others who had a knowledge of the secrets of the process. Andrew Despar, the defendant, went into the employ of the plaintiff in 1882 as a general hand, doing the hauling, teaming, and other work around the establishment, in the hauling of material and the delivering of goods, and had not a knowledge of the secrets of the business. The defendant had first received \$10 per month, and was, at the date of this agreement, in receipt of \$15 a month as wages. Gilbert Frisbee having died shortly before this agreement was made, and the plaintiff proposing to employ the defendant to aid him in the manufacture, proposed to instruct him in the process, give him the secrets of the business, and to employ him therein at increased wages, there being no definite amount of increased wages agreed on at that time. That agreement was read over to the defendant, was thoroughly explained to him, and he understood it fully, and knew what he was doing, and why the agreement was made. Thereafter the plaintiff revealed to the defendant the secrets of the business in consideration of that agreement, and raised his wages gradually, until, within a short time, and for years prior to defendant's leaving plaintiff's employment, he had been receiving \$50 a month, and was furnished steady employment. The defendant, from April, has been using the secrets and formula so obtained under said agreement and employment for his own private use, and has associated himself with one M. B. Moseley, and has been manufacturing, compounding, and selling the manufacture under this secret process, from his knowledge so obtained while in the employ of the plaintiff, and has been selling to the trade, and representing that it 'is the same axle grease' manufactured by the plaintiff.

"We find that the allegations contained in the first, second, and third paragraphs of the plaintiff's bill are true.

"Is the plaintiff entitled to relief? That he could maintain an action at law in the recovery of damages, we think is entirely clear. An employee getting the secrets of a business or trade under such circumstances, and especially under such an agreement carried out as this was, has no right to use the secrets so obtained for his own private use, or reveal them to others.

"Defendant's counsel cite the case of *Keeler v. Taylor*,<sup>1</sup> as against the right of plaintiff to the relief sought for. In that case Keeler revealed no secrets to Taylor of either trade or manufacture or skill that were not known to many others. The agreement was an agreement in restraint of trade, without a sufficient and proper consideration to sustain it. The case of *Peabody v. Norfolk*<sup>2</sup> and *Salomon v. Hertz*<sup>3</sup> give very full discussions of the principle governing cases of this sort.

"A suit for damages would be no adequate remedy in this case. The law, we think, is with the complainant. A decree should be issued enjoining the defendant as prayed for."

A decree was entered accordingly. Defendant appealed.

Error assigned was decree, quoting it.

*James H. Porte, James H. Smith* with him, for appellant.

*E. G. Hartje, Geo. Shiras 3d, C. C. Dickey, and W. K. Shiras*, for appellee, not heard.

*Per Curiam.* We think the findings of fact and conclusions of law as contained in the opinion of the learned court below are fully sustained by the evidence and authorities cited, and upon that opinion the decree of the court below is affirmed and the appeal dismissed at the cost of the appellant.

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### RANKIN v. HUSKISSON.<sup>4</sup>

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V.C., AUGUST 7,  
14, 1830.

[*Reported in 4 Simons 13.*]

By 7 Geo. 4, c. 77, the Commissioners of Woods and Forests were empowered, with the consent and approbation of the Lords of the Treasury, to lease, or previous to any such lease, to enter into any contract for leasing, all or any part of the houses, buildings and hereditaments, which should be erected on the site of Carlton Palace, and the gardens and grounds thereto belonging, to any person or persons whomsoever, for any term or terms of years, not exceeding 99 years, at such rent or rents, to be reserved and made payable to His Majesty, his heirs and successors, and for such fine and fines, and under and subject to such covenants, conditions, clauses and restrictions, and in such manner as the said commissioners should, from time to time, with

<sup>1</sup> 53 Pa. 467.

<sup>3</sup> 40 N. J. Eq. 400.

<sup>2</sup> 98 Mass. 452.

<sup>4</sup> *Ex relations.*

such consent and approbation as aforesaid, judge proper and think most advantageous. In 1826, an application having been made to the commissioners on behalf of the United Service Club for a lease of part of the ground comprised in the act, for the purpose of erecting a new club-house thereon; the parties were referred to the secretary of the commissioners, who showed them a plan of the ground, and a portion of it, adjoining on the south to another piece of the ground comprised in the act, and which was described in the plan as being intended to be laid out as an ornamental garden, was marked out and allotted for the club. An agreement was afterwards entered into between the commissioners, with the approbation of the Lords of the Treasury, and the building committee of the club, that a lease for 99 years of the piece of ground so marked out should be granted to the trustees of the club, and that the plot of ground on the south side of it should be laid out as an ornamental garden, and that no buildings whatever should be erected thereon. The plan was afterwards submitted to and approved of by the Lords of the Treasury, and was laid by the commissioners before the House of Commons, and the new club-house was built on the site marked out. After it was completed, the defendants, Huskisson and Lawley, began to build stables on the plot of ground on the south side, upon which the bill was filed, by the trustees of the club, on behalf of themselves and other members, against those defendants, the Lords of the Treasury, the Commissioners of Woods and Forests, and the Attorney-General. It alleged that the commissioners, in concert with Huskisson and Lawley (who, it was alleged, had entered into some contracts with the commissioners for that purpose) had begun to build the stables on the plot of ground intended for the ornamental garden, and so near to the club-house as to exclude the light and air from it. The bill charged that the commissioners ought to execute to the plaintiffs a lease of the ground on which the club-house had been erected, with proper covenants, so as to secure to the club the laying out and keeping the plot of ground on the south side as an ornamental garden; that the Lords of the Treasury and the Attorney-General, on behalf of His Majesty, claimed some interest in respect of the piece of ground agreed to be leased to the club, and of the rights or claims by the plaintiffs, on behalf of the club, over the plot of ground on the south side of the club-house. The bill prayed that the agreement entered into with the Commissioners of the Woods and Forests might be specifically performed; that it might be declared that the club were entitled to have the plot of ground on the south side of the club-house laid out and continued as an ornamental garden till the end of the term of 99 years; that it might be referred to the Master to settle a proper lease, with a covenant to that effect, and that the commissioners might be decreed to

execute such lease, and that the commissioners, and Huskisson and Lawley, might be restrained from proceeding with the erection of the stables, and from permitting such parts thereof as had been erected from continuing on the garden or plot of ground.

A motion for the injunction, supported by affidavits, was made by *Sir Charles Wetherell*, *Mr. Pepys* and *Mr. Spence*, and was opposed by the *Solicitor-General* and *Mr. Roupell*. The question principally discussed was whether the case made by the bill was substantiated by the affidavits, plans, and other documents produced in support of it. One of the points which was raised, but not pressed, in opposition to the motion, was that the court had no jurisdiction to grant an injunction against the Commissioners of Woods and Forests as being ministers of the crown.

The VICE-CHANCELLOR, however, after commenting upon the documents at considerable length, concluded his judgment as follows: "Upon the whole, my opinion is that the Commissioners of Woods and Forests are not justified in erecting the buildings in question, and, therefore, the injunction must go to restrain the prosecution of those buildings which have been commenced, and the erection of any further buildings in front of any portion of the southern base of the ground on which the house of the United Service Club stands."

At the conclusion of the judgment, the plaintiffs' counsel asked that the order might provide for the removal of the buildings which had been commenced, as had been done by Lord Eldon in the case of the Glamorganshire Canal.

The order which was drawn up was as follows: "This court doth order that an injunction be awarded to restrain the defendants, their agents and workmen, from continuing the projected buildings, or commencing any other buildings whatever, on the garden or plot of ground described in the pleadings in this cause, or any part thereof; and also from permitting such part of the said buildings as have been already erected on the said garden or plot of ground from remaining thereon, until the defendants shall fully answer the plaintiff's bill, or this court make order to the contrary."

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## STEWART v. WINTERS AND SAYRES.

IN THE COURT OF CHANCERY OF NEW YORK, MAY 26, 27, 28, 1847.

*[Reported in 4 Sandford, Chancery, 628.]*

MOTION to dissolve an injunction, restraining the defendants from carrying on the auction business, or selling goods at public auction, in the store number eighteen William Street, in the city of New York; and from conducting therein any business other than the regular dry goods jobbing business.

On the 2d day of February, 1847, the complainant, being the owner of that store, leased to the defendant, Winters, the first floor and cellar, for two years from the first day of May then next, at the yearly rent of fifteen hundred dollars, payable quarterly. The lease, executed by both parties, contained the following stipulation next following the demising clause, viz.: "the store to be occupied by the regular dry goods jobbing business, and for no other kind of business; and the store is not to be relet, without the written consent of the party of the first part; there is to be no marking or lettering on the granite, and no alteration in the shelving, or in the store otherwise, unless by the consent of the party of the first part."

On the first of May, 1847, Winters entered into possession of the premises, and immediately, in connection with the defendant Sayres, under the firm of Sayres & Winters, commenced selling goods there at auction, and continued to sell at auction daily, till the service of the injunction, suspending over the door the customary auctioneer's flag. Advertisements of their sales were published daily in the morning papers, in the columns of auctions, with the heading, "J. B. Sayres, auctioneer. By Sayres & Winters, Store No. 18 William Street. This day at 10 o'clock at the auction rooms. Dry goods," etc., etc.

On the 6th day of May the complainant notified Winters in writing that he was violating the stipulation in the lease by selling at auction, and that the complainant would insist on its being enforced; but Winters continued the auction sales as before.

The complainant owned several stores adjoining to and in the immediate neighborhood of the premises let to Winters, most of which were let to tenants carrying on the regular dry goods jobbing business; Winters' doings annoyed those tenants, and they complained of it to the complainant. The occupants of the lofts over Winters, who were also tenants of the complainant, were annoyed by the auction sales; and those sales were thereby, as he insisted, injuriously affecting his interests in respect to his stores as tenements, to prevent which was one

reason for his inserting the restriction. The bill stated that the auction business is not the regular dry goods jobbing business, and the conducting of the former in the demised premises was a violation of the stipulation in the lease. The defendants in support of the motion insisted in affidavits, that the business conducted by them was within the terms contained in the lease, and they showed that the complainant owned a store opposite the demised premises in the same street, which he had leased for an auction store, and that several other auction stores were close by.

*E. Sanford* for the defendants.

*J. Slosson* for the complainant.

The VICE-CHANCELLOR.<sup>1</sup> I have no doubt that the business of selling goods at auction is prohibited by the terms of the covenant in the lease, and that the lessee when he executed the lease knew perfectly well that the lessor intended to exclude the auction business. The philological authority cited by the defendants does not bear them out. Dr. Webster defines a "jobber" to be "a merchant who purchases goods from importers and sells to retailers." An auctioneer does not purchase at all. He sells the goods of others for a commission.

Without wasting time upon the well-established distinction between a dry goods jobber and an auctioneer, which is too clearly marked to be confounded or obliterated by affidavits, I will proceed to the only question in the cause, that of jurisdiction.

It is said that the remedy at law for damages is adequate, and that so far from there being an irreparable injury by the continuance of the breach of this covenant, it is shown that there can be no injury at all.

I apprehend that we are not to regard this subject in the manner indicated by the latter proposition. The owner of land, selling or leasing it, may insist upon just such covenants as he pleases, touching the use and mode of enjoyment of the land; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition.

In the case of the bakery in *1 Vesey & Beames*, hereafter cited, I have no doubt a great many witnesses might have been found, who would have testified that the bakery was not an annoyance to them, or to any but over-sensitive persons. And in *Hills v. Miller*,<sup>2</sup> the injury to the complainant, if tested by the opinions of witnesses, would scarcely have resulted in even nominal damages in an action at law.

It is not necessary that the act complained of should amount to a nuisance in law, either public or private. Nor is the court to enter into

<sup>1</sup> Lewis H. Sanford.—Ed.

<sup>2</sup> 3 Paige 254.

a comparison, and permit a tenant to carry on some trades as less offensive than others, where the covenant prohibits the former.<sup>1</sup>

So far as the injury is concerned, it is therefore unnecessary for the complainant to establish that it will be irreparable ; or on a continuing covenant, that it will be substantially injurious.

The question remains, is there an adequate remedy at law ?

In the first place, it is manifest that at law a new cause of action will arise every day that the defendants sell at auction. If the lessor avail himself of his full rights at law, he will sue daily for damages. This would lead to a multiplicity of suits, harassing to both parties, and highly obnoxious to the censure of a court of equity.

Then if the suits were brought, how is it possible to estimate the actual damages ? A jury might enter into a wide field of conjecture, without any certainty of coming out of it at the point of justice to the parties. The jurors might infer that the continuance of an auction business in the demised premises would for years diminish the rent of the adjoining property, and render the premises less desirable to good tenants. But any estimate of damages on that basis, however well founded, would be wholly conjectural. A different jury might imagine that the conducting of an auction business would enhance the value of the adjoining premises, and refuse to give any damages. And witnesses could undoubtedly be produced whose opinions would sanction a finding in either of these modes.

I think that in a case where the parties, by an express stipulation, have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which this court can perceive may be highly detrimental to the other, although on the facts presented it is not clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages ; it is the duty of the court by injunction to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protecting the rights of the complainant.

The motion to dissolve the injunction must be denied, with costs.<sup>2</sup>

<sup>1</sup> Per Lord Eldon, in *Macher v. The Foundling Hospital*, 1 Ves. & B. 188.

<sup>2</sup> A portion of the opinion has been omitted.—ED

## DICKENSON v. THE GRAND JUNCTION CANAL COMPANY.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., FEBRUARY 24,  
APRIL 2, 1852.

[*Reported in 15 Beavan 260.*]

*Mr. Cairns* for the plaintiffs.

*Mr. R. Palmer* and *Mr. Busk* for the defendants.

The Master of the Rolls reserved his judgment.

THE MASTER OF THE ROLLS. This was a motion for an injunction which, by consent of the plaintiffs and defendants, has been treated as the hearing of the cause, and upon which my decision is to have the effect of a decree made on the hearing of the cause upon the evidence brought before me.

The object of the suit is to restrain the defendants, the Grand Junction Canal Company, from using a well sunk by them near Tring, in Bucks, at a place called the Cow Roast Lock, to compel them to fill up this well, and to restrain them from excavating any other well, whereby the supply or flow of water in the stream called the Bulbourne may be obstructed from flowing down to the plaintiff's mill. The question on the motion and in the cause is substantially the same ; and accordingly, and as I think beneficially to both parties, the arrangement above mentioned has been entered into.

The plaintiffs submit that they are entitled to the injunction they seek, both on the ground of express contract, and also on the ground of their common law right.

The defendants generally insist on their right to continue doing what they have hitherto done.

A short statement of the facts is necessary to explain the view I have taken of this case, although there is not, in my opinion, much difficulty in arriving at a judicial conclusion on the subject. The Bulbourne is a stream which arises in the neighborhood of Tring, proceeds by Berkhamstead to a place called Two Waters, where it joins or falls into a stream called the Gade, which then proceeds by King's Langley, and falls into the Colne, some distance below Watford, and shortly above Rickmansworth. The plaintiffs are owners of four mills, used for the purpose of manufacturing paper, in the parishes of King's Langley, Abbot's Langley, and Rickmansworth. Two of the mills, called the Apsley Mill and the Nash Mill, are situated at a short distance from each other, and shortly below the junction of the Bulbourne and the Gade, at a place called Two Waters. It is not disputed that these



were ancient mills prior to the Act of 1793. In April, 1793, the first act for the incorporation of what is now called the Grand Junction Canal Company passed.<sup>1</sup> By that act it is enacted, by the 35th section, that reservoirs shall be provided for the purpose of supplying the rivers Gade, Colne, and Bulbourne with as much water as shall be taken for the use of the canal, and that before the water should be taken from the streams.

The canal was completed, but the reservoirs were never made. In 1809 the plaintiff, Dickenson, became the purchaser of one mill, and in 1811 of the other. After the plaintiff, Dickenson, became the owner, repeated actions were brought for damages arising from the withdrawal of the water, in all of which actions the plaintiffs recovered considerable damages. In order to put an end to this continued litigation, an agreement of the 11th of September, 1817, was entered into and duly executed by and between the Grand Junction Canal Company of the first part, the plaintiff, John Dickenson, of the second part, and the same plaintiff and his then partner, George Longman, of the third part. This agreement, after reciting several of the facts above mentioned, contained covenants on both sides. By the first, the company covenanted to endeavor to obtain an act of Parliament in the next session, to authorize a deviation in the canal, by which it should be united to the river shortly above, and in connection with the mills of the plaintiffs, and the second clause of the agreement contained a covenant by the company that "when and so soon as the said deviation shall be completed and used for navigation, the said company shall and will stop and thenceforth discontinue the navigation of the canal from 330 yards south of Frogmore Swing Bridge to the junction of the canal and river below the four locks, in the said parish of Abbot's Langley. And they, the said company, shall not nor will, at any time hereafter, make any other alteration in the state of communication between the canal and the rivers Gade and Bulbourne above Nash Mill, or any diversion of the waters of those rivers, but the same shall continue as at present existing," subject to such alteration.

This contract was embodied in an act of Parliament, which was obtained in the next session, for the purpose of making the proposed deviation. By this statute, which was passed in the 58 Geo. 3, c. xvi., after reciting the disputes which had arisen between the plaintiffs and defendants, it was enacted, among other things, as follows: "That it shall not be lawful for the said company of proprietors, upon any account or pretence whatsoever, to deviate more than fifty yards from the line described in the said last-mentioned map or plan and book of reference within the said parishes of Hemel Hempstead, King's Lang-

<sup>1</sup> 33 Geo. 3, c. lxxx.

ley, and Abbot's Langley ; nor to make any alteration in the state of communication between the said canal and the rivers Gade and Bulbourne, northward of Nash Mill aforesaid, other than as authorized by this act ; nor to divert any of the waters of the said rivers, or either of them, in any other manner than as diverted at the time of passing this act." <sup>1</sup>

No further dispute or contest arose between the parties until the year 1849, when the company, who had hitherto been in the habit of pumping up water from the locks on the north side of the summit level of the canal near Tring, where it passes the high chalk range, and in order to avoid the expense and inconvenience of that practice, sunk a large well, seventy feet deep, at a point near the Cow Roast Lock, just below the highest level, and near the source of the Bulbourne, to which well they attached a steam engine, and proposed, as it appears from the affidavits, to pump water from the well into the highest level of the canal, at the rate of a lock of water per hour, for twelve hours in every day. It is alleged by the plaintiffs that the water taken from this well diminishes the water in the river Bulbourne to the same, or nearly the same, extent as that which is taken from the well. It is admitted by the plaintiffs that the water which is drawn from the well is pumped into the canal, and that the canal and river unite above the plaintiffs' mills ; but it is alleged by them, that this circumstance does not remedy or obviate the injury arising from this diminution of the Bulbourne, for two reasons : First, because, as the water is pumped into the highest or summit level, half of it is necessarily discharged to the north of that level, and does not find its way into the stream to the south, leading to the plaintiffs' mills ; and, secondly, and more particularly, because, although the water be all pumped into this upper level of the canal, even if it should all come down to the south, it does so come down only when a barge descends or ascends on that side, and that, consequently, in such case, the lock of water liberated passes through all the steps of the canal, and finds its way from the highest to the lowest level of the canal, viz., the Thames, without augmenting the supply to the plaintiffs' mills ; but that if the water flowed into and through the Bulbourne stream, a different result would arise ; and that, inasmuch as in that case it would flow into the canal shortly above the plaintiffs' mills, and would continually flow over the weir of the canal, it would keep up a constant and adequate supply to the plaintiffs' mills. And, in confirmation of this statement, it is alleged, that the soil being chalk, the nature of it is such, that no overflow or total cessation of flow of the river was ever observed, but that as the strata of the chalk incline towards the south, this soil preserves and gives out gradually through the summer the water which

<sup>1</sup> 58 Geo. 3, c. xvi.

falls in the rest of the year, and that this is so constant and invariable, that the amount of such water, and the supply of it, can be foretold with reasonable accuracy by carefully ascertaining by the rain-gauge the amount of water which has fallen in the preceding months; and, it is alleged that all this was, and in fact would be, destroyed by the continuance of the practice of the defendants relative to their well, if they were permitted to continue the same.

In this state of things, on the 21st of April, 1849, the bill was filed for the purpose I have before mentioned. On the 11th of June, 1849, Lord Langdale made an order directing certain experiments to be conducted under the superintendence of Mr. Cubitt, the engineer, in order to ascertain the effect on the water of the river Bulbourne by the pumping of the water from the well. Mr. Cubitt proceeded to make the experiments required, and made his report to Lord Langdale on the 22d of March, 1850, with an appendix, explaining the nature and results of these experiments. These have incontestably established the fact that by the draining of the water from the well, the stream of the river Bulbourne is materially diminished, and that for a considerable distance near the source it is, by such means, completely dried up. Upon this state of the evidence, the motion before Lord Langdale was renewed, and on the 8th of August, 1850, Lord Langdale then made an order of that date, by which he restrained the company from pumping water from their well, except upon certain terms, of conducting one-half of it by pipes to the Bulbourne River near the plaintiffs' mills, which condition, whatever might have been the desire of the defendants to accede to it, if it had been, or were to be made a permanent arrangement, was too expensive to be entered upon as a temporary expedient, and before the rights of the parties were finally and conclusively ascertained by the proceedings then pending; so that, in truth, this direction has had the effect of an injunction absolute, from the date of that order until the present time. In addition to this direction or qualified injunction, Lord Langdale directed a case to be sent to the Court of Exchequer for their opinion upon six questions, the effect of which and of the answer of the Court of Exchequer are as follows: <sup>1</sup>

<sup>1</sup> In answer to the first question the Court of Exchequer was of opinion that the company, by digging the well, and by taking the water from the well at the Cow Roast, and thereby diverting the underground water from flowing into the Bulbourne, have violated the Act of Parliament of 58 Geo. 3, and the articles of agreement of the 11th of September, 1817, and that they have also rendered themselves liable to an action, irrespective of such act of Parliament and agreement.

<sup>1</sup> See Exch. Reports.

On the second question, the Court of Exchequer was of the same opinion as to the diversion of the water, which would otherwise have percolated and gone through the intervening chalk and earth underground, and would thus, in the course of nature, have found way into the river, and have flowed to the plaintiffs' mills.

In answer to the third question the court was of opinion that the draining off, in like manner, out of the Bulbourne through the intervening chalk and earth into the well, and pumping into the summit level the water which would otherwise have flowed to the plaintiffs' mills, was a violation of the act of Parliament and the agreement, and would also have rendered the company liable to an action irrespective of the act and the agreement.

The remaining three questions vary the points submitted to the Court of Exchequer ; but it is not, in my opinion, material to point out further the distinctions by which the questions put are varied. They are so framed, that by them it was intended, apparently, to meet every point of law suggested by the facts appearing upon the report of Mr. Cubitt ; and beyond this, also to obtain the opinion of the court upon the construction arising upon the clauses of the act of Parliament and the agreement.

After a full argument upon this case, the court was of opinion that the acts done violated the act of Parliament, violated the agreement, and even that if the act had never passed, and the agreement had never been entered into, still that the defendants could not have been justified, at common law, in the acts they have committed, but that they would have rendered themselves, that is, the company, liable to an action in respect of the damage, if any, thereby inflicted on the plaintiffs.

The certificate of the Barons was given on the 13th of January, 1852; and in this state of things the motion is renewed before me for the injunction, which, as I have already stated, is, by arrangement, to be treated as the hearing of the cause.

On the part of the defendants it is urged, amongst other things, that the case to the judges is imperfectly stated, and that no just conclusion can be drawn from thence to the prejudice of the defendants—that as the water taken from the well is pumped into the canal, and as the canal is united with the river above the mill, the water arrives at the same end, only in a different manner, but in a manner equally beneficial to the plaintiffs—that no just conclusion either is to be drawn from Mr. Cubitt's experiments—that because ten days' incessant pumping diverted the water, it does not follow that the moderate use of the pump required by the company would have that effect ; and that even if an injunction were granted, it ought to be confined only to prevent such an excessive pumping, as might produce the injurious effect complained of—that, in

truth, there is no evidence of any diminution of water at the mills, and that the greatness of the fall between the Cow Roast and the mills, which is shown to be very considerable, is such as would probably render any such diminution by the pumping at the Cow Roast imperceptible, and consequently, that the injunction, if granted at all, should only be so limited as to stop only such pumping of water as should prevent the owners of the mills from working them as beneficially as they might otherwise have done. Besides this, it is urged that, assuming the legal right in the plaintiffs, a mere legal right will not support an injunction ; and it is further urged, that on a balance of inconvenience, there is no question as to the course which the court ought to adopt, inasmuch as the injury to the company and the public, if, as is probable, it should amount to stopping the canal, is certain and irreparable, but that the injury to the plaintiffs is uncertain and prospective, and easily measured by damages.

After giving an attentive consideration to this subject, and reading through the great mass of papers connected with it, I entertain no doubt that the plaintiffs are entitled to a decree in their favor, and that the ground on which they are entitled to such decree is that which was, amongst others, strongly urged at the bar, viz., on the contracts entered into by the plaintiffs and defendants. The state of the case on this point is this: In 1816 and 1817 the plaintiffs had brought three actions against the defendants. In all these actions they proved actual damage done to the mills by the defendants, by the then state of the canal, and the disobedience to the act of Parliament then in force ; and they recovered damages in each of the actions—£2,000 in one, £2,800 in another, and £3,000 in a third. In 1817, a fourth action was brought and referred to arbitration ; and in order to prevent this incessant litigation, most injurious to both parties, a compromise was agreed to, and the articles of agreement of the 11th of September, 1817, were executed ; which, after reciting the then existing facts, agree that an act shall be obtained to authorize a proposed deviation of the canal, and it contains this clause.<sup>1</sup>

[His Honor read it.]

After this follows the Act of 58 Geo. 3, which contains this recital and this section.<sup>2</sup>

[His Honor read them.]

The first question that arises under this state of circumstances is, whether this is such a contract as this court will restrain the parties to it from violating, and upon this I cannot entertain the slightest doubt. The consideration for it was valuable, and the company obtained the advantage of that consideration in the cessation of those

<sup>1</sup> Stated *ante*, p. 263.

<sup>2</sup> See *ante*, p. 263.

continued actions by which they were harassed, and in which, up to that time, they had failed, and had had to pay large and repeated damages.

The next question is whether the acts of the defendants are a violation of this contract. The report of Mr. Cubitt shows conclusively, that by means of the pumping at the well the waters are diverted from the said rivers; and independently of the decision of the Court of Exchequer, I should, on the evidence of his report, have entertained no doubt but that the company had committed a violation of this contract, and of this act of Parliament, by pumping the water out of this well into the summit level of the canal. The decision of that court, however, on the case sent by Lord Langdale, is in my opinion conclusive on this subject, notwithstanding the arguments I have had addressed to me, to distinguish the facts there stated from the facts in evidence before me.

If it be a contract duly entered into between the parties, it is no answer to a violation of it to say that it will not inflict any injury upon one of the contracting parties. If the plaintiffs have purchased from the company a right to preserve the waters in the rivers Bulbourne and Gade from being diverted in any other manner than as diverted at the passing of the Act of 58 Geo. 3, it is no answer to them to say that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated.

It is therefore, in my opinion, a matter of no moment in this case, that the plaintiffs have given no evidence of any actual damage done to them, or of any actual diminution of water at their mills. Having established that the acts of the defendants are a violation of the contract entered into between them and the plaintiffs, and a violation of the act of Parliament passed to carry such contract into effect, the plaintiffs are entitled to call upon this court to protect them in the enjoyment of that right which they have so purchased, and this court is bound to preserve it from being broken in upon.

I am of opinion, therefore, that I must grant a perpetual injunction to restrain the company from further excavating, etc., etc., and that the defendants must pay the costs of this suit.

## ATTORNEY-GENERAL v. ALGONQUIN CLUB.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 1,  
1891.

[*Reported in 153 Massachusetts Reports 447.*]

INFORMATION in equity, at the relation of the Harbor and Land Commissioners, for the removal or alteration of certain portions of the defendant's club-house, situated upon Commonwealth Avenue in Boston, which were alleged to violate the restrictions in a deed from the Commonwealth under which the defendant derived its title. Hearing before HOLMES, J., who reported the case for the determination of the full court. The facts appear in the opinion.

The case was argued at the bar in January, 1891, and in the March following was submitted on the briefs to all the judges.

*H. N. Shepard* for the Attorney-General.

*G. Putnam* for the defendant.

C. ALLEN, J. The defendant further contends that the projections are not of sufficient importance to warrant a mandatory injunction or order for their removal.<sup>1</sup> This argument would be of more weight in a case where a defendant had erected a building with unauthorized projections, in ignorance that they were deemed to be unauthorized, and where he was not aware that his right to do so was disputed. Without considering what should be done in such a case, it is enough to say that such is not the case here. If the defendant, after deliberately proceeding in the face of the remonstrances of the officers of the Commonwealth to erect projections which are now determined to be unwarranted, can yet be heard to urge that after all no order for their removal should be passed, it would gain something not much short of a right by stoutly asserting an invalid claim. The space was reserved for reasons affecting not only neighboring owners, but the public at large. Compensation to the Commonwealth for such an intrusion into the reserved space would be an unsuitable remedy. The injury is one not easily measurable by money. It is then a question whether the defendant shall be allowed to retain its unauthorized projections, or shall be compelled to make such alterations as will bring them within the provisions of the deeds. We cannot say, under the circumstances as they appear, that the injury is trifling or unsubstantial. If one such intrusion into the reserved space is allowed to pass, others must be. When a general plan has been laid out in behalf of the Commonwealth for the im-

<sup>1</sup> Only so much of the case is given as relates to this question.—ED.

provement of land, and the construction of a broad avenue for the benefit of all purchasers of lots upon it and of the public at large, with specific restrictions requiring conformity thereto inserted in the deeds, it is of importance that architects and builders should understand that the Commonwealth has a right to insist that its rules and limitations must be observed ; and a violation so considerable as is shown in the present case, when made in the face of distinct notice and prohibition from the public authorities, cannot be entitled to indulgence, as a matter of right. In a suit brought under such circumstances in behalf of the Commonwealth to enforce the language of its deeds, we are not at liberty to say that the defendant shall not be held bound by the restriction, on the ground that the injury is slight, unless it is so small as to fall within the maxim *de minimis*. Stronger reasons apply when the suit is brought by the Attorney-General to enforce a public right ; but even in suits brought by private parties a removal has been ordered.<sup>1</sup>

The deed itself makes express provision for just such cases as this. The "Commonwealth reserves the right to enter upon the premises by its agents, and, at the expense of the party at fault, to remove or alter, in conformity with the above stipulations, any building or portion thereof which may be erected on the premises by the said grantees, or their representatives or assigns, in a manner or to a use contrary to the above stipulations." Instead of enforcing the Commonwealth's view of the meaning of the deeds at all hazards, the Attorney-General properly seeks the aid of the court to define the rights of the defendant under them, and to order the removal of all unauthorized projections which may not fairly be deemed to fall within the rule *de minimis*.<sup>2</sup>

In respect to the basement story a mandatory injunction must issue, and in respect to the other and minor projections there may be a declaration establishing the right of the Commonwealth, but not compelling the defendant to remove them at present, in view of its willingness and request to be allowed to retain them under the assent of the Commonwealth ; both to be under the direction of a single justice.

Decree accordingly.

<sup>1</sup> A citation of cases has been omitted.—ED.

<sup>2</sup> Attorney-General *v.* Williams, 140 Mass. 329.



## SECTION II.—INCIDENTS OF THE RIGHT TO SPECIFIC PERFORMANCE.

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### TOWNLEY *v.* BEDWELL.

IN CHANCERY, BEFORE LORD ELDON, C., MARCH 31, APRIL 1, 1808.

[*Reported in 14 Vesey 590.*]

By the Master's report under an order of reference to state encumbrances, it appeared that a lease had been executed in 1795 by the testator in this cause to Townley, for thirty-three years, with a proviso, that if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, £600 for the purchase upon having a good title made to him, Townley, his executors, administrators, or assigns.

The testator died before the expiration of six years from the date of the lease. After his death, and within that period, Townley declared his option to purchase, according to the proviso.

The Master's report also stated an agreement for a lease to Pratt, with a proviso for a covenant, that if at any time after the ground should be covered with houses by the tenant, he, Pratt, his executors, administrators, or assigns, should be minded to have all or any part made freehold, the testator, his heirs, executors, etc., would make a title, the value to be fixed by two persons; one to be appointed by the testator, the other by Pratt. In pursuance of that agreement a lease was granted in 1791, for ninety-nine years.

A petition was presented by the heir at law, praying to be let into possession, and to have the rents accrued paid to him out of court. No option to purchase had been declared as to the premises demised to Pratt.

*Mr. Fonblanque* and *Mr. Bell* in support of the petition.

The LORD CHANCELLOR. This precise question was decided at the Rolls by Lord Kenyon; holding, that upon such a contract by a lessee, for liberty to purchase the freehold and inheritance within a certain period at a limited price, that from the death of the lessor the

rent went to the heir, but the money, when the purchase was claimed, belonged to the executor.

*Sir Samuel Romilly, Mr. Wetherell, and Mr. Heald* for the next of kin.

This case ought to follow that decision. Under such a contract, where it is absolute, the heir at law holds the estate in trust for those who are entitled to the personal property; and where it is conditional, by the performance of the condition after the death it becomes absolute. The performance of the condition depended neither upon the heir, nor upon the next of kin, and when it was performed by the declaration of Townley's option to purchase, the right of the next of kin to enforce the contract attached. The court must proceed upon a general principle, applicable to all cases. That principle is, that when the condition is performed, the agreement becomes absolute, and there can be no distinction between an agreement so become absolute, and one that is absolute in its origin. When, therefore, the tenant asserted his right under the option, from that moment that portion of the real estate was to be considered personal. The provision, that the money is to be paid to the heir, is of no consequence, occasioned probably by the circumstance, that the conveyance was to be obtained from the heir, to which the next of kin could not be a party. That cannot determine this question, whether the heir can keep the money, or is to be a trustee. The testator, who did not contemplate any dispute upon the subject, must be considered as having died intestate, as to this part of his property. As to the objection, that the price of the premises demised to Pratt is to be fixed by arbitration, that very difficult question remains undetermined.

The LORD CHANCELLOR observed, as to the premises demised to Pratt, that until the option declared, which ascertains, whether the estate is ever to be converted, the rents and profits must go according to the freehold title; and it was admitted by the counsel for the next of kin, that the prayer of the petition that the heir may be let into possession, could not be resisted.

*Mr. Fonblanque*, in reply.

As to the other premises, the option to purchase which has been declared, the next of kin, not being entitled to enforce performance of the condition, cannot have the benefit of it when performed, though Townley might, during the testator's life, and within the period of six years from the date of the lease, have claimed. The direction that the money shall be paid, not to the executors or administrators, but to the heirs and assigns, distinguishes this case.

The LORD CHANCELLOR. Much reliance cannot be laid on that expression, as with similar inaccuracy the fee-simple is to be con-

veyed to Townley, his executors, administrators, or assigns. My present opinion, as to these premises, is, that the rents previous to the option, declared by Townley, belong to the heir, and upon the question as to the subsequent rents, I will read my note of the case before Lord Kenyon.

April 1. The case to which I alluded yesterday is *Lawes v. Bennet*, which, according to my own note, was this:

A person named Whitrong, in 1758, demised to Douglas for seven years, with a covenant, that if, after the 29th of September, 1761, and before the 29th of September, 1765, Douglas should choose to purchase the inheritance for £3,000 Whitrong would convey accordingly. Whitrong died in 1761, no election having been then made by Douglas, and left all his real estate to the defendant Bennet, and all his personal estate to Bennet and his sister, equally as tenants in common. In 1765, before the 29th of September, Waller, who had purchased the lease and the benefit of the agreement from Douglas, called upon Bennet, the devisee of the real estate, to convey upon payment of £3,000. The bill was filed in 1781, by Lawes, the husband of Bennet's sister, against the personal representative of Bennet the brother, claiming a moiety of the £3,000 and interest, and Lord Kenyon made the decree accordingly, observing, that though Whitrong could not have compelled Douglas to purchase, the money was, at the time of the election, declared to be considered as the personal estate of the testator, and did not belong to the devisee of the real estate.

That case was very much argued, and I do not mean to say that a great deal may not be urged against it; but, where there is a decision precisely in point, it is better to follow it.

Therefore the rents of the premises demised to Pratt, and the rents of the other premises demised to Townley, until the option declared by him, belong to the heir; and from the time of that option Townley is entitled to the latter, and must be charged with interest upon his purchase-money, which money and interest are personal estate of the testator, and go to his next of kin.

## WEEDING v. WEEDING.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., MARCH 24, 1861.

[*Reported in 1 Johnson & Hemming 424.*]

THOMAS WEEDING, being seised in fee of an estate at Kentish Town, made his will, dated the 28th of April, 1855, and thereby devised the said Kentish Town estate, and all other his real estates in England, to trustees, as to the Kentish Town estate upon certain specified trusts and subject to certain annuities, and as to other estates upon other trusts, and also left his residuary personal estate upon different trusts.

The testator made two codicils to his will, dated respectively the 2d and the 21st of August, 1855; but the same did not affect the devise and bequest before stated.

By an agreement, dated the 11th of February, 1856, Thomas Weeding agreed with Wm. Ansell Day to let a portion of the Kentish Town estate to him for ninety-nine years at certain rents, with a proviso, that if Day, his heirs or assigns, should, at any time before the 25th of December, 1859, be desirous of becoming the purchaser or purchasers of the demised premises in fee simple for £2,000, and should give one month's notice thereof to the testator, his heirs or assigns, then Day, his heirs or assigns, should be entitled to become the purchaser or purchasers of the same at that sum; and in case Day, his heirs or assigns, should, on or before the said 25th of December, 1859, pay or tender, or cause to be paid or tendered, unto the said Thomas Weeding, his heirs or assigns, the said sum of £2,000, and pay all arrears of rent up to the time of the expiration of such notice, then the said Thomas Weeding, his heirs or assigns, and all other necessary and proper parties, should and would, at the costs of Day, his heirs or assigns, execute a conveyance in fee simple to Day, his heirs or assigns, or as he or they should direct.

The testator died on the 5th of October, 1856. A claim for specific performance of the said agreement was filed by Day after the testator's death; and on the 2d of August, 1858, specific performance was decreed, and the price of £2,000 was paid into court, pursuant to the decree, to the credit of the cause of Weeding v. Weeding, which was a suit to administer the real estate of the testator, and a conveyance was executed.

This petition was now presented by some of the persons interested in the residuary estate, praying that the said £2,000 might be transferred to the credit of a cause of Randles v. Baggallay (which was a suit to administer the personal estate of the testator), as part of the residuary personal estate.

*Randles v. Baggallay* was a suit in another branch of the court, and the petition was intituled only in *Weeding v. Weeding*.

*Mr. Rolt*, Q.C., and *Mr. Freeling* for the petitioners.

*Mr. Willcock*, Q.C., for *Thomas Weeding*, the executor of the testator, and also devisee in remainder of the Kentish Town estate.

VICE CHANCELLOR SIR W. PAGE WOOD. I do not see how I can give any weight to the argument of the defendants, unless I can distinguish the present case from *Lawes v. Bennett* and *Townley v. Bedwell*. When a point has been decided by such a judge as Lord Kenyon, and the decision followed by such a judge as Lord Eldon, notwithstanding his admission that much might be said on the other side, I cannot conceive a case more completely bound by authority. Considering by whom the first case was decided, it is scarcely necessary to say that, though much might be urged against it, still there is much to be said also in favor of Lord Kenyon's view.

The testator must be presumed to know the law. With this knowledge he makes a will, devising real estate in one way, and giving his personal estate upon different trusts. After this he makes a contract, the effect of which he knows will be to give to a third person the power of saying, at a future time, whether a certain portion of what was then his real estate shall be realty or personalty. Then what indication have you, on the will, of the quality which the testator intended this property to possess? He only says: I wish A to take what is land and B to take what is money. If you look not merely to the question of value, but regard the peculiar and artificial system which, on feudal grounds, has created the distinction between real and personal estate, you can see that in the distribution of his estate a testator might not be influenced by considerations of value only, and that it might well be his intention that when the existing balance between the real and personal property was changed the distribution of the property should be changed also, as between the testator's devisees and legatees. You cannot, at any rate, assume an intention that the property should, in any event, be divided in the particular proportions as to value which existed at the date of the will.

I cannot agree with the argument that there is no contract. It is as much a conditional contract as if it depended on any other contingency than the exercise of an option by a third person, such as, for example, the failure of issue of a particular person. The suggested analogy of a power of sale in a mortgage deed does not press me at all, because a mortgage is regarded as essentially a security for money; and the circumstance of a power of sale being given as one of the various remedies cannot affect the mutual rights of the real and personal representatives of the mortgagor.

Conceiving the principle to be settled by the authorities I have mentioned, the only question is whether the case falls within the exception recognized by the cases of *Drant v. Vause* and *Emuss v. Smith*. I understand the principle on which those cases were decided to be this: When you find that in a will made after a contract giving an option of purchase the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it. This was the nature of both the authorities relied on, for in one the contract was before the will, and in the other the same effect was produced by the subsequent republication of the will.

But the case is very different when, after having given the property by will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away. Here the testator first gives the Kentish Town estate to certain devisees and his personalty to other persons. After that a part of the estate ceases to be Kentish Town estate and becomes personalty. There is no republication of the will after the contract by which this change would, in a certain contingency, be brought about. The intention is that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known, when he had entered into the contract, that what would ultimately be Kentish Town estate would depend on the option of the lessee; and the inference is that he meant his property to go according to the state to which it would be reduced by the exercise of that option.

The case is, in principle, on all fours with *Lawes v. Bennett*.

The only valid difference is in the use of the words "heirs and assigns"; but that is too slight to act upon, and, indeed, the same words occurred in *Townley v. Bedwell*. Such a distinction cannot be relied on after *Knollys v. Shepherd*,<sup>1</sup> where, upon a sale of the very estate devised, it was held that the gift to the devisee was only to her as trustee to carry the contract into effect. The result, therefore, is that all the produce of the land, until the option was exercised, goes to the devisees, after which time it became personalty and formed part of the residue. The able argument on the other side only confirms Lord Eldon's remark, that much might be said against Lord Kenyon's view. But I can only say, with Vice-Chancellor Kindersley in the late case before him, that I am bound to follow the authority of *Lawes v. Bennett* and *Townley v. Bedwell*.

<sup>1</sup> Mentioned in 1 J. & W. 499.

THE CITY OF LONDON IMPROVEMENT ACT. EX PARTE  
HARDY.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., MAY 27, JULY  
13, 1861.

[*Reported in 30 Beavan 206.*]

THE testator, with a view to make the division of his property as equal as possible amongst his children, directed, that after his death a fair valuation should be made of his three freehold houses in the city of London. And his will was, that the property should be successively offered, at the price of the valuation, to two of the children jointly, first to the sons, and afterwards to the daughters, according to seniority; and that if all the children refused, the price was to be reduced and the offer repeated. Until the sale should be completed, all his children were equally to participate in the rents.

The testator died in 1844, leaving nine children.

In 1850, one of the houses in Cannon Street was, by virtue of parliamentary powers, taken by the corporation of London for city improvements.

The purchase-money, amounting to £1,000, was paid into court, some of the children being infants.

Two of the children, Emma and John, afterwards died infants, and the option of purchase never having been exercised by any of the children, the question on this petition, the object of which was to obtain payment of their shares, was, whether such shares were real or personal estate, and whether they belonged to their eldest brother as their heir-at-law, or to their next of kin.

*Mr. Wickens* for the heir-at-law.

*Mr. Cole* and *Mr. Rigby*, *contra*.

*Mr. Pontefex* for the corporation.

THE MASTER OF THE ROLLS. I am of opinion that this is real estate, until it has been converted by the exercise of the option given to the children by the will. I also think that the option is not taken away by the circumstance that the city of London has purchased the property under its compulsory powers. The option will remain, whether the fund continues, as it is, in stock, or is reinvested in land. I must, therefore, wait until the youngest child attains twenty-one years, and see what takes place, and abstain from dealing with the corpus of the fund in the meanwhile. It is not clear that the option of purchasing will be exercised at all, for the children may die infants.

I have no doubt that this is now real estate, and that the heir is entitled to receive the rents or income until the option has been exercised. I will therefore direct payment of the income accordingly.

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CHARLES T. B. KEEP ET AL., ADMINISTRATORS, v. DAVID L. MILLER ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY OCTOBER TERM,  
1886.

[*Reported in 42 New Jersey Equity Reports 100.*]

BILL for relief. On final hearing upon pleadings and proofs.

*Mr. Alfred Mills* for complainants.

*Mr. S. D. Haines* and *Mr. S. B. Ransom* for defendant Faulks.

The CHANCELLOR. The bill states that John B. Miller, deceased, late of Madison, in the county of Morris, made and entered into a valid contract in writing with Jehiel K. Hoyt upon the 25th of April, 1872, for the sale and conveyance by him to the latter, or to such company or individuals as might be named by said Hoyt, of certain land therein mentioned for the price of \$800 an acre; and that on or about the 10th of June following he made another like agreement in writing with Hoyt for the conveyance to him, his heirs and assigns, or to such person or persons as he might designate, of the same property on or before the 1st day of September then next for the price of \$39,392, to be paid, and which Hoyt thereby stipulated to pay, as follows: \$100 upon the execution of the agreement and \$4,900 on the delivery of the deed, the balance, \$34,392, to be secured by the bond of the grantee or grantees, and his or their mortgage of the property; that the time for the delivery of the deed was, by another agreement in writing, made on the 20th of August, 1872, between Miller and Hoyt, extended to the 1st day of October then next; that Miller died September 5th, 1872, intestate, leaving a widow and a son, the defendant David L. Miller, who was his only heir-at-law; that letters of administration of his estate were granted to Theodore Little October 1st, 1872; that after the death of John B. Miller, and on or about the 28th of September, 1872, Hoyt notified David L. Miller that he would be ready to take the deed and carry out the agreement on his part on the 1st of October then next, and requested Miller, as heir-at-law, to deliver at that date a deed for the property, in conformity with the contract, to Henry E. Reddish and Henry C. Ohlen, whom he designated as grantees; that David L. Miller did



not and never would convey the property except upon condition that he should receive the purchase-money for his own use; that the complainants are informed that Reddish and Ohlen, on or about the 1st of October, 1872, demanded of David L. Miller that he convey the property to them by warranty deed, free from any dower of his wife, and from the dower of the widow of his father, and from the lien of certain judgments which were of record against him, David L. Miller, and tendered the money and bond and mortgage, but he would not comply with the request; that neither David L. Miller nor Hoyt, Reddish or Ohlen ever requested the widow to release her dower to Reddish and Ohlen; that she never refused to release it to them, but was at all times ready to release it upon condition that the purchase-money should be paid and secured to be paid to the administrator of John B. Miller, and that David L. Miller was aware of her readiness to release upon that condition; that on or about the 13th of December, 1872, the widow wrote a letter to her late husband's administrator, in which she said that she had expected to join with her husband in the conveyance to the purchaser, but he died before any conveyance was made; that she was still ready to do all that she could to perform the agreement, and was ready to release her dower on condition that the purchase-money should be paid or secured to be paid to the administrator, and she offered to release her dower upon those terms in case the administrator should take judicial proceedings to compel specific performance of the agreement; that he did bring suit to that end in this court in December, 1872; that in January following the widow died, and the complainants in this suit were appointed administrators of her estate; that in the suit brought by the administrator of John B. Miller specific performance was decreed, but the decree was, upon appeal, reversed, so far as Hoyt and Reddish and Ohlen and the performance of the agreement by them were concerned. By the decree of the Court of Errors and Appeals the bill was dismissed as to those defendants, but was retained as to the others, in order that the legal representatives of the widow might have an opportunity of raising by cross-bill the question whether they have any remedy against David L. Miller. This suit is brought accordingly by the administrators of Mrs. Miller against David L. Miller and his wife and his assignee in bankruptcy (he filed his petition in bankruptcy after the decree for specific performance was entered), the administrator of John B. Miller (he refused to bring the suit or to join in it or to permit the complainants to bring it in his name), and the administrators of a judgment creditor of David L. Miller. The prayer of the bill is that the land may be decreed to be personal property and may be sold under the order of this court;

that the proceeds of the sale may go into the hands of the administrator of John B. Miller as personal property, to be administered and distributed by him accordingly; that it may be decreed that the complainants, as the legal representatives of the widow, shall have her share thereof according to law, and that, if necessary, it may be decreed that David L. Miller's wife has no dower in the property, and that the judgment above mentioned is no lien upon the premises. None of the defendants have answered except the assignee in bankruptcy.

By the decree in the above-mentioned suit brought by John B. Miller's administrator,<sup>1</sup> in addition to decreeing specific performance, it was decreed that David L. Miller, at and ever since the death of his father, had been, and at the date of the decree was, seized of the property as a trustee to and for the use of Reddish and Ohlen, and not otherwise, and that David L. Miller's wife was not and had not been entitled to any dower or right of dower in or to the land, and that the judgment creditors of David L. Miller were not entitled to any lien to or claim upon or against the property by virtue of their judgments; and also that the moneys decreed to be paid and the bond and mortgage decreed to be given on account of purchase-money were and should be personal assets in the hands of the administrator of John B. Miller, and should be by him administered as personal property in due and legal course of administration, and that he should pay to the administrators of the widow her distributive share thereof. That decree (it was made over ten years ago) was not appealed from by David L. Miller.

The only question presented for decision is whether, under the circumstances of the case, the contract of sale worked an equitable conversion of the land into money at the death of John B. Miller. That it would have done so had the contract been enforced against the vendee is indisputable and is not denied. But the answering defendant insists that the failure to compel specific performance prevents such result. That failure, however, was due, not to the invalidity of the contract, but to the fact that because of the length of time which had elapsed between the time fixed by the contract (as extended) for the completion of the purchase and the making of the decree for specific performance, it was inequitable to require the vendee to complete the purchase, seeing that he had tendered himself ready to comply with the requirements of the contract on his part at the time fixed, and that in the meantime the property had fallen in value. It may be remarked that the non-compliance upon

<sup>1</sup> Miller's Admr. *v.* Miller, 10 C. E. Gr. 354; S. C. on appeal, Reddish *v.* Miller's Admr., 12 C. E. Gr. 514.

the part of the heir was not due to the widow. She did not refuse to release. She was never asked to release. On the 13th of December, 1872, she stated to her late husband's administrator by letter that she was willing to release in case he should take judicial proceedings to compel specific performance of the contract. It is proved that on the very day on which under the contract (as extended) the deed was to be delivered her attorney stated to the attorney of Reddish and Ohlen that she was willing to release upon such a payment as would secure her rights, by which was meant payment to her husband's administrator, and not to David L. Miller.

A valid and binding contract of sale, such as a court of equity will specifically enforce against an unwilling purchaser, operates as a conversion. The cases in which the court has refused to decree that a contract for sale works equitable conversion are those in which the contract was such as equity would not enforce. The counsel of the answering defendant insists that the decision in the case of *Teneick v. Flagg*<sup>1</sup> is decisive of the question under consideration, and is adverse to the claim of the complainants. But it is to be observed that that was an action at law. Mrs. Attie Teneick had agreed to convey land to James Buckalew, and had received part of the purchase-money. He refused to accept the deed because of the pendency of an action of ejectment brought against Mrs. Teneick by other parties to obtain possession of the land. She delivered a deed for the property to her agent, to be delivered by him to Buckalew upon the favorable termination of the action of ejectment. She died before that termination was reached. By her death the action of ejectment abated, and it was not renewed. After her death her heirs conveyed the property to Buckalew in pursuance of her agreement, and the purchase-money was paid to her administrators. The husband of one of the heirs brought suit against the administrators to recover a share of the money. The court held that he was entitled to recover on the ground that on the death of Mrs. Teneick the title descended to her heirs, the deed held in escrow passing no title since the event on which it was to be delivered to Buckalew did not happen in the lifetime of the grantor, and at her death the deed ceased to have any validity. In the decision of the case the difference between the equitable rule and the legal rule was distinctly recognized by Justice Haines in his opinion. The cause was, of course, decided in the court of law upon the legal rule. Upon a full and careful consideration of the matter I reached the conclusion, in the suit for specific performance, that the contract worked a conversion.<sup>2</sup> The only new feature now presented is the fact that the Appellate Court has de-

<sup>1</sup> 5 Dutch. 25.

<sup>2</sup> See *Miller's Admr. v. Miller*, *ubi supra*.

cided that specific performance ought not to have been decreed. The reason for that conclusion has already been stated. It was not the invalidity of the contract nor any consideration which rendered the contract unenforceable in equity at the death of John B. Miller or at the time fixed by the contract for completing the purchase. The contract was one which, at the time fixed by it for completing the purchase, could have been enforced against the purchaser in equity, and it would have been enforced at that time on the application of the heir, with the consent of the widow, and she was willing to join him in enforcing it if he had been willing to secure to her her right in the purchase-money. In equity he ought to have enforced it. Equity regards that as done which ought to have been done. The doctrine of conversion is a reasonable one. In this case John B. Miller had made a sale of the property which, had he lived, he would have been able to enforce in equity, and which it is to be presumed he would have enforced. He had sold the property at a high price. It should not be, and it is not in the power of the heir to defeat the right of the next of kin by his own unwillingness to carry out the contract. By force of the contract the vendor became, in equity, trustee of the property for the vendee, and the latter became trustee of the purchase-money for the former. It has been held that the equitable rights of the next of kin of the vendor are not defeated where the vendee, by his laches, after the death of the vendor, loses his right to specific performance, provided the contract was enforceable in equity at the death of the vendor.<sup>1</sup> Where there is a contract for the sale of an estate, the estate is, in equity, considered as converted into personalty from the time of the contract, although the purchaser has an election to purchase or not as he shall see fit.<sup>2</sup> The sale in this case worked an equitable conversion of the land into money, and the widow was entitled, accordingly, to a distributive share of the purchase-money as part of the personal property of her husband.

<sup>1</sup> *Curre v. Bowyer*, reported in a note to *Farrar v. Earl of Winterton*, 5 Beav. 6.

<sup>2</sup> *Lawes v. Bennet*, 1 Cox Ch. 167; *Sugd. Vend.* (8th Am. ed.) 187, and cases cited.

## LANGFORD v. PITT.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M.R., TRINITY  
TERM, 1731.

[*Reported in 2 Peere Williams 629.*]

UPON a bill brought by the plaintiff for the performance of articles for a purchase, the case was: The plaintiff Langford, vicar of Axminster in Devon, did by attorney enter into articles with Governor Pitt for the sale of lands in Cornwall. The articles were dated November, 1725, whereby the plaintiff agreed to convey the premises to the governor and his heirs, on or before Lady Day then next, at the costs and charges of the governor, and as counsel should advise; upon the making of which conveyance the governor covenanted to pay £1,500 to the plaintiff.

Governor Pitt lived until after Lady Day, but in 1722, long before the executing of these articles, made his will, by which he devised all his real estate to his son Robert Pitt for life, remainder to his eldest son John Pitt for life, remainder to his first, etc., son in tail male successively, with several remainders over, bequeathing all his personal estate to trustees, to be invested in lands and settled as above; and dying soon after Lady Day, 1726, his said eldest son and heir laid claim to the premises, as descending to him, and made his will, wherein by express words he devised the premises thus articulated to be purchased to his wife and others, in trust to pay his debts, etc., and soon afterwards died, leaving John Pitt his son and heir, to whom the governor had devised all his estate expectant on the death of Robert Pitt the son.

The plaintiff Langford brought his bill against the executors of the governor, the executors of Robert Pitt the son, and against John the grandson, to be paid the £1,500 purchase-money; and though it appeared in the cause by the plaintiff's own witness, that in 1728 the plaintiff had paid to his eldest brother's daughter (being the heir general of the family) £750 for her joining with her husband in a deed and fine to the use of the plaintiff and his heirs (note—the witness said, this was rather to clear up the title than that it was necessary), from whence the defendant's counsel urged it to be evident, even by the plaintiff's own showing, that he had not at the time of entering into the articles a good title to the premises.

Yet, by the Master of the Rolls, it is sufficient if the party entering into articles to sell has a good title at the time of the decree, the direction of the court being in all these cases to inquire whether the seller can, not whether he could make a title at the time of executing the agreement. In the case of *Lord Stourton v. Sir Thomas Meers*, the

Lord Stourton at the time of the articles for a sale, or even when the decree was pronounced, could not make a title, the reversion in fee being in the crown; and yet the court indulged him with time more than once for the getting in this title from the crown, which could not be effected without an act of Parliament to be obtained in the following sessions; however it was at length procured, and Sir Thomas Meers decreed to be the purchaser. Indeed it would be attended with great inconveniences, were decrees to direct an inquiry, whether the contractor to sell had at the time of entering into such contract a title; for thus all incumbrances and defects must be raked into; wherefore it has been thought sufficient to answer the end, if at the time of the decree or report the seller can make a good title, and accordingly it is usual for the report to mention, that if such a third person joins, the title will be good.

Then the question was between the defendants, whether the devisees of Robert Pitt the son, or the grandson, under the will of the governor, were entitled to the lands thus articulated to be purchased, for it was agreed that the purchase-money was to be paid by the executors of Governor Pitt.

And for the latter it was objected by the attorney and Solicitor-General, that when the governor by his will devised all his real, and also his personal estate to be laid out in land, and all this to be for the benefit of his grandson John, after the death of his son Robert Pitt, either in one shape or other, these lands thus agreed to be purchased by the governor should pass; that nothing could be plainer than his intention to dispose of all his estate both real and personal; and Mr. Solicitor cited the case of *Greenhill v. Greenhill*,<sup>1</sup> by which it is decreed, that where a man articles to buy land, this gives the party contracting an equitable interest in such land, which he may devise, though before the day on which the conveyance is to be made.

MASTER OF THE ROLLS. I admit the case of *Greenhill and Greenhill*, in which I myself was of counsel, to have been so determined; but this material difference is observable between the two cases: there the articles for the purchase were entered into by the testator before he made his will, and so the equitable interest which he gained thereby was well devisable; but in the present case Governor Pitt's will was made prior to the articles for this purchase, before he had any equitable interest in the land, consequently<sup>2</sup> when he had no kind of title, he could devise nothing; so that this interest in the premises gained by the governor's articles must have descended to his son Robert Pitt as heir-at-law, who might well devise the same; and though it may at first look strange,

<sup>1</sup> 2 Vern. 679.

<sup>2</sup> Vide *Green v. Smith*, 1 Atk. 572; *Potter v. Potter*, 1 Vez. 437.

that when the governor devised all his real and personal estate, these words should not carry all, yet it will not seem strange, when it is considered that an estate purchased after the will cannot pass thereby; now these articles are as a purchase subsequent, and though the governor's executors are to pay for such purchase, they cannot have the benefit of it, being to advance the money only as a debt due from their testator.

Decree ' the Master to inquire, whether the plaintiff can make a title, if he can, the purchase-money to be paid by the governor's executors out of his assets; the Master to see who has been in possession since Lady Day, 1726, at which time the purchase-money was to be paid and the conveyance completed; interest and costs to be reserved.<sup>2</sup>

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TOWNSEND v. CHAMPERNOWNE.

IN THE EXCHEQUER CHAMBER, BEFORE RICHARDS, LORD CHIEF  
BARON, HILARY TERM, 1821.

[*Reported in 9 Price 130.*]

THIS cause, which was a suit for specific performance of an agreement for the purchase of freehold estates in Devon to a very considerable amount, had been revived against the executors of the will of the defendant, who died pending the suit, and whilst the cause was at issue, leaving all his real and personal property to his infant children.

It appeared by the pleadings that the defendant had paid over several large sums on account of the purchase-money, and that great delay had taken place in making title to the estate. A very considerable proportion of the purchase-money was still due.

When the cause was called on to be heard, *Jervis*, *Pepys*, and *Preston*, for the defendants, objected, that the court could not proceed to hear the cause for want of proper parties, the bill having been revived against the executors only; whereas the infant devisees, as the real representatives of the defendant, ought to have been made parties to the bill of revivor, because they were immediately interested in the purchase, and would not be precluded by any decision the court could now make in their absence, but might file a bill immediately, or as soon as this cause should be determined, notwithstanding the decision. The heir-at-law or devisee of the real estates of a testator has a right to stand in his place. The executors may neglect the title and accept a bad one,

<sup>1</sup> Reg. Lib. B. 1730, fol. 423.

<sup>2</sup> On appeal to the Lord Chancellor this decree was affirmed.

and the heir or devisee ought not to be driven to sue the executors; and there may be a deficiency of assets.

*Martin, Sugden, and Lynch, contra*, submitted that as the executors were alone affected by this contract, and could alone be called on to perform it specifically, it was sufficient to make them alone parties to the bill of revivor. The general rule of equity is, that the parties against whom a decree can in any result be obtained on the pleadings are the only persons whom it is necessary to bring before the court; and that is the only criterion. Legatees are never brought before the court, although they have always an interest. In this case the executors are the persons whom alone the court can compel to complete the agreement to purchase the property. They must pay for the estate, and it is their duty to investigate the validity of the title, and to take care of the interests of all parties concerned. If there should appear to be any collusion on the part of the executors, the court would guard against it, but collusion cannot be presumed. The personal representative is the person also whose duty it is to litigate the question if there be any difficulty in it; and the real representative can do nothing in the suit as an actor, or interfere in any way during its progress. There can, therefore, be no reason for making the devisees parties.

THE LORD CHIEF BARON. I am sorry to find myself obliged to allow the objection, for the object of such objections is too often quite apparent and palpable. In this case, however, it may be very proper to have taken it.

As to the possibility of a deficiency of assets, I consider that there is nothing in that to support the objection, because the court charges the real estate, and gives a lien for the purchase-money.

This bill states the estate to belong to the defendant Champernowne. It is certainly his in equity, and an equitable title is subject to the same rules as a title at law. There appears to be a large proportion of the purchase-money still due from the defendant's estate. The personal property is clearly applicable to the payment of it in the first instance, but the real estate is liable for any deficiency. After all, the question is whether the agreement is for the benefit of the heir or devisee. Executors are trustees for devisees, legatees, creditors, and residuary legatees. But an heir-at-law or devisee may say he has a right, as creditor, against legatees, to inquire whether a good title can be made, and, therefore, he has a direct interest in the thing; and he may, indeed, file a bill against all parties now, for the purpose of ascertaining the validity of the contract, and the title to the estate. If so, the consequence of not making the real representative a party would be to expose the defendant to the danger of double vexation, in being called on for a double account. The moment it is admitted that the



real estate does not belong to the executors, but to the heir or devisee, there is an end of the question. He must be made a party.

Another reason is that I am bound to order a conveyance to be made by the person entitled to the estate, and on that account he ought to be before the court, that I may be enabled to make such an order, which otherwise I could not do. The devisee is not bound to take the estate if *damnosa hereditas*. But, in fact, I cannot make an effectual decree without him.

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The cause was, therefore, ordered to stand over for the purpose of bringing the infant devisees before the court by a supplemental bill, to be filed against them for that purpose.

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BUCK, EXECUTRIX, v. BUCK.

IN THE COURT OF CHANCERY OF NEW YORK, AUGUST 26, 1844.

[Reported in 11 Paige 170.]

THIS case came before the Chancellor upon an appeal, by the defendant, from an order of a Vice-Chancellor, allowing the complainants to amend their bill, and to retain a *ne exeat*, which had been issued upon the original bill. The object of the bill was to obtain the specific performance of an agreement to convey lands to the complainants' testator.

*W. North* for the appellant.

*J. Dunn* for the respondents.

THE CHANCELLOR. This is an appeal from a decision of the Vice-Chancellor of the Sixth Circuit, refusing to discharge a *ne exeat*, and permitting the complainants to take out letters testamentary in this state, and to amend their bill so as to state that fact. The respondents have required the sureties in the appeal bond to justify, as authorized by the recent amendment of the 116th Rule, and insist that the appeal could not be regularly noticed for argument until the sureties had justified. In this the counsel for the respondents has mistaken the effect of the recent amendment of the rule. The only effect of that amendment is to prevent the appeal from operating as a stay of proceedings, for more than thirty days, unless the sureties, within that time, shall justify, as required by the rule, upon due notice to the respondent. And if the appellant does not wish the appeal to operate as a stay of proceedings, no such justification can be required, after the appeal bond has once been duly approved by the proper officer. The appellant, therefore, may

notice the appeal for hearing, at any time after his appeal has been duly entered, whether the respondent does or does not give notice that he requires the sureties to justify upon due notice to him. But where such special justification is required, if the same is not had within the time specified in the rule, the appeal will not stay the respondent's proceedings upon the decree or order appealed from. In other words, the appeal is valid in such a case, but it does not stay the respondent from proceeding upon the decree or order appealed from.

The taking out letters testamentary here, if the bill was properly filed by the personal representatives of the decedent, was a matter of form merely, and the liberty to make such amendment, and to retain the *ne exeat*, would be a proper exercise of judicial discretion. Such an amendment is an exception to the general rule, that matters arising after the filing of the bill are not the proper subjects of amendment.<sup>1</sup> The difficulty of the complainant's case, however, is that, as to the only proper subject of equitable cognizance, the personal representatives of John Buck were not the persons to bring the suit. The decedent has devised the premises in controversy to his four sons; and they, in their character of devisees, are the proper persons to file a bill for a specific performance of the agreement to reconvey the lands in question, after the defendant should have received payment of the whole amount of his debt. It is true the decedent directs his personal representatives to take such just and proper means as will insure a deed of the premises to the devisees. But that cannot authorize them to institute a suit here, for a specific performance, in their own names; but the devisees, who are the real and only parties in interest, must themselves bring the suit. In an action at law upon the covenant to reconvey, to recover damages for a breach of such covenant, the executrix and executors might be the proper persons to institute the suit; but in this court the devisees, who have, by the will, acquired all the testator's interest, either at law or in equity, in the land, cannot file a bill for a specific performance, in the names of the personal representatives, who have no interest whatever in the land in their characters of executrix and executors.

The surplus, alleged to have been received upon the sale of that part of the premises which was sold before the decedent's death, may be recovered in an action at law upon the covenant, or in an action for moneys had and received for the use of the testator. And not being a proper subject of equitable cognizance, the complainants cannot come into this court for the mere purpose of obtaining equitable bail. For these reasons there is no equity in the complainants' bill which can sustain this *ne exeat*. The order appealed from must, therefore, be re-

<sup>1</sup> 1 Barb. Prac. 207.

versed on that ground, and the *ne exeat* must be discharged; but without prejudice to the right of such of the complainants as are devisees, to join with the other devisees in filing a new bill, in their characters of devisees, and to apply to an injunction master, or a vice-chancellor, for a *ne exeat*, and also for an injunction to restrain the defendant from selling or incumbering the premises devised.

The question as to the right of the executrix and executors to institute this suit, for the benefit of the devisees, does not appear to have been brought to the notice of the Vice-Chancellor. I shall not, therefore, give the appellant costs upon the appeal.

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ROBERTS v. MARCHANT.

IN CHANCERY, BEFORE LORD LYNDHURST, C., JANUARY 25, NOVEMBER 11, 1843.

[*Reported in 1 Phillips 370.*]

THIS was a suit by the administrator of a vendor of real estate against the purchaser for specific performance of the contract of sale. The purchaser having by his answer suggested that the heir-at-law of the vendor was a necessary party, the plaintiff set the cause down upon that objection, under the 39th order of August, 1841, and Vice-Chancellor Wigram having allowed the objection, the plaintiff appealed from that decision.

The appeal now coming on to be heard.

*Mr. Tripp* for the defendant.

*Mr. Wakefield* for the plaintiff.

THE LORD CHANCELLOR. It appears that the only exception to the rule that the appellant is entitled to begin, is where the defendant appeals from the whole of a decree. And the reason for that exception I take to be this: that the plaintiff may at the rehearing adduce new evidence, and shape his case differently; and it is therefore convenient that he should in all such cases begin, in order that he may state to the court at once how he shapes his case. But that reason does not apply where the subject of the appeal is a particular objection to the frame of the suit. I think, therefore, that in these cases the general rule should prevail, and that the appellant ought to begin.

*Mr. Wakefield* and *Mr. Rogers* in support of the appeal.

The only proper parties to a suit for specific performance are those who were parties to the contract, or if they be dead, the parties who

represent their rights under it.<sup>1</sup> Now the right of a vendor under a contract for the sale of real estate is simply a right to the purchase-money, and that right upon his death devolves upon his personal representative. His heir is as completely disinherited by the contract as he would be by a devise, or by a deed conveying the estate to a trustee for sale; and yet it is clear that to a bill for specific performance of a contract entered into by such devisee or trustee, the heir-at-law would not be a necessary party; for a vendor claiming under a will is not bound to establish the will against the heir;<sup>2</sup> still less is a trustee, under a deed in trust for sale by which real estate has been converted into personalty, bound, in a suit between himself and a purchaser, to make the heir of the grantor a party for the purpose of enabling him to contest the validity of the deed by which he is disinherited. The Vice-Chancellor assumed that if the vendor in this case had left a will devising the estate, the devisee would have been a necessary party to the suit. But in *Calvert on Parties*,<sup>3</sup> from which His Honor appears to have adopted that proposition, the only case cited in support of it is *Townsend v. Champenowne*,<sup>4</sup> which does not warrant it. For there, it was not the vendor but the purchaser who had devised the estate, and the suit having been revived against his executors only, the objection taken was, that his devisees were not made parties; which objection of course prevailed, because the devisees were the parties who had succeeded to his interest under the contract. On the other hand, there is an unreported case of *Williams v. Shaw*,<sup>5</sup> before Sir J. Leach, where upon the death of a vendor who had filed a bill for specific performance against the purchaser, his executors revived the suit before decree, without making his heir-at-law a party; and from a manuscript note of the case, *ex relatione* Mr. Pepys, with which we have been furnished by Mr. Walker, it appears that the objection was taken at the hearing, but that it was overruled.

*Mr. Tripp, contra.*

*Mr. Wakefield* in reply.

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NOV. 11. The LORD CHANCELLOR. This was a suit by the administrator of the vendor against the purchaser of an estate for a specific performance of the agreement of sale. The defendant by his answer objected that the heir-at-law of the vendor ought to have been a party to the suit. The Vice-Chancellor, Wigram, allowed the objection. This is an appeal from that decision.

<sup>1</sup> *Tasker v. Small*, 3 Myl. & Cr. 63.

<sup>2</sup> P. 293.

<sup>4</sup> 9 Price 130.

<sup>2</sup> *Morrison v. Arnold*, 19 Ves. 673.

<sup>5</sup> Reg. Lib. B. 1818, f. 1805.

It was argued that by the contract the estate was converted into personalty, and that the heir-at-law had no interest in the matter. But that is to assume the very point in controversy, for the heir-at-law may dispute the contract and controvert its validity. It was further argued, that, as a general rule, it is not necessary to make parties to the bill those who are not parties to the contract ; but that rule does not extend to representatives ; and the heir-at-law is the representative of the vendor as to the realty.

The cases which were cited do not apply. The mortgagee, it is said, need not be a party in a suit by the mortgagor. But his interest is not affected by the sale, and on payment of the mortgage-money by the purchaser it entirely ceases. So, as to the cases where the sale is by a person holding the estate under a conveyance or a devise ; the heir-at-law of the grantor or devisor need not be made a party ; he does not claim through, or in any way represent, the vendor. I agree with the Vice-Chancellor that the purchaser is not to be prejudiced by the death of the vendor, but is entitled to the same benefit from a decree as if it had passed against the vendor himself.

A case of *Williams v. Shaw* was cited in the course of the argument at the bar, in which the Vice-Chancellor is said to have decided, upon the objection being taken at the hearing, that the heir-at-law was not, in a case of this nature, a necessary party to the suit. That case was not mentioned in the court below. Neither the argument at the bar, nor the reasons of the judgment, are stated. I do not think, if it had been referred to, it would, under these circumstances, have changed the opinion of that learned judge in the present case. It has not altered mine.

Appeal dismissed.

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FOSTER v. DEACON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., NOVEMBER 13, 1818.

[*Reported in 3 Maddock 394.*]

By an agreement, 16th of October, 1815, the defendant agreed to sell to the plaintiff certain lands, and that the purchaser should take the rents and profits from Michaelmas then last, and that interest at five per cent. on the purchase-money should be paid from that time until the purchase should be completed. The lands were then and still were in the possession of the defendant. A decree was obtained for a specific performance of the agreement, and the usual reference made as to title.

A motion was now made on behalf of the purchaser, that it might be referred to the Master, to whom the cause stood referred, to inquire and state to the court what abatement ought to be made out of the purchase-money, for or in respect of the deterioration in value of the premises since the purchase, and that the Master might be at liberty to state in his report any special circumstances that he might think proper.

In support of the motion, affidavits were filed to show the deterioration of the premises. Other affidavits were made in answer.

There were two other motions by different purchasers, to the same effect.

*Mr. Barber* in support of the motion.

*Mr. Heald* for the trustees.

*Mr. Wetherell* and *Mr. Roupell* for the vendor.

The VICE-CHANCELLOR. If a purchaser is kept out of possession for three years, by difficulties in the title, and the land during that time remains uncultivated and otherwise deteriorated, it is obvious the purchaser cannot have what he agreed to purchase, but land diminished in value. If there had been willful waste by the vendor, I should have had no hesitation in making him answer for the same out of the purchase-money, but there is no willful waste in this case; it is waste occasioned by negligence; and being so, when this motion came on before, I thought it necessary it should stand over, to ascertain to whom the delay in completing the purchase was attributable. The affidavits do not make out that the purchaser could at any time with propriety have accepted the possession. An offer of interim possession was, indeed, made by the vendor, but the vendee was not bound to accept it, nor could he prudently accept it whilst the title was questionable.

Part of the deterioration seems attributable to the conduct of a tenant whose lease has expired, but the vendor is answerable for his tenant.

I do not sift the affidavits as to the deterioration of the land. It is enough to say they are sufficiently strong to justify a reference to the Master. Let it be referred to the Master, to inquire whether the lands or hedges and fences of the estate have suffered any, and what deterioration, and to what amount, by unhusbandlike conduct and mismanagement of the lands since the date of the purchase; and reserve the consideration of costs until the Master shall have made his report.

## BAILEY AND WIFE v. DUNCAN'S REPRESENTATIVES.

IN THE COURT OF APPEALS OF KENTUCKY, APRIL 4, 1827.

[*Reported in 4 Monroe 256.*]

OWSLEY, J. John Bailey and Mary his wife, formerly Mary Duncan, claiming in right of the latter an interest in the personal estate, slaves, and land of Isaac Duncan, senior, deceased, exhibited their bill in chancery against Margaret Duncan, the executrix of the last will, etc., of the said Isaac, deceased, and the surviving brothers and sisters of Mrs. Bailey, for the purpose of obtaining an account of the personal estate, hire of slaves, rents and profits of the land, and partition of the slaves and land.

After several amended bills, cross bills and answers (the particular import of which need not now be mentioned) were filed, the cause came on to be heard, and the decree to which this writ of error is prosecuted was pronounced.

The questions made in the pleadings and involved in the assignment of errors may, with propriety, be said to embrace the following points: . . .

Fourth.<sup>1</sup> As to the right of dower in the land claimed by Margaret Duncan, the widow of Isaac Duncan, senior, and which was decreed to her by the court below. . . .

We have been unable to find any case, either in this country or Virginia, where dower has been decreed to the wife, in an equitable estate in fee, to which the husband became entitled by contract, for a conveyance of the land; but the right of the wife to dower in such a case came before the Appellate Court of the State of Virginia, in the case of *Rawton v. Rawton*,<sup>2</sup> and although a majority of the court decided against the claim of dower in that case, two out of the five judges composing the court were expressly in favor of the claim for dower; and the decision of the others went not upon the idea of dower not being allowed in an equitable estate, but upon the principle that the equitable estate, of which dower was claimed, was not made out by the testimony in the cause. And in the case of *Claibourn v. Claibourn*, which afterward came before the same court, Judge Roane, who was one of the judges that decided against the widow's claim of dower in the former case, in remarking upon that case, after stating its circumstances, says, "the transaction having happened subsequent to the act of 1785" (the act of which the act

<sup>1</sup> Only so much of opinion is given as relates to this question.—ED.

<sup>2</sup> 1 H. M. R. 92.

of this country is a transcript), the widow claimed her dower only under the provision of that statute. Three of the judges overruled her claim; but it was on the ground of no contract having been proved, as they thought, for more than a life estate, in favor of the husband: two other judges thought that the husband had an equitable estate in fee, and on that ground were in favor of the dower, under the act of 1785." In the course of his remarks he further says, "the counsel, in opposition to the claim of dower, admitted that under the act of 1785 the widow was entitled to dower, provided it should appear that her husband had such an equity in a fee simple estate as would authorize a court of equity to decree the legal estate." Thus it seems to have been the concurrent opinion of the bar and the bench of the Supreme Court of Virginia, that since the act of 1785, of which ours is a copy, that a wife is dowable of any equity in a fee simple estate, belonging to the husband, if it will authorize a court of equity to decree the legal title. . . .

Hence we infer that the bequest to the widow should not be construed to have been intended by the testator to be in lieu of her dower in the land, and that it was consequently correct in the court below to sustain the claim of dower, without requiring the widow to relinquish the provision made to her by the will.

The decree must be affirmed, with cost.

*Triplett* for plaintiffs; *Haggin* for defendants.

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### MOYER v. HINMAN.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER, 1855.

[Reported in 13 *New York Reports* 180.]

IN October, 1835, H. W. Schroepel being the owner of two hundred and fifty acres of land, situate in Oswego County, contracted with the plaintiff to sell and convey to him a part of it containing sixty acres, at the price of \$465; fifty dollars of the purchase price to be paid down, and the residue at or before the expiration of ten years with annual interest. By the contract it was agreed that the plaintiff should have immediate possession of the premises, and on payment of the purchase-money, the same should be conveyed to him in fee by Schroepel. The following spring the plaintiff entered into possession of the land mentioned in the contract, which was wild, and erected a house and commenced making other improvements thereon.



From that time till the commencement of this action, he occupied and improved the premises.

In 1838, R. S. Corning recovered a judgment against Schroeppel in the Supreme Court, which then became a lien on the real estate of the latter, situate in Oswego County; and in 1844, an execution upon the judgment was issued to the Sheriff of Oswego County, who, by virtue thereof, in August of that year, sold the premises contracted to the plaintiff, together with the residue of the two hundred and fifty acres, and gave the usual Sheriff's certificate of sale to Corning, the plaintiff in the execution, who was the purchaser at the sale. A duplicate of this certificate was duly filed by the sheriff in the clerk's office of Oswego County. In August, 1845, Corning sold and assigned to the defendant the sheriff's certificate, and in the ensuing January the premises were conveyed to him by the sheriff, pursuant to the sale and certificate. The sheriff's deed to the defendant was duly recorded in Oswego County in February, 1846.

Intermediate the recovery of the judgment and the sale by virtue of the execution, the plaintiff made several payments to Schroeppel upon the contract; and in October, 1845, after the sale and assignment of the sheriff's certificate to the defendant, but before the execution of the sheriff's deed, he made a further payment to Schroeppel on the contract of \$224. When the plaintiff made these payments, he had no actual notice of the judgment or of the sale made by the sheriff.

Soon after the defendant received his deed, he notified the plaintiff and forbid his making further payments to Schroeppel, and offered to convey to him the premises on his paying to the defendant the amount unpaid upon the contract at the time of the sheriff's sale. This the plaintiff declined to do, and the defendant, in 1851, brought an action against him to recover possession of the premises. The plaintiff thereupon tendered to the defendant the amount due upon the contract after crediting the \$224 paid Schroeppel after the sheriff's sale, and before he conveyed to the defendant and demanded a conveyance of the premises described in the contract; and the defendant declining to accept the amount and execute the deed, this action was instituted to compel him to do so, and to stay the suit commenced to recover possession of the premises. This action was tried before Mr. Justice Pratt without a jury, in 1852. He found the facts above stated, and decided that the payment made to Schroeppel in October, 1845, was not valid as against the defendant, and that the latter was entitled to demand and receive the amount owing on the contract at the time of the sheriff's sale, and he ordered judgment that the defendant convey the premises to the plaintiff, on his paying

this amount. The plaintiff excepted, and the judgment having been affirmed by the Supreme Court at general term in the 5th district, he appealed to this court.<sup>1</sup>

*Geo. F. Comstock* for the appellant.

*L. Morgan* for the respondent.

DENIO, J. The counsel for the parties in this case agree that the plaintiff, being in possession under his contract at the time of docketing the judgment under which the defendant claims, is to be protected in equity as to his rights which existed at that time; and the position is so well established by authority as to have become an elementary doctrine in this branch of the law of real estate. I consider it equally well settled that the docketing of a judgment against the vendor affords no notice of its existence, either actual or constructive, to the prior vendee of the judgment debtor. Parties who deal with the debtor respecting his lands subsequently to the docketing of the judgment are affected with notice. Such persons may make themselves perfectly safe in that particular by searching the docket book of judgments in the proper office; and they will, of course, abstain from purchasing if they find the land which they are proposing to buy encumbered by a judgment. So, it may be said, a party holding a contract upon which payments remain to be made may, before making such payments, examine for judgments against the vendor; but it would be an intolerable inconvenience to require this, where the payments, as is usually the case, are to be made annually or oftener; and should such examination ever be strict, the vendee would have to run the risk of an incumbrance intervening, while he was going from the office where the search was made to the residence of the vendor to make the payment. It has been repeatedly decided that the docketing of a judgment or the recording of a mortgage is no notice to a prior purchaser or mortgagee of the premises whose conveyance is on record, or of which notice was had, the object of the recording acts, and of the law requiring judgments to be docketed, being, it is said, to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, etc., which are not recorded and of which they had no notice, and to deprive the holder of the prior unregistered conveyance or mortgage of the right which his priority would have given him at the common law.<sup>2</sup> The plaintiff in this case being in possession under his contract, that circumstance was notice to all persons who might subsequently become interested in any way

<sup>1</sup> For a report of the case in the Supreme Court, see 17 Barb. 137.

<sup>2</sup> *Cheesebrough v. Millard*, 1 Johns. Ch. R. 409; *Stuyvesant v. Hall*, 2 Barb. Ch. R. 151.

in the premises, not only of such possession, but of the terms of the contract and of all his existing rights under it.

In the view of a court of equity, his condition was like that of a party having a prior conveyance or lien which was duly recorded. When, therefore, Corning had recovered his judgment against Schroepel, the situation of the respective parties was this: The plaintiff was the equitable owner of the land, subject to future payments to be made by him, and the judgment creditor had notice of his situation and of his rights; but the plaintiff had no notice and was not chargeable with notice of the lien of his creditor. The creditor had at law the right to acquire the legal title to the land by means of a sheriff's sale and a purchase by himself; but in equity his rights were limited to the future payments to be made by the plaintiff. But as the vendee had no notice of the judgment creditor's lien, and the creditor had full notice of the vendee's situation, it would seem to be reasonable that in order to intercept those payments and divert them from the vendor's hands into his own, the creditor ought at least to inform the vendee of the existence of his lien and of his right to the unpaid purchase-money. In accordance with this view, it was held, in a case in Maryland, that where the vendee, subsequently to the recovery of a judgment against the vendor, but without actual notice thereof, had paid over a balance of the purchase-money and taken a conveyance from the judgment debtor, such vendee was, in equity, entitled to be protected against the claim of the judgment creditor.<sup>1</sup> And we have the deliberate judgment of the Court of Errors of this State upon the same point in an action at law. In *Parks v. Jackson*,<sup>2</sup> Parks, the plaintiff in error, was in possession of a tract of land which had been purchased by one of these executory contracts and possession had been taken by the vendee upon the contract being executed, which was continued down to the time the controversy arose. Judgments were recovered against the devisee of the vendor, and afterwards the party holding under the vendee, without actual notice of the judgments, paid the whole purchase-money, took a conveyance and conveyed to Parks. Then the judgment creditor sold the land on the judgment, obtained a sheriff's deed, and brought ejectment against Parks. The Court of Errors held that the plaintiff could not recover. The Chancellor, who alone dissented from the judgment, put his opinion on the ground that the remedy of Parks was in equity. There were a variety of other facts in this case, but they tend to strengthen the decision as an authority upon the point under consideration. The purchase-money for the land was paid to, and the deed under which Parks held was executed by, one Henry Franklin, to

<sup>1</sup> *Hampson v. Edelen*, 2 Har. and Johns. 64.

<sup>2</sup> 11 Wend. 442.

whom the devisees of the original vendor had conveyed the premises, and the judgments under which the plaintiff in the ejectment suit claimed were against these devisees. The judgment creditor claimed that the conveyance to Henry Franklin was void as against the creditors of the grantors, and commenced a suit in chancery against the parties to that conveyance, and obtained a decree setting it aside for the alleged fraud, having, at the time of filing the bill, filed a notice of *lis pendens* in the County Clerk's office. The payments were made and the deed under which Parks held was given pending that suit. It was scarcely contended that docketing the judgment against the grantors of Henry Franklin would alone enable the creditor to question the payments subsequently made; but it was insisted that the *lis pendens* affected the parties holding under the vendee in the executory contract, and that the payments were consequently made in their own wrong; and so the Supreme Court had decided. That judgment was reversed, the Court of Errors holding that neither the judgments, nor the *lis pendens*, nor both of them, affected the vendees or impaired the effect of the payments or of the deed under which Parks held. This case, therefore, proves something more than that judgments docketed against the vendor do not affect payments subsequently made by the vendee, having no actual notice of the judgment. It establishes, in effect, that payments made by the vendee pursuant to an executory contract are not to be considered as a fresh dealing with the vendor respecting the land; for if they were so, they would, when made, *pendente lite* be ineffectual against a decree determining that the party to whom they were made had no right to receive them, it being an established principle that the purchase of any interest in the subject in litigation is subverted by the ultimate judgment, if adverse to the right of the party selling. The true inference from the case is that such payments are referable to the original contract, and are not the purchase of a further interest in the land.

If, then, the payment made by the plaintiff to Schroepfel is not affected by the docketing of Corning's judgment, I am not aware of any principle upon which the sale upon the execution and the purchase of the premises by Corning, under which the defendant holds, can prejudice that payment. The sale converted the general lien into a particular one upon these premises. It was still but a lien; for any judgment creditor of Schroepfel might, notwithstanding, redeem the premises. But the consideration which, in my judgment, prevents its having the effect claimed for it, of cutting off the plaintiff's right to pay Schroepfel is, that the former had no notice of the transaction, while Corning and the defendant must be considered as having full notice of the plaintiff's rights. Admitting that Schroepfel had

no right to the money, and that Corning or the defendant had, either the plaintiff or the defendant must lose the money; and the rule in such cases is, that the party shall suffer who, by his acts or omission, permitted the money to go into the hands of a party not entitled to it. The defendant could readily have informed the plaintiff of the judgment and of the sheriff's sale; and then if the plaintiff had chosen to pay to Schroepfel instead of refusing so to pay, or to take measures by bill of interpleader or otherwise, if threatened by a suit by Schroepfel, perhaps the payment would have been in his own wrong. As the case stands, he paid the money to the party holding his obligation for the payment without any notice that any other person had become interested in that contract, or had any right to the money which he had engaged to pay to Schroepfel.

The case does not call upon the court for a decision upon the question, whether if the defendant had obtained a conveyance from the sheriff before this payment was made, the plaintiff might not still have paid to Schroepfel until he had notice of such conveyance. Individually, I am of opinion that a vendee in possession under such a contract may safely continue to pay to the vendor until he has notice that some other person has acquired an interest in the land or in the contract. If this is not so, the vendor may, in any case, make a secret conveyance of the land and continue to receive the purchase-money from the vendee, and the latter will be without remedy if the vendor be insolvent. The recording of the conveyance would make no difference in the principle, for this is only constructive notice to subsequent purchasers and incumbrancers; and as we have seen, a payment pursuant to a prior executory contract is not to be regarded as the purchase of a new or further interest in the land. The application of the doctrine of equitable conversion, in my opinion, furnishes a solution of the difficulty in this class of cases. By a contract for the sale of land, the vendor becomes the trustee of the legal title for the vendee, and the vendee, the trustee of the vendor, as to the unpaid purchase-money.<sup>1</sup> This is the view of a court of equity. A court of law looks only at the legal title. Hence it permits a judgment creditor to subject the land to a sale on execution, though the judgment debtor had, before the docketing of the judgment, converted it into personalty by contracting to convey it and receiving the obligation of the purchaser for the consideration. But when the parties go into equity, as they have done in this case, the state of the legal title becomes immaterial, and the question is whether the party claiming the purchase-money has the better equity. If it appear, as I think it does here, that he has stood by and permitted it to be paid over to

<sup>1</sup> Story's Equity, § 790 and *seq.*

the person originally entitled, without giving notice of the transfer to himself of the right to receive it, he cannot be heard to question the payment made under such circumstances.

The judgment of the Supreme Court should be modified, and a judgment should be given in accordance with this opinion, to be settled by one of the judges of this court. The defendant should pay the costs in the Supreme Court.<sup>1</sup>

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CARRODUS v. SHARP.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JANUARY 23, 24,  
29, FEBRUARY 15, 1855.

[*Reported in 20 Beavan 56.*]

IN August, 1853, the plaintiff Carrodus, being entitled to the lease of a mill, called Beckfort Mill, agreed to assign it to the defendant Sharp. The lease contained a covenant against assignment and underletting without the consent of the lessor, which consent the plaintiff undertook to obtain, and a covenant to keep the premises in repair. The contract also provided that the machinery and effects should be valued by a person named and taken by the plaintiff at that valuation. They were afterwards valued at £707. Differences took place after long communications between the parties, and ultimately, in November, 1853, the defendant having denied the plaintiff's right to specific performance, the vendor on the 30th of November, 1853, filed this claim for specific performance. A decree was made in February, 1854, when a reference was made as to title.

The principal point in contest was, when the lessor had given an unqualified assent to the assignment, and both the chief clerk and the court came to the conclusion, on an examination of the evidence, that such assent had not been given until the 1st of December, 1854.

There was some evidence to show that a beam or some timbers which were old were decaying, and some flags on the pavement or floor seemed to be in an unsatisfactory state, but this was waived by the lessor.

The claim now came on for further consideration. The questions remaining to be decided related to the expenses and outgoings of the mill, the repairs and sustentation of the premises and machinery, the interest on the amount of the valuation of the machinery, etc., and the costs of the suit.

<sup>1</sup> The concurring opinion of Hand, J., has been omitted.—ED.

*Mr. Roupell* and *Mr. Amphlett* for the plaintiff.

*Mr. R. Palmer* and *Mr. J. V. Prior* for the defendant.

The Master of the Rolls postponed giving his judgment.

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Jan. 24. THE MASTER OF THE ROLLS. The questions remaining to be decided relate to the expenses and outgoings belonging to the mill, and to the repairs and sustentation of the premises and the machinery there, and the costs of the suit.

They all, I think, in a great measure depend on the same question, which is this: From what time is the defendant to be treated as the purchaser of the mill? In the absence of any express contract on the subject, the principle on which this question depends is this: At what time could the purchaser, acting prudently, have taken possession of the premises sold? Up to that time the expenses and outgoings must be borne by the vendor, and from that time they fall upon the purchaser. Although this is not universally true, yet usually this inquiry is answered by considering at what time a good title was first shown, it being commonly clear that no purchaser can prudently take possession of what he has contracted to buy until he is satisfied that he will be able to retain possession of it, or, in other words, until a good title is shown. The first showing of a good title, however, may depend on a slight circumstance, evidence of which could always have been furnished, if required, but which was not done, because of some other matter, which was the real point of contest between the parties, and which has been ultimately decided against the purchaser.

In this case, my certificate shows, that a good title was first shown on the 1st of December, 1854. I have read through the affidavits, and attended carefully to the arguments of counsel, for the purpose of ascertaining whether the defendant could prudently have taken possession of the premises before that time; and the solution of this question, in my opinion, depends on whether the lessor had assented to the assignment of the lease to the defendant, for the lease to the plaintiff contained a condition that he was not to assign without the consent in writing of the lessor. [His Honor examined the evidence minutely, and then stated the conclusion to which he had arrived as follows]: I am of opinion that no such assent was communicated to the defendant as would have enabled him to take possession of the mill with a reasonable security that he would be able to continue in possession of it until the 1st of December, 1854. In fact, I think that this question is concluded by the certificate, and that if it had been previously shown to the defendant that the lessor would have assented to a simple and unconditional assignment to him of the plaintiff's lease, there being no question between the parties beyond this, a good title would have been

shown and the matter settled between the parties ; subject, however, to some question respecting compensation for dilapidations.

The result is that, in my opinion, the plaintiff will have to pay the outgoings incidental to the lease of the mill up to the 1st of December, 1854.

With respect to the dilapidations, it appears to me, upon the evidence, that some, though not a considerable, repair is required, for the purpose of putting the mill into tenantable repair, and to comply with what is required by the landlord ; I refer to the evidence with regard to the beam in the mill and some flags on the pavement. On this part of the subject, I trust that the parties will have the good sense to come to an agreement as to the payment of a small sum, otherwise it must be ascertained by the chief clerk.

With respect to the machinery, I am of opinion that the defendant must pay the £707, the amount of the valuation, but that he is not liable to pay any interest on that sum down to the 1st of December, 1854.

I am of opinion that the defendant must pay the costs of the suit up to and including the hearing, as it was occasioned by his resisting a decree for specific performance, which, in my opinion, he was not entitled to do ; but since that period the parties appear to me to have mutually claimed what they were not entitled to, and I shall therefore give no subsequent costs on either side.

There will therefore be a decree directing an assignment of the lease ; the defendant must pay the £707, with interest thereon from the 1st of December, 1854, together with the rent, rates and taxes, and other outgoings of the mill and machinery, and the preservation thereof, since the 1st of December, 1854. The plaintiff will have to bear them down to that date, and must pay a sum to be arranged or ascertained in respect of the dilapidations of the mill. The defendant must also pay the plaintiff the costs of suit up to and including the first hearing.

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IN RE CUMING.

IN CHANCERY, BEFORE SIR G. M. GIFFARD, L.J., DECEMBER 11,  
1869.

[*Reported in Law Reports, 5 Chancery Appeals 72.*]

IN 1867 Henry Cuming contracted to sell certain leasehold and copyhold property to the petitioner, Frederick Slade ; and by indenture dated the 9th of November, 1867, acknowledging in the usual way the receipt of the purchase-money, Cuming assigned the leaseholds to the



petitioner, his executors, administrators, and assigns, and covenanted for himself, his heirs, executors, and administrators, with Slade, his heirs and assigns, that he, Cuming, would forthwith surrender the copyhold property to the use of Slade, his heirs and assigns, according to the custom of the manor.

Before any surrender had been made, Cuming died intestate, leaving a customary heir who was of unsound mind, though not found so by inquisition. Slade thereupon presented a petition in lunacy intituled *In the Matter of A. Cuming*, a person of unsound mind not so found by inquisition, *In the Matter of the Trustee Acts, 1850 and 1852*, and *In the Matter of Frederick Slade's Trust*, praying that a proper person might be appointed to convey the copyholds to the petitioner.

*Mr. North*, for the petitioner, referred to the Trustee Act, 1850, §§ 3 and 20, and to *Re Collingwood's Trusts*,<sup>1</sup> and contended that, though there were not here, as in that case, any words declaring a trust, still in the case of an executed contract a suit was not necessary.

SIR G. M. GIFFARD, L.J. I think that the distinction drawn between an executed and an unexecuted contract is sound. Where there is only a contract for sale a suit is necessary to declare the vendor a trustee; but where the contract has been executed by payment of the purchase-money and a formal covenant to surrender, I think that no suit is necessary. An order will be made as prayed on production to the Registrar of an affidavit proving strictly the execution of the deed and the payment of the purchase-money.

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## LEGGOTT v. METROPOLITAN RAILWAY COMPANY.

IN CHANCERY, BEFORE SIR W. M. JAMES, L.J., JULY 12, 1870.

[*Reported in Law Reports, 5 Chancery Appeals 716.*]

THIS was an appeal motion to vary an order of Vice-Chancellor Stuart, refusing an application to vary the chief clerk's certificate, by certifying that the plaintiff ought to be charged with an occupation rent of £800 a year.

On the 19th of July, 1867, an agreement was entered into between the plaintiff and the Metropolitan Railway Company, for the purchase by the company of three leasehold houses, of which the plaintiff was the owner, and in one of which he carried on the business of a victualler, the other two being let to tenants. The price was £12,000, to be paid or deposited in the Bank of England on the 25th of March, 1869,

<sup>1</sup> 6 W. R. 536.

or at such earlier time as the company might choose, after giving three calendar months' notice. Possession was to be given on such payment or deposit being made. The tenant's fixtures, furniture, etc., were to be paid for at the same time at a valuation, which was made immediately. The stock in trade and licenses were to be valued before completion, and paid for at the same time. The vendor was to be tenant to the company from the 25th of March, 1867, at £800 a year, such tenancy not to be determined by either party before the 25th of March, 1869, unless the company, after giving three calendar months' notice, paid or deposited the purchase-money before that time; but on the 25th of March, 1869, it was to be determinable by seven days' notice. The company were to pay interest at £5 per cent. on the purchase-money and on the amount of the valuation of fixtures, furniture, etc., until completion. The vendor was to pay all outgoings during the continuance of the tenancy.

The tenant's fixtures, furniture, etc., were duly valued, and the plaintiff remained in possession as tenant, paying the rent, and receiving the interest stipulated for till March, 1869, when he gave the requisite seven days' notice to determine the tenancy.

On the 20th of March the solicitors of the company, after receiving the notice, wrote to the plaintiff's solicitors to say that on the 25th the company would be prepared with a person to take possession of the premises, and who would take to the tenant's fixtures, etc., at the valuation, and to the stock in trade and licenses at the price to be settled as provided by the agreement. The plaintiff's solicitors replied by asking for a draft assignment of the premises. The company's solicitors replied: "Our letter of the 20th instant was written for the purpose of informing you that should your client be desirous of giving up possession of the premises, the company would have a person ready to take possession, and would be prepared also to pay the amount due for fixtures, stock, etc. Our clients have not placed us in funds to enable us to pay the purchase-money on the day named." The plaintiff's solicitors wrote in reply that they could not advise the plaintiff to give up possession without receiving the purchase-money. The company, not being prepared to complete, the plaintiff, on the 27th of March, served upon them a formal notice that he should take proceedings to compel completion, and should retain possession of the property as owner, and not as tenant to the company, and should hold the company answerable for payment of all outgoings from the 25th of March, 1869, as well as of the principal and interest. On the 23d of April, 1869, the plaintiff filed his bill for specific performance, asking also that the company might be decreed to reimburse him what he had paid for ground rent, taxes, and outgoings since the 25th of March, 1869.

On the 18th of November, 1869, a decree was made for specific performance, with a declaration that the company had accepted the title; and payment of the purchase-money, with interest at £5 per cent. from the 25th of March, 1869, was ordered. It was also ordered that the company should pay to the plaintiff all such sums as he had properly expended in payment of rent, taxes, and other necessary outgoings as from the 25th of March, 1869; and an account of the sums so expended was directed. It was further ordered that an inquiry should be made whether, having regard to the circumstances and conduct of the parties, the company was entitled to any and what allowance in respect of the occupation by the plaintiff of the premises.

On the inquiry as to allowance for possession, the plaintiff deposed to the effect that he had not received any rent for the premises since the 25th of March, 1869, the premises formerly let to tenants having been unoccupied; and that he had carried on business at the tavern at considerable inconvenience and disadvantage, and with much less profit than would otherwise have been the case, owing to the uncertainty of his tenure.

The chief clerk certified that the outgoings properly paid by the plaintiff amounted to £65; and that, having regard to the circumstances and the conduct of the parties, the company were not entitled to any allowance in respect of the occupation by the plaintiff of the premises, except that the £65 ought, under the circumstances, to be borne by the plaintiff.

Both parties took out summonses to vary this certificate, which were adjourned into court. The Vice-Chancellor refused the defendants' application with costs, and declined to make any order on that of the plaintiff.

The company appealed from this decision.

*Mr. Karslake*, Q.C., and *Mr. Bovill*, for the company, in support of the appeal.

*Mr. Dickinson*, Q.C., and *Mr. Rodwell*, for the plaintiff, were not called upon.

SIR W. M. JAMES, L.J. I am of opinion that the order of the Vice-Chancellor is quite right. No doubt it is the ordinary rule as between vendor and purchaser, that after the time fixed for completion the vendor is entitled to interest, and the purchaser to the rents and profits. But when the property is occupied by the vendor for the purposes of his business, and the purchaser makes default in payment of the purchase-money, until payment of which the vendor is not bound to give up possession, the vendor continues the business, not on the account of the purchaser, but on his own behalf, under a pressure arising from the purchaser's default. He carries it on under great inconvenience, for all his

arrangements must be made subject to determination on the payment of the purchase-money. In such a case the application of the ordinary rule would not be just and right. The decree proceeds on the footing that the ordinary rule does not apply ; and the onus of showing that an occupation rent ought to be allowed is thrown on the railway company, from which onus they have not discharged themselves. The appeal motion must be refused with costs.

Solicitors : *Messrs. Paine & Layton ; Messrs. Burchells.*

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PHILLIPS v. SILVESTER.

IN CHANCERY, BEFORE LORD SELBORNE, C., NOVEMBER 21, 22, 1872.

[*Reported in Law Reports, 8 Chancery Appeals 173.*]

THE plaintiffs in this case were the trustees under the will of the Rev. S. H. W. Nanney, who had, on the 4th of August, 1865, agreed to sell to the defendant John Silvester, for £8,500, certain lands at Towyn, in Wales ; the purchase to be completed on the 25th of March then next, when the defendant was to be let into possession ; and if the purchase was not then completed the defendant was, until completion, to pay interest at the rate of 5 per cent. on £8,075, the balance of the purchase-money.

A dispute arose between the plaintiffs and the defendant whether a certain piece of land in the occupation of a railway company was included in the agreement for sale ; and after several attempts to arrange the dispute the plaintiffs filed the bill in this suit for specific performance of the agreement. The defendant, by his answer, in effect claimed the whole of the land as included in the agreement, but submitted to perform the agreement as the court should direct.

The cause was heard on the 10th of February, 1872, when the Master of the Rolls made a decree that the agreement for purchase ought to be specifically performed ; that the land occupied by the railway company was not included in the agreement ; that the title being accepted by the defendant, the plaintiffs should execute a proper conveyance, whereupon the defendant should pay to the plaintiffs the sum of £8,075, being the balance of the purchase-money ; that the plaintiffs were entitled to interest at 5 per cent. on the said sum of £8,075 from the 25th of March, 1866 ; that an account should be taken of rents and profits received by the plaintiffs in respect of the premises, or which, but for their willful neglect and default, might have been received ; and an inquiry as to any deterioration in the premises since the 25th of

March, 1866, and as to what would be required to restore them; and it was declared that the defendant would be entitled to set off against the interest the amounts so found; and the defendant was ordered to pay the costs of the suit other than such as related to the neglect and deterioration.

In pursuance of this decree, the balance of the purchase-money had been paid, and the property had been conveyed; but the plaintiffs appealed against so much of the decree as related to willful neglect and default, and to deterioration.

It appeared that the tenant of the land had in 1865 given it up in contemplation of the change of ownership, and that the land, or a great part of it, had since remained unlet and neglected. The house and buildings were allowed to go to ruin; and it was stated that the land was left wild and open to any one, so that gypsies pitched their tents upon it, and the neighboring farmers were in the habit of turning in their cattle. At one time the tithe-owners had seized the land in order to recover payment of the tithe rent-charge, which was left unpaid. Negotiations had gone on between the parties, and it seemed that at one stage of the proceedings the purchaser would have been let into possession on payment of a disputed sum of £250 claimed by a former tenant. The tenant, however, when possession was demanded, acting under the orders of the trustees, refused to deliver possession; and the trustees alleged that they should not be justified in putting the purchaser into possession until his purchase-money was paid.

*Sir R. Baggallay, Q.C., and Mr. Rowcliffe* for the appellants.

*Mr. Fry, Q.C., Mr. W. W. Cooper, and Mr. H. Fawcett*, for the purchaser, were not called upon.

LORD SELBORNE, L.C. With respect to the point which has been argued upon this appeal, the Master of the Rolls has come to the conclusion that it was, under the circumstances, at their own risk that the vendors, insisting upon continuing in possession of this property pending the disputes between themselves and the purchaser, left it to fall into that state of dilapidation which the evidence proves, to a greater or less extent, to exist. Supposing that the question is looked at upon principle only, and without reference to authority, I cannot doubt that the Master of the Rolls has proceeded upon sound principles of equity.

By the effect of the contract, assuming there to be no ground on either side for simply setting it aside, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money-right to receive the purchase-money, he retaining a lien upon the land which he has sold until the purchase-money is paid. Let us for a moment suppose the case of any other description of security, and that the holder of the security in-

sisted, for his protection, upon entering into possession of the land over which the security extended—then is not such a person so entering into possession answerable, when the account under the security comes to be taken, for keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason why a vendor who insists upon continuing in possession of the land over which he has security—the contract being one which, in the view of a court of equity, has changed the title of the land—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a further security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditure for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant, as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until payment of the purchase-money is made and the conveyance is accepted. He has that right; but the question is, upon what terms that right is to be exercised? It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person. In this particular case it so happens that the vendors, after Mr. Nanney's death, were his trustees. Supposing this contract had gone off—supposing that the purchaser had been unable to complete—would they have discharged their duty to their *cestuis que trust* by leaving the property in this condition? It is plain that, if they set up their duty to their *cestuis que trust* as a reason (and it may be a very sufficient reason) why they would not give up the property without payment of the money, they undertook towards those *cestuis que trust* the very same duties which, in my judgment, they undertook towards the purchaser if it turned out that the beneficial interest was in him.

So I should have regarded the case, apart from authority. The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to show that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible

that a purchaser might have no claim if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to take its chance. But no case of that kind is alleged here. There is nothing whatever to show or to suggest that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to show or to suggest that the purchaser was not a person who could be made responsible for anything that might become due from him in pursuance of the contract. I entirely agree that the vendors were acting in their strict right, and were doing nothing wrong in insisting, as they did, upon retaining possession until the purchase-money was paid, yet, on the other hand, I cannot admit that that is any reason why they should be exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears, they would have incurred no risk in allowing possession (the purchase-money remaining unpaid) to be taken by a solvent and responsible purchaser, retaining, as they might have done, their lien for the purchase-money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say, "The time has come when you might have taken, and ought to have taken, possession, and, therefore, you must bear the consequences of all the subsequent deterioration"; and in another breath say, "We have a right to refuse you possession, and we choose to exercise that right."

Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this, that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so he may be answerable for deterioration. I have no doubt whatever that if in this particular case the plaintiffs had sent to Mr. Silvester and had said, "We are perfectly willing to let you go into possession subject to the question between us," and Mr. Silvester had said in reply, "I am willing to take possession, but I am not willing to pay the purchase-money"; or if he had said, "I will not take possession unless you give me a conveyance and the whole thing is cleared up," Mr. Silvester would have put himself within the reach of those authorities. In that case, according to the contract, the time for taking possession would have come, possession would have been offered to him, and there would have been no obstacle or impediment to his taking it except one which, in the exercise of his strict rights, he would have himself created.

But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that when the parties differ upon some subordinate question as to the manner of completing the contract, whether in the form of the convey-

ance or in the parcels, each party being minded that the contract should go on—it is not true that giving possession to the vendor would be a departure from the ordinary course of proceeding. Possession may be changed before completion. But payment of the purchase-money before completion is not according to the ordinary course of proceeding, although sometimes the money is paid into court.

Here there was a very small question between the parties as to this land occupied by the railway—a question as to parcels merely. The purchaser was willing to complete, and the vendor desired to compel him to complete, however that question might be determined. The purchaser was perfectly solvent, and there was no good reason why he should not be let into possession pending the settlement of the question, leaving the question of payment to stand over. At one time it appears to have been contemplated that on the payment of a small sum of money, £250, he might, and would have been, let into possession. But there was some misunderstanding as to the payment, and the delay unfortunately led to different views being taken by some of the parties, so that when the time had elapsed the consent of the vendors, which was necessary for the purchaser taking possession, was absolutely refused; and I cannot perceive that anything which afterwards took place changed the relative position of the parties.

My opinion is that, in that state of things, there being proof of careless, and I must say wantonly negligent, conduct on the part of the plaintiffs, which has caused serious dilapidations, I cannot differ from the conclusion of the Master of the Rolls, or see any reason to alter His Lordship's order in this respect.

Appeal dismissed with costs.

Solicitors : *Messrs. Gregory, Rowcliffes & Rawle ; Mr. J. Needham.*

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### LYSAGHT v. EDWARDS.

IN THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE,  
MARCH 17, 20, 1876.

[*Reported in Law Reports, 2 Chancery Division, 499.*]

*Cookson*, Q.C., and *Cozens-Hardy* for the plaintiffs.

*Chitty*, Q.C., and *Kekewich* for the defendants.

JESSEL, M.R.<sup>1</sup> This case is an illustration, if another illustration were wanting, of the great difficulties which arise from deciding cases for the purpose of convenience, instead of allowing the Legislature to

<sup>1</sup> Because of the full statement of facts in the opinion the Reporter's statement of facts has been omitted.—ED.



intervene for the purpose of correcting any defects in the law. Had it not been for the case of *Wall v. Bright*,<sup>1</sup> I should not have thought the present special case arguable. As it is, I confess that I decide it with something like hesitation, not because I doubt at all as to the way in which it ought to be decided, but because I cannot help thinking that it is impossible for me at this distance of time to say that *Wall v. Bright*, as decided, is not law, and that I must consider what the effect of that case is, not merely having regard to the facts of it, but also having regard to the reasons given by the learned judge who pronounced it, and to the effect which that case may have had upon subsequent titles, and the practice of conveyancers. Notwithstanding that, I cannot help considering this case in the first instance independently of that decision, and stating the conclusion I should have come to without that decision, and the reasons for it; and then I shall take into consideration the effect, if any, which that case ought to have upon my ultimate decision.

In this particular case the testator made his will on the 22d of July, 1873. He was at that time owner in fee of certain freehold estates, and he was also owner of certain copyhold estates. Among his estates was a farm called Bury Farm, partly freehold and partly copyhold. By his will he charges such part of his real estates as consisted of the Bury Farm, with debts and pecuniary legacies, and he proceeds: "Subject to the trusts hereinafter contained for sale of the same hereditaments, and to the power of postponing such sale, I direct the said debts and legacies to be raised under the statutory power for that purpose." Then he gives to two gentlemen, named Hubbard and Muller, all his real estate, with a certain exception, which it is not material to mention, and he devised all his copyhold estates to the use of such persons as they might appoint for the purpose of carrying into effect any sale which should be made under the trusts thereafter declared, and then he gave them the net proceeds of the sale upon the trusts therein mentioned. There is, therefore, a gift of the freehold estate upon trust to sell, and of the copyhold to such uses as they shall appoint for the purpose of effecting a sale. That is the conveyancer's form of the trust for sale of freehold and copyhold estates, the difference of form being merely to avoid the necessity of a double admission to the copyholds. The trustees are to convey the copyholds to the purchaser directly in order to avoid the expense of two fines. Then there is a power to postpone the sale; and, last of all, there is this devise: "And I devise to the said Egerton Hubbard, his heirs and assigns, all real estate which at my death may be vested in me as trustee subject to the trusts affecting

<sup>1</sup> 1 Jac. & W. 494.

the same." After the date of his will, he entered into a contract of sale dated the 23d of December, 1874. It was an ordinary contract of sale. A deposit of £3,000 was paid, and requisitions on the title were sent in in the usual way; but eventually the title was finally accepted by the plaintiffs on the 1st of May, 1875. The testator, the vendor, died on the 12th of June, 1875; and, under those circumstances, the question which I have to decide is, there being a difficulty in finding the heir-at-law or customary heir of the testator, whether the trustees Hubbard and Muller, or the trustee Hubbard, takes the legal estate in the freehold and copyhold lands which have been sold.

Now, the first question to be considered is, What is the meaning of the will itself? The new Wills Act says that unless a contrary intention appears by the will, the will is to speak from the death of the testator as to the real and personal estate comprised in it. In other words, in the absence of a contrary intention, you are to read a general gift of real estate as being equivalent to "all the real estate which I shall be entitled to at the time of my death" in the same way as you always read a general gift of personal estate. In this particular instance the testator has used these very words as regards trust estates: as to them he has only given those which at the time of his death may be vested in him as trustee. It appears to me that there is nothing in this will to exempt the real estate from the operation of the statute, and it must be read as a gift of all the real estate "to which I shall be entitled at the time of my death." No one can doubt for a moment that the after-acquired real estate would have passed under those words, and would have been subject to the trusts for sale.

That being so, the next point I have to consider is, What is the effect of the contract? It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to attain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a

vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the court of equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside. If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death; while in the other case there will not be conversion, because there never was in equity a valid contract. Now, what is the meaning of the term "valid contract"? "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser—a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights

which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he willfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money and his right to enforce his security against the estate. With those exceptions, and his right to rents till the day for completion, he appears to me to have no other rights.

Upon this point I shall merely refer to two authorities. First, in the case of *Hadley v. London Bank of Scotland*,<sup>1</sup> I find this passage in the judgment of Lord Justice Turner: "I have always understood the rule of the court to be that if there is a clear valid contract for sale the court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him."

In *Shaw v. Foster*<sup>2</sup> the general proposition is, I think, laid down by every one of the noble lords who made a speech on that occasion. Lord Chelmsford says:<sup>3</sup> "According to the well-known rule in equity, when the contract for sale was signed by the parties, Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir William Foster." Lord Cairns says:<sup>4</sup> "Under these circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a court of equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything

<sup>1</sup> 3 D. J. & S. 63, 70.

<sup>2</sup> Law Rep., 5 H. L. 321.

<sup>3</sup> Law Rep., 5 H. L. 333.

<sup>4</sup> Ibid. 338.

should be done in derogation of it. The relation, therefore, of 'trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property"—that interest being, as I said before, a charge or lien upon the property for the amount of the purchase-money. Lord O'Hagan says: <sup>1</sup> "By the contract of sale the vendor, in the view of the court of equity, disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money"—that is, perhaps, not quite accurate—it is not "a trust for the payment of the purchase-money," but it is a charge or lien—however, he meant the same thing—"or, as Lord Westbury has put it in *Rose v. Watson*,<sup>2</sup> 'When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in equity transferred by that contract.' This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee," by which I understand him to mean "a mere trustee." He has already said that he is a trustee, and he is not now distinguishing the vendor's position from that of a trustee, but distinguishing it from that of some other kinds of trustees. His Lordship continues: "Thus, as it is stated by the Master of the Rolls in *Wall v. Bright*,<sup>3</sup> 'The vendor is not a mere trustee; he is in progress towards it'"—that is, towards being a mere trustee—"and finally becomes such when the money is paid, and when he is bound to convey." The Lord Chancellor (Lord Hatherley) says: <sup>4</sup> "My Lords, I should stop here, and not say a word more, were it not for what I consider to be a very singular misapprehension which occurred with reference to some expressions in my judgment, and which expressions have occasioned the infliction upon your Lordships (for which I am sure I owe the House an apology) of the citation of authorities to prove the elementary proposition that the moment that a contract for sale and purchase is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the vendee. It is but a constructive trust." He uses the expression, "the vendor becomes a constructive trustee for the vendee," and then he goes on to say that he thinks, upon consideration, that he had not gone beyond the view of Sir Thomas Plumer; and he disposes of that by saying he thinks his own expressions were not different from those of Sir Thomas Plumer. It is immaterial to consider that; for he states the doctrine in perfect accordance with

<sup>1</sup> Law Rep., 5 H. L. 349.

<sup>2</sup> 1 Jac. & W. 508.

<sup>3</sup> 10 H. L. C. 678.

<sup>4</sup> Law Rep., 5 H. L. 356.

every one of the other noble lords, including Lord O'Hagan, if you correct the expression of Lord O'Hagan in the manner in which I am sure he would have corrected it himself had his attention been called to it.

It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.

What, then, is there on the other side? I will, first of all, dispose of the case of *Purser v. Darby*.<sup>1</sup> In that case Joseph Darby, being seised in fee of certain closes of land, agreed in September, 1855, to sell them to the plaintiffs. Afterwards, on the 9th of June, 1856, Joseph Darby made his will, and thereby devised all his share, right, and interest in the land (that is a specific devise), of which the closes contracted to be sold formed part, to his sons, the defendants (two of whom were still infants), and their heirs, as tenants in common, subject to the payment of all debts, etc. Then there was a devise of the testator's mortgage and trust estates to two of his sons, whom he also appointed executors of his will. He died without completing the contract, and the bill was filed for specific performance. Mr. Bernard, for the defendants, submitted that this was not a case for costs, and he said: "At the date of his will the testator was *quoad* the property he had contracted to sell a trustee for the plaintiffs, and he had taken the precaution of devising all his mortgage and trust estates." Then the Vice-Chancellor is reported to have said: "But, so far as regards the property comprised in the contract, he was merely a constructive trustee." That is the same doctrine as in all the same cases, and there would have been no difficulty if he had stopped there, but he proceeds thus: "I have held—and the decision has been since affirmed—that where there is merely a constructive, and not an express trust, a devise of trust estates does not supersede the necessity of a decree." I confess that I am unable to understand clearly what this means; nor has the learned counsel who cited it, with all his ingenuity, been able to explain it. The answer to Mr. Bernard's argument appears to me to be this, there was a specific devise of the land in question, and it could not possibly, therefore, have passed under the devise of trust estate; because although the testator had no right to charge this particular property with his debts, and if the devise had been a general devise the charge of debts might have shown that, being a trust estate, it was not intended to pass, still, where you devise it specifically, it must pass at law, and you cannot get rid of the specific description of the property by saying that there is a charge upon it which the testator had no right to make. It is alto-

<sup>1</sup> 4 K. & J. 41.

gether, if I may say so, out of the authorities which I shall presently consider. Upon the whole, I think the Vice-Chancellor must mean, though I am not sure about it, that where an infant or a lunatic, that is, a person under disability, would take the estate if the contract were not established in a court of equity, there the purchaser cannot safely complete without establishing the validity of the contract by decree; and if that be the meaning, the case does not militate in the least against the other decisions.

In another case of *Thirtle v. Vaughan*,<sup>1</sup> which came before the same Vice-Chancellor, there was a contract for sale, and the vendor died before the purchase was completed, having, by his will, given the residue of his real and personal property to his children equally to be divided between them as tenants in common, with a gift over if either of them died under twenty-one. The question was whether, it being a general devise, the gift over showed that trust estates were not included; and Vice-Chancellor Wood said: "He thought that this case was distinguishable from those cases which had decided that the fact of a general devise being to persons as tenants in common was not sufficient by itself to prevent trust estates from passing under it. Here there was the additional clause providing for accruer, and the wording of it was such that it was difficult to come to any other conclusion than that the testator was referring to beneficial interests only. He must therefore hold that the legal estate in the property did not pass by this devise, but had descended on the heir, who would be declared a trustee." That is, there being a valid contract for sale, he decided that it bound the estate, but that the words of the devise were not sufficient to pass it, because it was a trust estate, and the expressions used in the devise (it being a general devise) were inconsistent with the notion that the testator intended to dispose of estates of which he was a constructive trustee. That case of *Thirtle v. Vaughan*<sup>2</sup> was also followed and approved of by Vice-Chancellor Malins in *Martin v. Laverton*.<sup>3</sup>

Now, what is the doctrine to which Vice-Chancellor Wood referred in *Thirtle v. Vaughan*? It rests upon two leading cases, which I need not do more than mention, namely, *Lord Braybrooke v. Inskip*<sup>4</sup> and *Roe v. Reade*,<sup>5</sup> which have established this, that a general devise of real estate, like every other clause in the will, must be construed according to its ordinary meaning, that the use of the words "my real estate" (that is, the use of the word "my" prefixed to "real estate") is not of itself sufficient to show that the real estate which the testator had at law only would not pass as well as real estate to

<sup>1</sup> 2 W. R. 632.

<sup>2</sup> 2 W. R. 632.

<sup>3</sup> Law Rep., 9 Eq. 563.

<sup>4</sup> 8 Ves. 417.

<sup>5</sup> 8 T. R. 118.

which he was entitled either beneficially or legally and beneficially. Where you get a devise of "my real estate," or "my freehold estate," or anything in the shape of a general as distinguished from a specific devise of land, where a particular parcel of land is spoken of by a particular description, there you may control the words "my real estate" by the context, and, as in other cases, restrict their meaning to real estates in which the testator has a beneficial interest by force of the context ; and if you find that the context consists of restrictions and limitations which are wholly inconsistent with the notion that the testator was dealing with the trust estate either because he would have had no power so to deal with the trust estate, or because so dealing with it it would be a breach of trust, you avail yourself of these restrictions and limitations to say that that is the context which shows that the testator, in speaking of "my real estates," did not mean "the real estates which I am entitled to at law only," but "the estates to which I am beneficially entitled." What particular words will produce this result it is immaterial now to consider. It has been said that a charge of debts and legacies is sufficient, because the testator has no power to charge the estate of which he is trustee with debts and legacies. It may be that limitations in strict settlement are sufficient, because a testator would be guilty of a gross dereliction of duty if he devised a trust estate in strict settlement. But, whatever the words may be, they are only used by the court as a reason for cutting down the primary meaning of the words "my real estate" to mean "the real estate to which I am beneficially entitled," or, as I should say, under the new Wills Act, "the real estate to which I shall be beneficially entitled at the time of my death." That being so, the question arose, in the case of *Wall v. Bright*,<sup>1</sup> whether the words used in that particular case were sufficient to show that the testator did intend the words "my real estate" to mean "the real estate to which I am beneficially entitled." That was the real question decided in the case of *Wall v. Bright*.

Now, the first observation to be made upon *Wall v. Bright* is this, that there was no gift of trust estates. The court was not embarrassed there by having to choose between two devises. It was not a devise of "all my real estate to A and all my trust estate to B." If that had been the devise, another well-established rule of construction would have applied, namely, that where you find a general gift in the will followed by a particular gift which would from its nature be included in the general gift, you read the particular gift as being an exception from the general gift. A man may begin his will by saying, "I give all my personal estate to A, and I give my gold watch

<sup>1</sup> 1 Jac. & W. 494.



to B, and £100 to C." Nothing can be better established than this, that although the words "all my personal estate" would carry both the gold watch and the £100, yet, they being found as particular bequests—one specific and the other general—still, the words "all my personal estate" are to be read as "all my personal estate except what I have hereinafter given to B and to C." The words are read as a gift of residue, and not as a gift of the entirety. If a man says, "I give all my real estate to A, and I give Blackacre to B," no one could doubt for a moment that the gift to A must be made consistent with the gift to B, by excepting Blackacre from the gift of all the real estate. Therefore, when we have a will which says, "I give all my real estate to A, and I give all my trust estate to B" you except the trust estate on the same principle as you except Blackacre from the gift of the real estate; and therefore it must be read as a gift of "all my real estate except the trust estate to A," and a gift "of my trust estate to B"; and in that way you make the whole will consistent. Consequently, if, in *Wall v. Bright*,<sup>1</sup> we had had a gift of "all my real estate to A," followed by a gift "of my trust estate to B," I can see no doubt that the estate in question (assuming it to be, as I think it was, a trust estate) ought to have been held to pass under the second gift, and not under the first gift. But in *Wall v. Bright* there was only a single gift, and therefore the words "all my real estate" could not be cut down by reason of there being a subsequent gift of part of the real estate, and they were therefore to have their primary signification, unless you could find in the trusts something which was repugnant to the idea that the testator was dealing with an estate which he contracted to sell.

I shall now first of all consider the will which was the subject of decision in *Wall v. Bright*, and give my reasons for thinking that the decision was correct, and then I am afraid I must consider the reasons given by the learned judge who gave that decision, and say how far I can follow them. The will in *Wall v. Bright* was made after the date of the contract. It does not appear whether or not the title was accepted, but from the time which had elapsed and what had taken place, I think it is most likely that the title was accepted in the testator's lifetime; but it is treated in the judgment as not being accepted at the date of the will. Whether this was so or not does not appear from the report or from the record, which I have sent for. The gift was a gift by the testator of all and every his freehold and all other his real and leasehold messuages or tenements, farms, lands, and hereditament whatsoever and wheresoever, and whether held for lives, term of years, or otherwise, and also all his goods and chattels,

<sup>1</sup> 1 Jac. & W. 494.

and personal estates, and effects of every nature and description, to trustees, upon trust, as soon as conveniently might be after his decease, to sell and dispose of all and singular his said freehold and other real and leasehold messuages, etc., and all his personal estate of every description, and to receive the purchase-money and to invest it in certain stocks and funds, which were to be held upon certain trusts. Now why, under such a gift, should not the legal estate pass? If there was a valid contract for sale, either because the title was good, or if bad had been accepted, the testator would have become a constructive trustee for the purchaser, but a constructive trustee with possession (for it appears that the purchaser had not been let into possession of the whole), with a right to retain that possession until the purchase-money was paid, with a lien or charge upon the estate for the purchase-money, and a right to make that lien effectual by a suit in equity if he thought fit. In other words, the testator was possessed of personal estate with a charge upon the real estate to secure the payment of the sum due to him as part of his personal estate. If, on the other hand, the title, being bad and not having been accepted, was in such a state at the time of his death that the purchaser was entitled to refuse the estate, then there was not a valid contract to sell; there was nothing which would have been binding upon the testator's heir, under the doctrine of constructive conversion; and then the testator would have been entitled to the real estate, to the freehold estate free from any contract at all, because the contract he had entered into was not binding.

Those are the two possible views of the position at the time the testator made his will, and at the time of his death. It seems to me that, taking either view to be correct, there is nothing in these trusts inconsistent with the notion that you are to give to the words "my real and personal estate" their full meaning. If he were entitled simply to the real estate as a security for the payment of the purchase-money, there is a trust for the trustees to get in and to sell and dispose of his personal estate, a trust which they can only carry out by having the legal estate to convey to the purchaser. They cannot get in the personal estate given to them, except by having the legal estate, and therefore there is a reason why he should give them the legal estate. Not only so, but under the words of the will they might actually put up for sale and have sold the charge, and upon payment by the purchaser they would have conveyed the legal estate in the property to him in order to secure the lien. There is nothing, therefore, in this view of the case which would lead you to say that the terms of the gift were inconsistent with an estate contracted to be sold by the vendor being intended to pass. On the other hand, if the contract were invalid, of course he had a right to devise it as part of his real estate upon trust for sale. Therefore, looking

at the will as it stands, it does appear to me, taking either alternative, that there was not any repugnancy in the trust, nothing to cut down the proper meaning of the words in a gift of real and personal estate.

While on this branch of the subject I may advert to those numerous decisions on mortgage estates in which it has been held that the legal estate in a mortgage passed by a gift of mortgages or a gift of securities for money to persons who were to take the mortgage-money in order to enable them to receive the money which it was part of their duty to receive. Therefore, if the decision had stood alone without more, I could have seen ample ground for holding that in the particular case which the court had to deal with in *Wall v. Bright*,<sup>1</sup> there was no difficulty in saying that full effect was to be given to the ordinary meaning of the words. I must say, however, I am not quite entitled to deal with the case in this way. In the first place, I feel bound to observe that the case was not very carefully decided. It appears by the report and by the record (which I have examined), and it was stated in the argument, that one of the fields, one of the two comprised in the second agreement, had been fully paid for. Upon looking at the agreement, which is properly stated in the report, it appears that these two fields were two separate purchases although they were in one contract—they were separately sold for separate sums, and were distinct purchases. Consequently, as regards one of these fields, there had been full payment, and the testator was a mere trustee. That point seems to have escaped notice by the judge, for I see that the decree is general, and includes the whole of the property.

The next observation is, that although Sir Thomas Plumer says in one part of his judgment that the vendor is a constructive trustee, yet in other parts he seems to consider he is not quite a trustee. He says:<sup>2</sup> “Now, though there is a great analogy in the reasoning, with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate, yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it as of his own.” That is not quite accurate. A man may have once been owner and become trustee; he may settle his own estate for value by declaring himself a trustee, and he may thus become a trustee although he was once the owner; so that it is not quite right to say the question depends upon his being owner once. Then the judgment goes on to say: “In that respect he does not resemble one who has agreed to sell an estate, that up to the time of the contract was his. There is this difference at the outset, that the one never had more than

<sup>1</sup> 1 Jac. & W. 494.

<sup>2</sup> 1 Jac. & W. 501.

the legal estate, while the other was at one time both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract ; and in the interim, between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee ; he is only a trustee *sub modo*, and provided nothing happens to prevent it, it may turn out that the title is not good, or the purchaser may be unable to pay." Now, as regards the first of these alternatives, the law is correctly laid down. If the title is not good there is no valid agreement, and the whole doctrine assumes that there is a valid contract. But as regards the other, I must say that the law is now settled otherwise, and, as I think and have said before, it was so settled before the time of Lord Hardwicke. The fact of the purchaser being able to pay or not able to pay is immaterial ; if there is a valid contract, the conversion is effected. All the cases as to conversion turn upon this, whether, at the time of the death, there was a valid contract ; and you never go on to inquire whether the purchaser is solvent or insolvent—whether he is able to pay or not able to pay. If the purchaser proves unable to pay, you may get back the estate in equity ; but the contract is binding, and makes conversion. Therefore that must be thrown out of consideration. Then the judgment goes on to say : " The agreement is not for all purposes considered to be completed." That is so. " Thus the purchaser is not entitled to possession, unless stipulated for ; and if he should take possession it would be a waiver of any objections to the title ; the vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, but not otherwise. Till then it is uncertain whether he may not again become sole owner ; the ownership of the purchaser is inchoate and imperfect ; it is in the way to pass, but it has not yet passed." I cannot treat that as law. The ownership has passed the moment the contract is made, if valid. If the learned judge means to include the case of a bad title which the purchaser refuses, then I say that in that case there is no contract for the purpose we are now considering. Every contract for the sale of real estate is made under an implied condition that the vendor is entitled to sell the estate ; if he is so entitled, then by the contract the equitable ownership passes subject to a charge for the purchase-money ; but it may be destroyed by proceedings in equity by the owner of the charge. Then he goes on to say : " While a suit for a specific performance is pending, nice questions may arise, and it is settled that the vendor may complete the title while under investigation in the Master's office. The purchaser is not bound till the title is made out, and suppose the will to be made in the interim. Then there is a contract to

sell, which the other party has refused to adhere to ; the title is doubtful, and it is uncertain whether it can be completed. Is he not then, if making his will in that state of things, to make a disposition of the estate ?” That, I think, is the key to the argument. What he means is this : The vendor does not know yet whether he can make a title or not ; there is, therefore, at least one alternative in which he may dispose of the estate, namely, in the case of the title not being made out, so that the contract is avoided. Then he goes on to say : “ If the court were to decide that the legal estate did not pass to the trustees, the consequence would be that the defendant would be exonerated from his contract, and it will then become necessary either to decide that it did pass, or else to say that it descended beneficially to the heir-at-law.” That is not so. The law is correctly stated by Vice-Chancellor Wood, in the case I have cited, to the effect that the contract binds the heir-at-law ; he does not take beneficially ; he is a mere trustee for the next of kin. It is quite true at this time you could not get a conveyance from the heir-at-law if he was under disability, and therefore you could not force the purchaser to complete, because he was entitled to have the legal estate ; but although the purchaser got off completing the contract, the heir-at-law did not take beneficially. Nevertheless it seems to me that this idea that the heir-at-law could take beneficially was the moving consideration with Sir Thomas Plumer to make the estate pass. Then he goes on to say : “ The vendor is, therefore, not a mere trustee, he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey ; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains, for certain purposes, his old diminution over the estate. There are these essential distinctions between a mere trustee and one who is made a trustee constructively, by having entered into a contract to sell ; and it would, therefore, be going too far to say that they are alike in all respects ; the principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences. It is sufficient to say that it governs the equitable estate, without affecting the legal. Then, under all these circumstances of dissimilitude, are we to extend the principle that has been established as to mere trustees, to one who is partly the owner, who has the legal, and partly the beneficial estate ? . . . ” “ This case, I think, is very different from those, and does not fall within the principle which they afford. The will of a trustee, giving the trust estate for his own purposes, never can be right, that of this testator might. In this case, if the contract fails, there is a beneficial ownership, that is left undisposed of if the will is not to have effect. If the contract is performed, no injury

arises from this construction ; the only effect is that the trustees convey instead of the heir ; but if it be not performed, a positive injustice is done by the other, for the estate goes to the heir, contrary to the intent of the testator. The safest way is to hold that the estate passes, adhering to the words, there not being enough to take it out of them." So that he really ends by saying that it is an example of the doctrine that the words would pass all the real estate, as they undoubtedly would, and there is not enough in the trust to lead to a contrary conclusion. He then says : " The present is a strong instance of the propriety of this construction, for the testator has in substance done no more than would have been proper if he had contemplated the consequences. He intended that all his real estate should be converted into money ; then if the contract is completed, it supersedes the necessity of another sale ; if not, the trustees are to sell. To give to the trustees the legal estate, is not inconsistent with this intention, on the contrary, it is just what he ought to have done to enable them to convey to the purchaser. They are to dispose of the legal estate in the manner directed by the will, except that it differs by being in pursuance of a prior instead of a future sale." There the judgment ends.

I think it is impossible to give effect to all those reasons, and that some of them must be considered as not quite accurate in law. It is quite possible to support the decision on the grounds I have stated, and it is quite possible to support it even on less special grounds. It may well be that where there is no devise of trust estate, but a mere devise of real estate upon trust to sell, with a gift of the personal estate to the same persons to get in, you ought to hold that the real estate passes, because *quacunque via*, those persons would get the purchase-money, and therefore they ought to have the means of obtaining it. There is still another ground, as to which I must now refrain from giving an opinion, but upon which it is also possible to support the decision. It might be said that where there is a devise of " my real estate " upon trust to sell and take the purchase-money, and the proceeds of sale and the personal estate are beneficially given to the same persons, that in such a case it is given for the purpose of completing the sale already made. You cannot so treat it where the real and personal estate are not given to the same persons beneficially, because the estate contracted to be sold has been converted into personalty by the contract, and would go in a different way from the real estate directed by the will to be sold. A striking example of this is the case of *Lawes v. Bennett*.<sup>1</sup> There an option of purchase reserved by a lease was exercised after the death of the lessor, and it was held that the option took effect from the date of the lease, so that the property had been converted in his lifetime

<sup>1</sup> 1 Cox 167.

from real estate into personal estate; and that the persons who took the personal estate under the lessor's will had become entitled to the purchase-money, and not the devisee of the real estate.

I think I ought also to refer to the case of *Whittaker v. Whittaker*,<sup>1</sup> as to the effect of the annulment of the contract for sale by reason of the incapacity of the purchaser to pay. In that case it was held that the cancelling of the contract by the decree of the court of equity after the death of the purchaser, by reason of his executors not then having funds available to complete the contract, did not affect the rights of the persons who took beneficially under the will of the purchaser; in other words, that it did not reconvert the estate, but effected a cancellation of the contract from the date of the decree, and was not a rescission of the contract *ab initio*, which of course would prevent conversion.

I now come again to the will before me. First of all, there is a charge of "such part of my real estate as consists of my messuage, farm, and lands at Arlsey aforesaid, called the Bury Farm, in exoneration of my personal estate with the payment of my debts, and of the pecuniary legacies aforesaid"; and, subject to the trust hereinafter contained for sale of the same hereditaments, he directs the debts and legacies to be received under the statutory power; and then there is a general devise of all the real estate.

The first question is, Is there a specific devise of Bury Farm? It is a question of some difficulty, but I think there is not. He had sold Bury Farm, he had not got Bury Farm at the date of his death; if he had not Bury Farm at the time of his death, beyond all question he could not charge it. The object of referring to Bury Farm is to charge it. It is stated to be part of his real estate, and it was at the date of his will really part of his real estate. When he says, "subject to the trust hereinafter contained," he means subject to the trust affecting my real estate, so far that real estate includes Bury Farm, but if Bury Farm is dropped out of the charge of debts (as it was, because the will is to take effect from the time of his death), why am I to say that that which was a mere clause to show that the general gift of his real estate was not to be done away with by the specific charge of Bury Farm—that is, that Bury Farm was still to be subject, as all his other real estate, to the trusts of his will—why am I to hold that such a clause is to prevent it dropping out of a gift of "my real estate"? I think the will must be read and interpreted by the Wills Act, and that the gift of "my real estate" is a gift of "the real estate which I shall be entitled to at the time of my death." Then we have that followed by a devise to Mr. Hubbard of "all real estate which at my death may be vested in me as trustee." Therefore this testator actually contemplated that something

<sup>1</sup> 4 Bro. C. C. 31.

might happen between the date of his will and his death, and even without the Wills Act you might well have read it as providing that "if by any reason that which is vested in me as absolute owner of my real estate shall become vested in me as a trustee, that shall go to somebody else." That is perfectly consistent, and consequently if this estate was vested in him (as I hold it was) as trustee at the time of his death, it appears to me that it must pass to Hubbard as sole devisee.

Therefore, in my opinion, there is a good title, and the concurrence of the heir-at-law or customary heir is not necessary to give a complete title to and a conveyance of the estate comprised in the contract with the plaintiffs.

Solicitors: *Whites, Renard & Co.*, agents for Henry Brittan, Press, & Inskip, Bristol; *Freshfields & Williams*.

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HENRY HELLREIGEL, RESPONDENT, v. JOHN B. MANNING,  
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 7, 1884.

[*Reported in 97 New York Reports 56.*]

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made May 15, 1882, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

*H. C. Day* for appellant.

*Spencer Clinton* for respondent.

EARL, J. This action was brought by the plaintiff to compel the defendant to specifically perform a contract for the purchase of land, and was based upon a written agreement signed, sealed, and acknowledged by the defendant, and dated November 17, 1876, whereby he, in consideration of \$50 paid to him by the plaintiff, agreed with the plaintiff that at the end of four years, if the plaintiff became dissatisfied with the purchase of the same land at that time made by him and should call upon the defendant to do so, he would pay him for his undivided one-half interest in the land the sum of \$3,800, upon condition of his executing and tendering to the defendant a deed of his interest in the land "by a good title free of incumbrances."

Upon the trial, the counsel for the defendant offered as follows: "To prove that during the four years of the running of the contract in ques-



tion, the buildings on the premises have never been painted, although they required painting; that they have been suffered to become dilapidated for want of painting; that Mr. Hellreigel has allowed them to run down; that he has realized everything from the buildings without laying out anything on them for repairs; to show that he has permitted the sewers to be stopped up; that the cellars are filled with water to the depth of two feet and upward; that the gates have been broken off the hinges; that the sidewalks have been permitted to become out of repair, and dangerous for the people passing over it"; and that, in consequence of all these, the buildings had depreciated in value to the extent of several hundred dollars.<sup>1</sup> There was no allegation in the answer nor offer to prove that the plaintiff had done anything intentionally or willfully to damage the buildings or depreciate their value. The deterioration in the condition of the buildings seems to have been due to natural causes, and the ordinary use of them. It is not claimed that there is anything in the language of the contract which required the plaintiff to keep the premises in repair, and hence his conduct in reference to them must have been such that it would be inequitable and unjust for a court of equity to enforce the contract in his favor. There was no allegation in the answer, and no proof that the premises were not worth the sum which the defendant agreed to pay for them. There was no proof, or offer to prove, that the plaintiff had realized more than a fair interest upon his investment from the rent of the premises, and hence that he put into his pocket what he might well have expended in keeping the premises in good repair. We do not perceive that, under the circumstances, he owed the defendant any duty to keep the premises in repair. A party agreeing to sell and convey premises at a future day does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in good repair, or to guard against the decay which is due to time and ordinary use. Circumstances might occur which would impose such a duty upon the vendor; but they do not exist in this case, and were not offered to be proved.

We have examined other exceptions to which our attention is called by the brief submitted on behalf of the defendant, and it is sufficient to say of them that they point out no error.

The judgment should be affirmed, with costs.

All concur, except DANFORTH, J., absent.

Judgment affirmed.

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

## IN RE COLLING.

IN THE COURT OF APPEAL, MARCH 22, APRIL 5, 1886.

[*Reported in Law Reports, 32 Chancery Division 333.*]

By an order made on the 9th of March, 1885, in the matter of Ann Colling, a person of unsound mind not so found, and in the matter of the Lunacy Regulation Act, 1862, it was ordered that a small freehold property of Ann Colling should be sold by the guardians of the poor of Northallerton, and that they should be authorized to make such sale on her behalf and receive and give a discharge for the purchase-money, and to execute a conveyance to the purchasers on her behalf for all her estate and interest in the property, and that the guardians should be allowed to retain £68 5s., which they had expended on the maintenance of Ann Colling, and should lodge the balance in court.

The guardians put up the property for sale by auction in two lots on the 28th of May, 1885. Lot 1 sold for £600. Lot 2 was shortly afterwards sold by private contract for £280. Deposits of £60 and £28 were paid by the purchasers. The time fixed by the conditions for completion was the 23d of November, 1885. The property was subject to mortgages for £160 and £156. Abstracts of title were delivered and the title was not objected to.

On the 28th of June, 1885, Ann Colling died. It was believed that before she became of unsound mind she had made a will, but it had not been found. Her heir-at-law was known, but she had no personal representative.

The guardians now presented a petition asking that it might be declared that Ann Colling, at her decease, was a trustee within the meaning of the Trustee Act, 1850, that their clerk might be appointed a trustee of the property in her room, and that the property might be vested in him upon trust to complete the sale.

*G. Y. Robson* for the petition.

COTTON, L.J. The case involves two points, whether the lunatic was a trustee within the acts, and if so, whether we ought to transfer the legal estate where the trust is only constructive and the purchase-money has not been paid. We will consider the case.

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April 5. COTTON, L.J. This is a peculiar case, and one of some difficulty. If we could make the order asked for we should be very glad to do so, as it would relieve the parties from considerable embarrassment. The application is one under the Trustee Acts asking for a vesting order as to land, on the footing that Ann Colling at her

death was a trustee of it. An order for sale of the land had been made in lunacy, a contract for sale was entered into and a deposit paid ; but before the residue of the purchase-money had been paid the lunatic died. We were pressed by Mr. Robson with a decision of the late Master of the Rolls in *Lysaght v. Edwards*,<sup>1</sup> where, after a contract for sale had been entered into, the estate was held to pass under a devise of trust estates, but the question in that case was quite different from that in the present. Where a contract for sale has not been completed in the lifetime of the vendor, can he, at his death, be considered a trustee ? To hold that he can would be a dangerous departure from the rules on which the court has been in the habit of acting. The case which furnishes the best guide to a decision is *In re Carpenter*,<sup>2</sup> where Lord Hatherley, when Vice-Chancellor, refused to make an order under circumstances very similar to those of the present case, and said that he could not do it unless the right to specific performance had been settled by a decree. It is difficult on an application of this kind to enter satisfactorily into the question whether the circumstances are such that specific performance would have been enforced. His Lordship, after referring to Sec. 29 of the Trustee Act, 1850, and to Sec. 1 of the amending act as showing that in cases of real estate the constructive trust must first have been declared by a decree of the court, said " that the reason of that was, that there might always be a question whether the contract could be enforced by a suit for specific performance ; and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided." I think that is the correct principle. We were referred to a case before Lord Romilly, where he made a vesting order, guided, I think, by the special circumstance that the purchaser in that case had the power of taking the land compulsorily. I do not think that correct in principle. In *In re Cuming*,<sup>3</sup> Lord Justice Giffard held, and we have since followed that decision, that if the purchase-money is paid to the vendor in his lifetime he becomes a trustee of the legal estate. Here the purchase-money has not been paid. The rule laid down by Lord Hatherley appears to me the correct one, and, though I regret it, I think we have no power to deal with this case under the Trustee Acts.

FRY, L.J. I am of the same opinion. I think that Lord Hatherley laid down the correct principle. In Sec. 29 the obtaining a decree for sale for the payment of debts of a deceased person is treated as a condition precedent. So in Sec. 30 a decree for specific performance or conveyance is made a condition precedent. The 1st section of the Act of 1852 provides for the case where an order has been made for the sale of any lands for any purpose whatever. The legislature appears to

<sup>1</sup> 2 Ch. D. 499.

<sup>2</sup> Kay 418, 420.

<sup>3</sup> Law Rep. 5 Ch. 72.

me to have meant that, in cases of contract, the Act in general should only apply in favor of a purchaser where there has been a decree or order on which his right is founded, and without saying that in no case where there is no decree or order can a vendor be held a trustee, I think that we cannot, in the present case, treat Ann Colling as having become a trustee of the property.

Solicitors : *Williamson, Hill & Co.*

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CLARKE v. RAMUZ.

IN THE COURT OF APPEAL, JULY 7, 1891.

[*Reported in Law Reports 2 Q. B. (1891) 456.*]

ACTION by the purchaser of land against the vendor for wrongfully, and in breach of his duty to the plaintiff under the contract for sale of the land, suffering one Jackson to remove from the said land some hundreds of cartloads of soil.

At the trial before GRANTHAM, J., with a jury, the facts appeared to be as follows : On August 2, 1889, the defendant entered into a contract for the sale to the plaintiff, for £255, of the fee simple of five small plots of building land situate at Southend. The property in question formed part of various lots sold by auction under the same conditions of sale. The date fixed by the contract for completion was August 12, 1889. By the conditions of sale it was provided that a purchaser who required a free conveyance, as thereafter provided, should not be entitled to an abstract of title except on payment of a specified fee ; and it was further provided that the contents and dimensions of the property as stated in the particulars should be taken to be correct, and no compensation should be required for any excess or deficiency in any of the quantities stated, and that no misdescription should annul the sale, nor should any compensation be allowed in respect thereof. On August 17 the defendant's solicitors wrote to the plaintiff reminding him that August 12 was the time fixed for completion, and asking him to name an early day for completion. On September 10 they again wrote reminding him that August 12 was the day for completion. On September 11 the plaintiff answered, asking for a free conveyance. On October 21, 1889, a conveyance of the land to the plaintiff was executed by the defendant, and the plaintiff then paid the balance of the purchase-money.

The defendant remained in possession of the land sold till completion. The defendant had employed one Jackson to make roads on his

property adjoining the land sold to the plaintiff. Jackson, between September 11 and 30, 1889, without the knowledge of or any authority from the defendant, who lived at Herne Bay on the other side of the Thames, removed a large quantity of surface soil from the plots of land sold to the plaintiff, for the purpose of filling up a hole in a road being made by him on the defendant's land. At the time when completion took place neither the plaintiff nor the defendant knew that this had been done. The plaintiff did not find out that the soil had been removed till August or September, 1890. He then commenced the action. It seemed to have been assumed at the trial that the question was one of law for the judge, except so far as the amount of damages was concerned. The jury accordingly assessed the damages, and the judge gave judgment for the plaintiff for the amount found by them.

The defendant now moved for judgment or for a new trial, on the ground that the judge's ruling was erroneous.

*Lumley Smith*, Q.C., and *R. M. Bray* for the defendant.

*Jelf*, Q.C., and *D. Stewart-Smith*, for the plaintiff, were not called upon.

LORD COLERIDGE, C.J. The contention is that such an action as this will not lie. It appears to be well established in equity that, in the case of a contract for the sale and purchase of land, although the legal property does not pass until the execution of the conveyance, during the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made. Of course, where, from any cause, a long period of time elapses during which such possession of the vendor continues and deterioration of the property takes place, other considerations may come in; but in this case the injury complained of is the removal of a considerable portion of the soil for purposes for which the vendor had no right to allow such removal without the consent of the purchaser. The case of *Phillips v. Silvester*<sup>1</sup> is stated by Mr. Dart to have been commented upon by Jessel, M.R.; but the doctrine that the vendor in possession is, under such circumstances, a trustee for the purchaser appears to have been entirely acquiesced in by him in the subsequent case of *Earl of Egmont v. Smith*,<sup>2</sup> *Phillips v. Silvester*,<sup>1</sup> is a decision with which we not only agree, but which is binding upon us. It lays down in clear terms, under circumstances hardly distinguishable from those which exist in the present case, that there is such a duty as I have mentioned incumbent upon a vendor in possession after a

<sup>1</sup> Law Rep. 8 Ch. 173.

<sup>2</sup> 6 Ch. D. 469

contract for sale. If there is such a duty, it is clear in the present case that there has been a breach of it, because no care has been taken by the vendor to keep the property in the state in which it was when the contract was made. The counsel for the defendant were driven to contend that no care was under the circumstances reasonable care, a position which cannot possibly be supported. Then it was contended that by reason of the execution of the conveyance there was an end of any remedy for the breach of trust which had taken place, and which had lessened the value of the land. I could understand that, where the purchaser knew what had happened, it might possibly be argued that, by reason of his taking a conveyance without making any claim in respect of the breach of trust, there was evidence of a waiver by him of his right ; but where, as in this case, neither party, at the time when the conveyance was executed, knew anything about what had happened, I cannot see any ground whatever for the suggestion that the execution of the conveyance had the effect contended for by the defendant. It appears to me clear on principle, and upon the authority of the decision in *Phillips v. Silvester*,<sup>1</sup> followed, as it has been, by Jessel, M.R., in *Earl of Egmont v. Smith*,<sup>2</sup> and by Kekewich, J., in *Royal Bristol Permanent Building Society v. Bomash*,<sup>3</sup> that this action is maintainable ; and that, therefore, this application must be dismissed.

BOWEN, L.J. I am of the same opinion. It is clear that a vendor remaining in possession of the property after a contract for sale, as the defendant did, is bound to use some care to preserve the property, and here the defendant took no care. It was argued that this case was like those where it was a question of allowing compensation under the contract in respect of misdescription of the property, and matters of that kind, and that, when the conveyance was executed, there was an end of all remedy for the breach of trust. It is true that the execution of the conveyance puts an end to all contractual obligations which are intended to be satisfied by the execution of the conveyance. But that doctrine does not apply to cases where the contractual obligation is of such a kind that it cannot be supposed to have been the intention that it should be extinguished by the conveyance. Can it be said that the breach of an obligation arising between the making of the contract and the conveyance was intended to be satisfied by the execution of the conveyance ? That must depend on the circumstances. One circumstance that must be material is whether the breach of duty in question was known to the parties. If it was, as in this case, unknown to them, it is impossible to suppose that they intended the conveyance to operate as a waiver or release.

<sup>1</sup> Law Rep. 8 Ch. 173.

<sup>2</sup> 6 Ch. D. 469.

<sup>3</sup> 35 Ch. D. 390.

KAY, L.J. I agree. In this case the purchaser has not got the whole of what he contracted to buy. If that has happened through no fault of his own, it would seem to be good sense that he should be able to say that he has not got what he bought, and therefore he claims compensation. If the vendor could show that it was the purchaser's fault that he had not got what he bargained for, that might be a good answer. But in the present case the purchaser says that, so far from its being his fault, he knew nothing about what was happening; and it was the fault of the vendor. The fact was that, after the contract and before the completion, some one removed a large quantity of the surface soil; and the vendor not only did not prevent such removal, but he took no care to prevent it. I cannot doubt that that amounts to negligence on the part of the vendor, when I consider what the position of a vendor, situated as this vendor was, towards the purchaser has been held to be by the decisions. The cases of *Phillips v. Silvester*,<sup>1</sup> and *Earl of Egmont v. Smith*,<sup>2</sup> clearly establish the proposition that for some purposes the vendor in possession after a contract for sale of land is in the position of a trustee for the purchaser. He has certain duties towards the purchaser, one of which is—I am only putting into my own words what the decided cases have established—to take reasonable care that the property is not deteriorated in the interval before completion and while it is in his possession as such trustee. Here no such care was taken; and, therefore, there was a breach of the duty owed by the vendor to the purchaser. It was argued strenuously that, although the parties at that time knew nothing about what had happened, the fact of the purchaser's having taken a conveyance of the land deprives him of any remedy. The proposition must be that, though he had a remedy before he took the conveyance, because he took the conveyance without asserting his rights at that moment, he lost all remedy. I could understand that, if he took the conveyance with his eyes open, knowing what at the time the state of the property was, and did not make any claim, such conduct might—I do not say it would, but it might be argued that it would—amount to a waiver of his right. But that is not the present case; here the plaintiff knew nothing about what had happened. I cannot see any reason whatever why under these circumstances the conveyance should deprive him of the right which he had previously, but which he was ignorant of, and therefore could not have intended to waive. No authority has been cited in support of the proposition contended for, and I am glad to think that there is none. Another point argued was that this removal of soil happened after the time fixed for completion, and that there was a difference as regards the duty of the vendor towards the purchaser between the time before and that after

<sup>1</sup> Law Rep. 8 Ch. 173.

<sup>2</sup> 6 Ch. D. 469.

the date fixed for completion. Certain dicta were referred to for the purpose of showing this. But this was a contract under which it was plainly not the intention of either party that the purchaser should have possession until completion took place and the purchase-money was paid. It is rare for a contract for sale of land to give the purchaser a right to possession before completion; and, whenever that is intended, it is always expressed most explicitly. There is nothing in the terms of this contract which would give a right to possession before completion and payment of the purchase-money. Under these circumstances, it seems to me that there is no difference in this case, so far as the duty of the vendor is concerned, between the time before and the time after the date fixed for completion, and that his duty was as described until the purchase was completed. For these reasons, it appears to me that the action is maintainable.

Application refused.

Solicitor for the plaintiff: *W. N. M. Scutts*.

Solicitor for defendant: *Charles R. Taylor*.

#### ACLAND AND OTHERS *v.* GAISFORD AND OTHERS.

IN CHANCERY, BEFORE SIR THOMAS PLUMER, V.C., AUGUST 28,  
1816.

[*Reported in 2 Maddock 28.*]

THE original bill was filed 31st May, 1809, by T. P. Acland, praying that David Cuming, the defendant (since deceased), might specifically perform his contract to sell to the plaintiff the fee simple of an estate called Stone, and Stone Down, at Exford, in Somersetshire; and that the defendant might be decreed to allow the plaintiff interest on the purchase-money, £2,900. The purchase agreement was dated 4th June, 1807, and the purchase-money was agreed to be paid on or before the ensuing 25th March if a tender of a proper conveyance was made. The estate was in the possession of one ——— Pitts, as tenant to the vendor, whose tenancy expired at Lady-day, 1808.

On the 9th July, 1812, a decree was made by the Master of the Rolls, referring it to a Master, to see whether a good title could be made to the estate, and an inquiry was directed, whether the defendant, before the filing of the bill, could make a good title; and the consideration of costs was reserved.

Before the Master made his report the defendant, David Cuming, died.



Acland declining to file a bill of revivor, Jane Gaisford, the executrix of David Cuming, filed a bill of revivor and supplement against Acland, the plaintiff in the original bill, and also against George Cuming, the brother and heir-at-law of David Cuming, deceased.

The supplemental cause was heard 18th March, 1816, when it was decreed that the former decree, 9th July, 1812, should be prosecuted between the present parties in like manner as was thereby directed as to the then parties, reserving further directions and costs.

On the 22d May, 1816, the Master made his report, which was afterwards confirmed, whereby he was of opinion that the late defendant, David Cuming, could in his lifetime, and that George Cuming, as heir-at-law of said defendant, and the said Jane Gaisford, widow, as his executrix, could, at the time of the report, make a good title to the estates; and he was also of opinion that the late defendant, David Cuming, could have made a good title to the estate before the filing of the original bill.

This report, which was obtained by Jane Gaisford, widow, was absolutely confirmed.

The cause now came on for further directions and as to costs.

*Mr. Bell* and *Mr. Horne* for the plaintiff in the supplemental bill.

*Mr. Benyon* for the plaintiff in the original bill and defendant in the supplemental bill.

*Mr. ———* for George Cuming, the defendant to the supplemental bill.

On the part of the vendee, it was insisted, he was entitled to the rents and profits of the estate from Lady-day, 1808; and that an inquiry ought to be made what rents and profits he had received, or which, without his willful default, he might have received. On the part of the vendor it was contended that the vendee was only entitled to such rents and profits as he had received, which, owing to the conduct of Pitts, who continued as tenant after Lady-day, 1808, were very deficient; and that possession of the premises had been taken by the vendee. It was denied, however, on the part of the vendee that he had taken possession. The vendor also claimed the interest which had been made on the purchase-money, the same having been laid out in exchequer bills, though not with the consent of the vendor.

The VICE-CHANCELLOR. The Master having reported that a good title can be made to this estate, and that David Cuming, deceased, the defendant to the original bill, could make a good title before the filing of the original bill, Mr. Acland, the plaintiff in that suit, must pay the costs of it, and so much of the costs of the supplemental bill as relate to the original suit; but I shall not give any costs in the

supplemental suit. One question is, what interest Acland is to pay on his purchase-money. It has been contended that he should pay £5 per cent. on his purchase-money, because he, in a letter, stated in the original bill, and admitted in the answer to that bill, applied to Cuming for his consent to lay out the purchase-money in exchequer bills, to which Cuming returned no answer; but in fact the purchase-money was laid out in exchequer bills. This does not vary the general rule. Cuming not having assented to the purchase of the exchequer bills, Acland was alone subject to all the risk;<sup>1</sup> and the plaintiff in the supplemental bill cannot now claim the benefit of that purchase; but Acland must pay his purchase-money, with £4 per cent. interest. Another question that has been made is, whether the decree should not go farther than in ordinary cases, and direct in favor of Ackland an account of the rents and profits of the estates, which were, or which, without his willful default, might have been, received.

I have not found any authority which determines what is to be done with the estate during the interval when the title is under dispute, during the suspension of an executory contract. In equity, an estate agreed to be purchased is considered as the estate of the purchaser from the time of the contract, and the purchase-money from that time is held to belong to the vendor; but with respect to possession, there is no change in the notion of equity until the purchase-money is paid. The vendor has a clear right to keep possession until the purchase-money is paid; if the purchaser enters before he has paid his purchase-money he is a trespasser.<sup>2</sup> *Quoad* possession, the estate belongs to the vendor—it is not the estate of the vendee for the purpose of possession; for though in many cases the purchaser is responsible, as if there be a fire,<sup>3</sup> still as to possession the right is in the vendor till his purchase-money is paid.

What has been decided as to responsibility for the purchase-money? If the purchaser suffers the money to lie dead it is matter of indifference to the vendor. Why? Because the vendee, having the money, must take care to employ it. *Roberts v. Massey* is an authority to show that the vendor is entitled to his purchase-money and interest, though the vendee has kept it at his bankers unemployed. The vendor, therefore, may call for interest upon his purchase-money, although the vendee has suffered it to lie dead. Then, to pursue that principle, must not the vendor, the legal owner of the estate, by a parity of reasoning, take care of the purchased estate? He must.

<sup>1</sup> *Roberts v. Massey*, 13 Ves. 561.

<sup>2</sup> See *Crockford v. Alexander*, 15 Ves. 138.

<sup>3</sup> See *Paine v. Meller*, 6 Ves. 349, and *Poole v. Shergold*, 2 Bro. C. C. 118.

If he has received rent he must account for it; if he has suffered tenants to run in arrear he is responsible for the loss thereby occasioned. If possession of the estate was given, or any tender of possession was made to the defendant, or the defendant exercised acts of ownership over the premises, that may make a difference. These facts are not now before me. If the parties wish, they must be inquired into.

The order on further directions was :

“ That it be referred to the Master to compute interest on the sum of £2,900, the purchase-money for the estate and premises comprised in the said agreement, after the rate of £4 per cent. per annum from the 25th day of March, 1808, the time when the purchase-money was to have been paid. And it is ordered that the said Master do inquire and state to the court whether any tender of possession of the said estate and premises was made to the plaintiff at Lady-day, 1808, and if so, whether the same was accepted or declined, and whether the same tenant continued in possession of the said estate and premises, and at the same rent, and by whom and for whose use such rent was received, and up to what time, and what arrears are due, and from whom and from what cause those arrears have accrued, and whether any notice was given of the said tenant being in arrear; and whether the said Thomas Palmer Acland, the purchaser, has since the agreement exercised any acts of ownership over the said estate and premises; and in case any special circumstance shall arise in making the said inquiries the said Master is to state the same to the court; and, for the better discovery of the matters aforesaid, the parties are to produce before the Master, upon oath, all books, etc., and are to be examined upon interrogatories as the said Master should direct; and it is ordered that the said Master do tax the costs of the late defendant, David Cuming; and also the costs, to this time, of the said Jane Gaisford, the executrix of the said late defendant, so far as the same relate to the original suit of Acland against Cuming, etc. And this court doth not think fit to give any costs on either side in the said supplemental suit of Gaisford against Acland; and this court doth reserve the consideration of all further directions, etc.”

## ESDAILE v. STEPHENSON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., DECEMBER 19, 1822.

[*Reported in 1 Simons and Stuart 122.*]

THIS was a suit for the specific performance of an agreement for the purchase of an estate.

The conditions of sale stipulated that, if the conveyance was not executed by the necessary parties, and the purchase-money paid, on or before the 24th day of December, 1819, the purchaser should pay interest on the purchase-money, at £5 per cent., until the purchase should be completed. The estate was subject to quit rents, for which the Master had reported the proper compensation to be made out of the purchase-money.

The cause now came on for further directions.

*Mr. Sugden*, on behalf of the purchaser, insisted that it was the fault of the vendor, that the purchase had not been completed at the time stipulated in the conditions, and that he ought not, therefore, to benefit by his own delay, by taking the subsequent interest at £5 per cent., which was much more valuable than the mesne profits of the estate. He also insisted upon the hardship of compelling a purchaser to complete his contract, where there were quit rents on the property: on account of the difficulty it occasioned upon a re-sale of the estate in lots, where every purchaser who was not to pay the whole quit rents was to be indemnified in respect of the part not to be paid by him.

The VICE-CHANCELLOR. Where there is no stipulation as to interest, the general rule of the court is, that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time, and shall from thence pay interest at £4 per cent., taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, there, to give effect to the general rule, would be to enable the vendor to profit by his own wrong; and the court, therefore, gives the vendor no interest but leaves him in possession of the interim rents and profits.

In the present case, the interest does not depend upon any rule of the court, but upon the express stipulation of the parties; and the terms of that stipulation apply to every delay however occasioned. It is highly probable, but I cannot in reasoning assume it as a necessary consequence, that the interest must, under all circumstances, exceed the mesne profits, so as to infer from thence that the true intention of the parties must have been that the purchaser should pay interest at £5

per cent., only when the delay in completing the contract was occasioned by himself. The purchaser must, under the circumstances of this case, pay interest according to the terms of the conditions of sale.

With respect to the other point, I admit the hardship insisted on by the purchaser in this case. But it is now settled, that quit rents are subjects of compensation, probably, because they may be regarded as incidents of tenure. Rent charges are not incidents of tenure, but are created by the voluntary act of the vendor, or those under whom he claims. And it would be a good rule, that a purchaser should not be bound to complete his purchase, unless they were noticed in the agreement or conditions of sale. I fear that the habit of the court has been not to proceed upon this distinction between quit rents and rent charges, but to compel the purchaser to complete where the rent charge is small.

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KERSHAW v. KERSHAW.

IN CHANCERY, BEFORE LORD ROMILLY, M.R., DECEMBER 10, 1869.

[*Reported in Law Reports, 9 Equity Cases 56.*]

THIS was a suit for the administration of the trusts of the will of a testator named Ralph Kershaw. It appeared that a portion of the real estate of the testator had been sold under a contract which was partly as follows: "Amount of purchase-money, £38,500. Purchase to take effect from 30th June, 1868, and interest at 5 per cent. to time of payment, and timely notice to be given as to requirement of the purchase-money."

The purchaser was let into possession on the 30th of June, 1868. Difficulties afterwards arose in completing the purchase by reason of an annuitant, who was entitled to an annuity charged on the property, being resident abroad. On the 12th of November, 1868, the purchase not having been completed, the purchaser gave notice to the vendors that he had appropriated for the purposes of his purchase, and transferred to a separate account at a bank, the sum of £38,000; and that he was ready to complete the purchase, and would not pay interest under the contract. On the 13th of November, 1868, the vendors replied as follows: "We beg to acknowledge the receipt of a notice from you in this matter, dated the 12th instant, the sufficiency of which however we dispute."

In September, 1869, the purchaser discovered that he ought to have paid £38,500 into the bank; and thereupon he paid into the bank the sum of £500, with interest at 5 per cent. up to that time.

The purchase-money had since been transferred into court, and the vendors now applied by summons that the purchaser might be ordered to pay interest at 5 per cent. on the purchase-money from the 30th of June, 1868, to the time when the payment into court was made.

*Mr. Hamilton Humphreys, Mr. Southgate, Q.C.*, with him, for the vendors.

*Mr. Jessel, Q.C.*, and *Mr. Ince*, for the purchaser, were not called upon.

LORD ROMILLY, M.R. It is quite clear that if the purchaser had paid £38,500 into his bankers to a separate account, and said that it was lying idle, that would have stopped the interest; and if the vendors wished for interest they ought to have called on him to invest it. There is nothing in the contract to make him liable for interest after appropriating the purchase-money in this way. Then what he does is this: he pays in £38,000 only; and the vendors write this letter in reply to his notice:—[His Lordship read it.] It is to be observed that they do not tell him that he has not paid in enough; all that they say is that the notice is not sufficient. The case is quite different from that of *Winter v. Blades*; there the purchaser had simply a floating balance at his bankers; but here this sum of £38,000 was throughout appropriated to the purchase. Then the vendors say nothing about the deficiency, and after a while the purchaser finds out the defect, and pays in £500 and interest. I think that in substance he paid in the whole purchase-money on the 12th of November, 1868, and that the slight defect which there was at first he has completely repaired. Therefore, I do not think he is chargeable with interest after the 12th of November, but he must pay to the vendors any interest he may have received from the bank in respect of the sum which he paid in.

Solicitors: *Messrs. Johnson & Weatheralls; Messrs. Clarke, Woodcock & Ryland.*

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### KING v. RUCKMAN.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY,  
NOVEMBER TERM, 1873.

[*Reported in 24 New Jersey Equity Reports 556.*]

*Mr. W. L. Dayton* and *Mr. C. Parker* for King.

*Mr. Vanatta* and *Mr. Browning* for Ruckman.

The opinion of the court was delivered by the CHIEF JUSTICE.

This is not the first occasion that this controversy has called for the attention of this court.

The bill was filed for the specific performance of a written contract, whereby Elisha Ruckman agreed to sell and convey certain lands to Benjamin W. King, the complainant. The vendor refusing to make the stipulated conveyance, the suit in chancery was begun. The judgment in the first instance was unfavorable to the complainant, but that result being disapproved of was reversed in this court, and the defendant was accordingly directed, among other things, to make a conveyance in conformity to his contract. The proceedings having been remitted to the Court of Chancery, a reference was made to a Master to ascertain certain particulars. On the coming in of the report of this Master, his finding was excepted to by both parties, and it is from the final decree of the Vice-Chancellor, following on this report and the exceptions to it, that the present appeals have been taken. This decision stands now before this court subject to exceptions as well on the part of the complainants as on the side of the defendants.

Of the questions thus arising, by far the most important one, considered with respect to these litigants, is that relating to the claim made by Mr. Ruckman, the defendant, to an allowance of interest on the purchase-money. The articles of agreement bear date the 12th day of May, 1868, and stipulate for the following payments, viz.: \$100 on the execution of the contract; \$19,900 in cash on the first day of June then next; \$80,000 in cash on the first day of July then next, on the delivery of the deed, and the residue to be secured by a bond and mortgage, payable in five equal annual payments, from the date of said agreement, with interest at six per cent. per annum, payable semi-annually. The agreement on the part of the vendor was that, on receiving such payment and such securities, he would execute and deliver to the vendee a deed of general warranty, conveying the premises in fee, free from incumbrances.

The number of acres of land which, by the decree of this court, the defendant was directed to convey has been ascertained to amount to one thousand three hundred and fifty-three acres and seventy-seven hundredths, so that the total contract price is \$372,286.75. The contention of the defendant is that interest on this sum should be awarded to him in the same manner as though he had complied with his contract, and had executed a deed and put the complainant in possession of the property, as he agreed, on the 1st day of July, 1868. The lands during this interim have been, comparatively, unproductive, the Master reporting that the rents and profits have been equalled by the taxes.

The Vice-Chancellor rejected this claim of the defendant, and I think such rejection is clearly justifiable on grounds both of natural and legal equity. The proposition that when unproductive lands are agreed to be sold, the vendor, breaking his contract, can refuse to con-

vey, and thus keep the vendee from the use or improvement of the property, and when at last compelled to perform his agreement by the decree of a court may throw the loss, in the form of accumulated interest, on the innocent vendee, appears to me to be devoid of even a color of justice. Such a principle would cast the burden on the innocent instead of on the faulty party. Even when the intention of the vendor has been blameless, and when he has refused to comply with his engagement from an honest belief of his right so to do, if a loss ensues in consequence of such refusal, such loss should be borne by him. The common rule of the law is that where one of two innocent parties is to bear a loss he must bear it through whose act such loss has occurred. That a vendee, kept out of the possession of unproductive lands, must always be placed at great disadvantage is undeniable. And yet much of the argument in the present case proceeded on the idea that because these premises have, since the sale, advanced in value, the complainant has suffered no injury by being kept out of possession. But this is altogether false reasoning. The change in value has nothing to do with the point. If the vendee had been put in possession the same change would have occurred. The injury to him is that he has, by an illegal act, been deprived of the enjoyment of the property for over five years, and if he should pay the interest claimed, he will pay precisely the same that he would have paid if he had been in possession during this long period. I do not see how any one can deny that this deprivation of enjoyment and of title is a matter of concern to a vendee. Who can say that in the present case the interest of this vendee would not have been greatly promoted by having had the opportunity to sell or improve these lands? But it seems futile to spend time in any argument to show that a present title and a present possession of real property, in contrast to a precarious expectation of a future title and possession, are valuable interests, the withholding of which is necessarily attended with great risk of disaster and detriment. The complainant, by the misconduct of the defendant, has suffered this wrong for over five years, and it is now insisted that the loss resulting must be borne exclusively by the complainant, and that the defendant should be placed, by a court of equity, in the precise situation that he would have been in if he had performed his contract to the letter. As I have said, I see no justice in such a demand, and if the question was now to be settled on principles of common sense and right, I should, on that ground, be prepared to reject it. But such is not the case, for, in my estimation, the rule applicable to the case is not, and never has been, in any doubt whatever. The equity of the situation has been so clear that the course of practice seems to have assumed from the first a settled form, and it has been continued to the present day without, so



far as I have learned, any voice of dissent or even of criticism being heard.

This general theme, as to when a vendee will be required to pay interest on the purchase-money, is discussed at large in the text books, and the rules which are applicable in general or in particular conjunctions are there defined and elucidated. Among the principles there stated will be found the one at present applicable, and with which alone I shall attempt to deal.

The rule which I deem apt in this instance is thus expressed by Lord St. Leonards, viz. : "Where interest is more in amount than rents and profits, and it is clearly made out that the delay was occasioned by the vendor, to give effect to the general rule would be to enable the vendor to profit by his own wrong ; and the court, therefore, gives the vendor no interest, but leaves him in the possession of the interim rents and profits."<sup>1</sup>

The Vice-Chancellor has applied this rule to the present case, and the questions are as to the existence of the rule and the propriety of its application.

As to the first question, with regard to the existence of the rule, as I have already said, I do not know that its prevalence, whenever applicable, has on any occasion, either in a dictum or judgment, been challenged or gainsaid. That the vendee, if kept out of possession by the vendor, would not be charged with interest was referred to as a settled rule by Lord Hardwicke in the case of *Blount v. Blount*,<sup>2</sup> and from that time to the present this rule can be traced in constant use through a long line of decisions. The briefs of counsel in the present case point to many of these adjudications, which are so clearly to the purpose that I think it is necessary for me only to make this general reference to them.

I consider, then, the rule to be indisputable ; why, then, is it not applicable to this case ?

This rule, as I conceive this subject, is put in force in every case in which these three qualities enter ; first, the rents and profits must fall below the interest ; second, the delay must be the fault of the vendor ; and, third, the vendee must be out of possession. I do not find that in any case in which these three elements exist interest has been exacted. That these elements are present in the case now before us is, of course, beyond denial.

But in ease of the pressure of this settled practice it has been intimated, in the course of the present discussion, that in order to put the rule in force it was necessary that the vendor should not only be in fault, but that such fault should be willful. I think there is not the

<sup>1</sup> 2 Sug. V. & P. (8th Amer. ed.), p. 322, § 24.

<sup>2</sup> 3 Atk. 636.

least foundation for such a contention. Indeed, the rule has been almost universally applied in those instances when there was no suggestion of anything intentionally wrong in the conduct of the seller of the property. It has received its most frequent exemplifications in cases in which the delay in completing the contract has arisen from the discovery of latent defects in the title. On such occasions the vendor was no further in fault than every one is in fault who undertakes to do what he afterwards discovers he is not prepared to do. In such cases a vendor is blamable simply for having perhaps omitted to have his title looked into with sufficient care. These illustrations make it demonstrably clear that the point as to the degree of the culpability of the vendor has not, in the least, affected the course of equity in the particular in question. The only inquiry has been whether the vendor has failed to fulfill his contract. Whether such nonfeasance was the result of an act of volition, or of his inability, has not been deemed of any consequence. In the case of *Jones v. Mudd*,<sup>1</sup> which is one of the examples of the rule referred to by Mr. Sugden, there was no entire absence of any willful refusal, on the part of the vendor, to carry his agreement into effect, and yet interest was denied to him during the time that he had been unable to perfect his title. I regard that case as not distinguishable from the present one. The agreement was that Jones would deliver a satisfactory abstract of title, and that he should afterwards, at a fixed time, upon receiving part of the purchase-money and security for the residue, convey the property, the vendee agreeing to pay, upon receiving such conveyance, such part of the price, and to secure the residue by a mortgage drawing interest at a certain rate. The abstract of the title proved unsatisfactory, and it took a considerable time to have it perfected. Here there was a case of fault in the vendor, but a fault of the slightest kind, and it was not even hinted that the delay was willful on his part. The vendor claimed interest on the purchase-money, and it was denied to him. If, in the present instance, the defendant, instead of being in willful default, had been willing to perform his contract, but had been unable to do so on account of the state of his title, this case and the reported case would have been parallel. As long as the case of *Jones v. Mudd* shall be suffered to stand as a legal precedent, I cannot think that it can rationally be denied that when the default is on the side of the vendor, no matter how involuntary such default may be, he can have no just claim to an allowance of interest.

And, indeed, so completely was it the established course to refuse interest to a vendor who failed to convey, from whatever cause, that when the parties desired a different result it was found to be necessary

<sup>1</sup> 4 Russ. 118.

to introduce in their articles of sale a special agreement with that aspect. These clauses are of frequent occurrence in the reports, and have been construed in several of the decisions, and were to the effect that interest should be paid from a fixed time, whether or not the title was delayed from being passed on any ground whatever. This is a prominent feature in the cases of *Esdaille v. Stephenson* ;<sup>1</sup> *De Visme v. De Visme* ;<sup>2</sup> *Sherwin v. Shakspeare*.<sup>3</sup> Now the purpose of these stipulations is obvious: it was to make the vendee pay interest for which he would not have been liable, that is in case of an involuntary delay of the vendor in making title. And this has been the adjudged construction of them. For example, where the term of the contract was "that if from any cause whatever the completion is delayed, the purchaser must pay interest," it was held that if the delay arose from the voluntary act of the vendor the obligation to pay interest did not attach. It was considered that the clause applied only when the delay proceeded from a circumstance outside of the volition of the seller. Such was the view taken in *Williams v. Glenton*,<sup>4</sup> the Master of the Rolls saying, in connection with one of these special clauses, "the exception is this, that when the delay is occasioned by the misconduct of the vendor it is inequitable that he should profit by his own wrong, and consequently, in such cases, the terms of the contract must be varied, or if not varied, it must be understood to imply that the words used include every case except the misconduct of the vendor." To the same effect are the other cases already cited. And the introduction into contracts of sale of these special clauses afford a striking proof of how entirely the general rule of equity was established; it required a particular agreement to entitle the vendor to interest when involuntarily in default. And it was exclusively in connection with these special stipulations for interest that the question whether the default of the vendor was willful or was involuntary arose and was discussed. Under contracts providing for the payments of interest, whether or not from any cause whatever a delay occurred in passing the title, it manifestly was a point for consideration whether such provision was intended to apply to delays willfully or fraudulently occasioned by the vendor. As we have seen, the judicial result was that even these special agreements, notwithstanding their broad language, did not extend to a result brought about by a willful breach of contract on the part of the vendor. It therefore follows that if we were to import into the present case a precise stipulation on the part of the complainant to pay interest on the purchase-money, notwithstanding any delay in making the title, still, by force of the limitation put upon such an agreement, by the adjudged cases,

<sup>1</sup> 1 Sim. & Stu. 123.<sup>2</sup> 1 Macn. & G. 336.<sup>3</sup> 17 Beav. 267.<sup>4</sup> 34 Beav. 531.

the claim which the defendant, on this point, makes would have to be disallowed. But there is no such special contract in the case, and the result is that if the non-performance of this contract had been involuntary on the side of the defendant, but had come about from some unforeseen circumstance, no claim of interest could have been listened to. This is the settled rule as I read the authorities. But this court has already adjudged that this defendant willfully refused to carry out his contract. How is it possible then to contend that the loss coming from that misconduct is to be borne by the complainant who, in this matter, has done no wrong? It is scarcely necessary to say that the circumstance that the purchase of the land has proved a fortunate enterprise or the reverse has never, in the decision of these questions, entered into the judicial consideration.

Being satisfied that the rule in question is entirely established as a part of our system of laws, and that it is applicable in this present instance, my conclusion is that the result reached on this head in the Court of Chancery is correct.

The next exception made by the defendant to the decree appealed from relates to its provision directing a portion of the price to be secured by a mortgage. By the terms of the article of agreement the residue of the purchase-money, after the payment of the first three installments, was to be secured by a mortgage on the premises, payable, with interest, in five equal annual sums from the date of the agreement, which date was the 12th of May, 1868. The Vice-Chancellor has directed that on the execution of the conveyance for these lands a mortgage should be executed which will give to the purchaser the same time and modes of payment, after he acquires title, which he would have had after such event if the transaction had been closed in accordance with the compact between these parties. This part of the order is put in dispute by the defendant on the ground that this works an alteration of the contract, and that all that the court can rightfully do, on a bill of this character, is to order the agreement such as it was to be specifically performed. But this objection certainly is not tenable. The contract, on this point, cannot now be carried into effect. The stipulated time for the giving of the title on the one side, and the mortgage on the other, has gone by, and is irretrievable. From the necessity of the case there must be something substituted in this respect for what the parties agreed. It is impracticable to execute the contract in this particular, except upon the doctrine of *cy pres*. The decree, in this feature of it, goes upon the theory that the stipulation for time for the payment of the residuum of the price, after the acquisition of the title by the purchaser, was a substantial part of the agreement, and it seems to me that this is well founded in the merits of the case. After a vendee gets title and

the possession, he is then in a position to turn the land to account in the way of raising money. He can, either in whole or in part, sell or mortgage it. The complainant in this case was, by force of his agreement, entitled to this advantage, and I therefore entirely assent to the view of the Vice-Chancellor, that he ought not to be deprived of it by the misconduct of the other party.

This disposes of the grounds of appeal which were urged in behalf of the defendant.

With respect to the exceptions taken to the decree on the other side, I do not think any one of them is well taken. I shall dispose of them in a few words.

The complainant has been directed to allow the expenses of making the roads and fences. These improvements of the property cannot be looked upon as voluntary ; the roads were made by the public authority, and the fences are incidents of them. They enter into the value of the corpus of property which will go to the complainant, and under the circumstances it is just that he should pay for them.

With respect to the lands not conveyed. I think these lands are embraced in the contract. Parol contracts are not void, they are merely, by force of the statute of frauds, unenforceable by suit ; but they can exist, and it is admitted both in the bill and in the answer that they are embraced in this agreement. But it seems to me that an equitable compensation has been made to the complainant for these lands. He has been exempted from the payment of \$275 per acre for them, which was more than their average value when they should have been conveyed to him. Without attempting to lay down any general rule upon the subject, I will say that I am not satisfied that this does not fully satisfy the equities of this case. The last objection related to charging the annual taxes for the land against the complainant. These taxes are so large that they absorb the whole of the annual profits of the property, so that it seems to me that they ought not, as between these parties, to be regarded as a render paid to the public for the mere enjoyment of the possession. They have been obviously imposed in view of the value of the fee in the land, rather than with any reference to the mere usufruct. They have, therefore, been properly charged to the complainant. If the sum estimated on this score comprises, in part, taxes for lands not embraced in this controversy, that matter, it seems to me, should be corrected on an application to the court below. From the case as it is now developed before this court it would seem that this point has been started, in a specific form, for the first time, on this appeal. The petition of appeal objects to the entire allowance for taxes rather than to any particular part of it. A matter which is thus wrapped up in the proceedings, and which has not received a distinct

adjudication, should not be made a subject of appeal. If a small error creeps into a Master's report, and such error is not pointed out to the Chancellor, and a general decree is made, it does not seem to me that such decree can be attacked in this court by reason of such minute defect.

In my opinion, the decree in this case should be affirmed, each party paying his own costs in this court.

The whole court concurred.

## BENJAMIN LOMBARD v. THE CHICAGO SINAI CONGREGATION.

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, 1874.

[*Reported in 75 Illinois Reports 271.*]

APPEAL from the Superior Court of Cook County ; the Hon. SAMUEL M. MOORE, Judge, presiding.

This was a bill in equity, filed by Benjamin Lombard against the Chicago Sinai Congregation, for specific performance. The case was before this court once before, and is reported in 64 Ill. 477. The decree of the court below was then reversed and the cause remanded, and upon the second hearing a decree was rendered in accordance with the opinion of this court. The complainant, not being satisfied with the decree, again brings the record here by appeal.

*Messrs. Harding, McCoy & Pratt* for the appellant.

*Messrs. Rosenthal & Pence* for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court :

This cause comes before us on a second appeal, and for a brief historic view of the case reference is made to the former opinion, 64 Ill. 477.

It was there held the vendee, Lombard, was entitled to have a specific performance of his agreement, of the date of September 15, 1871, with the Sinai Congregation, for the purchase of the premises in controversy. That agreement contained a clause, in case legal objections were interposed to the title, it should be optional with the congregation to return the earnest money and declare the agreement cancelled, or make the title good. Before any election had been made, the buildings, together with the contents of the property, were destroyed by fire on the 9th or 10th of October, 1871. On this branch of the case this court decided, under the circumstances, the purchaser was entitled to maintain his bill to obtain so much of the property agreed to be sold as he could get, and

to obtain compensation, to be deducted from the purchase-money, for that portion of it destroyed pending the option of the vendor.

It appeared, on the former hearing, the vendor had supplied all defects suggested in the title, by the 17th day of February, 1872, and on the third day of April tendered a deed to the vendee in compliance with the terms of the contract. This deed was not accepted, principally for the reason the vendee insisted upon compensation for that portion of the property destroyed, which the vendor was unwilling to concede. It may be there were objections to the form of the deed itself, but they were such as could have been readily corrected had they been pointed out, and no doubt would have been, had the question of compensation been adjusted. The vendee, by his bill, seems to have conceded the title was good in the vendor; at least on the fifth day of April he filed his bill to enforce specific performance of the agreement. Having determined the vendee was entitled to relief, a question arose from what date interest should be allowed on the purchase-money. It was decided that inasmuch as the interest was considerably more than the rents and profits, the case should be controlled by the English rule, which holds the vendor should be left in possession of rents and profits until a good title should be shown, and from that period only will the vendor be entitled to interest, and the purchaser to rents and profits. On the remandment of the cause the court decreed in accordance with the directions indicated in the opinion.

One objection taken to the decree is, that the compensation found for that portion of the property destroyed is inadequate and against the weight of the evidence. We have examined with care the testimony in the record, and we see no reason to be dissatisfied with the finding of the court. Indeed, we think it is quite as liberal as the evidence, considered all together, would warrant. Had these buildings escaped the fire that had laid waste everything in the vicinity, no doubt they would have rented for considerable sums for a brief period, but that fact would afford no safe criterion by which to estimate their real value. The amount found is all the property is proven to have been worth—certainly it is not so far out of the way as would justify a reversal of the decree for that reason.

The court allowed interest on the balance of the purchase-money, after deducting the amount allowed for compensation for the property destroyed, from the 5th day of April, 1872, and charged the vendor with reasonable rents and profits from the same date, although none had actually been received. There was no error in this. It is in accordance with our previous conclusion, and we perceive no just reason for departing from it. The title had then been perfected, and according to the

principle of the former opinion, in equity the property was to be regarded as the property of the vendee, subject only to the rights of the vendor under the contract.

On the hearing, by leave of the court, an amendment was filed to obviate the concession previously made, that the title was good in the vendor, and whether or not any answer was filed in apt time denying the allegations of the amended bill, the vendee ought not, by a subsequent amendment, be permitted to deny the state of facts upon which he had obtained a decision favorable to his interests. Besides, we do not understand any valid objection existed as to the title of the vendor, and whatever objections could justly be taken as to the form of the deed tendered, could have been readily obviated had they been pointed out. We are satisfied with our former conclusion on this branch of the case, and have no inclination, nor do we see any necessity, to investigate it anew.

Finally, it is insisted the court erred in compelling the vendee to pay, by a day fixed, the matured payments. It is not perceived how the court could have decreed otherwise. The installments had then become due according to the terms of the contract the vendee was seeking to enforce, and the court possessed no authority to extend the time of payment. The contract could only be enforced as the parties themselves had made it.

The decree is right in every particular, and must be affirmed.

Decree affirmed.

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### BALLARD v. SHUTT.

IN THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE,  
JULY 12, 13, 1880.

[*Reported in Law Reports, 15 Chancery Division 122.*]

THIS was an action by a purchaser for the specific performance of an agreement to sell land situate near Accrington.

It was admitted that there must be a decree for specific performance of the contract set out and sued upon. But the defendant contended that the plaintiff was bound to pay interest on the purchase-money from the 28th of January, 1875, on which day the defendant alleged that possession was taken by the plaintiff, and on this point the plaintiff joined issue.

The evidence on this point showed that the plaintiff had put up a notice-board on the land announcing that it was to be let or sold for building purposes, and that application for information should be



made to him, and had negotiated some contracts with reference to the land, but he had never entered into actual possession of the land, nor received any rents or profits from it, the land being waste or building land, of which one George Barlow (who made an affidavit in the action to that effect) had for several years had the free use as a run for poultry and other domestic purposes, without paying any rent to any one for it.

*Cookson*, Q.C., and *Stock* for the plaintiff.

*North*, Q.C., and *Hamilton Humphreys* for the defendant.

*Cookson* in reply.

DENMAN, J., after stating the matter in dispute, continued:

I think that the plaintiff was in his right when he brought the action for specific performance, and that he remained in the right down to the time when he declined to pay interest on the purchase-money; at least so far as any defense raised in the action is concerned. But upon the main question argued before me, viz., whether the plaintiff is liable to interest on the purchase-money from the 28th of January, 1875, I am of opinion that he is so liable. It appears that as soon as the agreement was signed he erected a notice-board on the land announcing that it was to be let or sold, and referring to himself for information, and that he actually entered into contracts relating to the land. Putting the best construction I can upon the evidence, I come to the conclusion that he did this intending then and there to assume the ownership of the land and to deal with it as his own.

It was said that the rule of equity that the purchaser shall pay interest on the purchase-money from the time he takes possession does not apply to this case, because there was no profit by the plaintiff out of the land.

I can find no such distinction drawn in the cases upon the subject. It is true that in many of the cases, notably in *Birch v. Joy*,<sup>1</sup> the purchaser was not only in possession, but also in actual receipt of rents and profits; but where possession of land of which there are no tenants is taken by a purchaser pending delay in the completion of the purchase, even though such delay be attributable to the vendor, especially where, as in the present case, he takes possession with a view to making a profit out of the land, I apprehend there is the same reason as in the other case that the vendor should not remain without the land and also without interest upon his purchase-money.

The doctrine that possession by the purchaser cannot give the vendor a right to interest unless profit is actually made, seems to me to

<sup>1</sup> 3 H. L. C. 565.

be inconsistent with the case of *Rhys v. Dare Valley Railway Company*,<sup>1</sup> founded as that case is not merely on the ground of the statute, but upon the authority of *Fludyer v. Cocker*<sup>2</sup> and *Attorney-General v. Christchurch, Oxford*,<sup>3</sup> in both of which it was in effect held that the taking of possession carries with it the liability to interest in the absence of any stipulation to the contrary.

I think, therefore, that the plaintiff was wrong in insisting upon his non-liability to interest, and inasmuch as it is clear that the whole of the proceedings subsequent to the date when he so insisted have been occasioned by his own mistake in that respect, and that he might have obtained the whole object of his suit at that time with all costs then incurred, I think it would be unjust to saddle the defendant with any costs incurred subsequently to that date.

Solicitors for plaintiffs: *Dixon, Ward, Letchworth & Wells.*

Solicitors for defendants: *Johnson & Wetherall.*

## WHITE v. NUTT.

IN CHANCERY, BEFORE THE LORD KEEPER, MICHAELMAS TERM,  
1702.

[*Reported in 1 Peere Williams 61.*]

ONE by articles, reciting that he had an estate for two lives in a church lease, covenanted to convey his title to the premises by such a day to J. S. as J. S. or his counsel should advise.

It happened that after the articles and before the time appointed for the conveyance one of the lives dropped. And the question being upon whom the loss should fall.

It was decreed per LORD KEEPER:<sup>4</sup> That in regard here was no default in the seller in making the conveyance, the loss of the life ought to be borne by the purchaser in the same manner as if the reversioner had articted to sell the reversion expectant upon two lives, and one of them had died before the conveyance the purchaser should there have had the benefit of it; and in each case in equity the estate is as conveyed from the time of the articles sealed.

But His Lordship seemed to think that if all the lives had dropped before the execution of the conveyance it might have been another

<sup>1</sup> Law Rep. 19 Eq. 93.

<sup>2</sup> 13 Sim. 214.

<sup>3</sup> 12 Ves. 25.

<sup>4</sup> Reg. Lib. B. 1702, fol. 47.

consideration, for that the money was to be paid upon the conveyance, and no estate being left, there could be no conveyance.<sup>1</sup>

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PAINE v. MELLER.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 22, 1801.

[*Reported in 6 Vesey 349.*]

UPON the 1st of September, 1796, the plaintiffs sold to the defendant by auction some houses in Ratcliffe Highway, upon the usual terms, a deposit of £25 per cent. and a proper conveyance to be executed upon payment of the remainder of the purchase-money at Michaelmas next. The premises were, with others, subject to certain annuities; but a trust of stock was declared for the payment of these annuities. The first abstract delivered was clearly defective; so that the purchase could not be completed at the time. A farther abstract was delivered to the solicitor for the defendant at the end of September or the beginning of October. He insisted upon having a release from the annuitants. The treaty continued through October; and about the end of that month the defendant's solicitor agreed to waive all objections, if the plaintiff would allow him eleven guineas, and if the trustees of the stock would join in the conveyance; and refused a proposal to give up the purchase. The plaintiff agreed to make the allowance desired. On the 4th or 5th of November the defendant's solicitor sent a draft of conveyance. The trustees of the stock were prevailed upon to join in the conveyance by a new declaration of trust. The draft was returned to the defendant's solicitor; the deeds were engrossed; and upon the 16th or 17th of December he declared himself satisfied with the title, and said the deeds would be ready in two or three days, and that he should complete the purchase under the promise of the eleven guineas. Upon the 18th of December the houses were burned, the insurance having been suffered to expire at Michaelmas, 1796. On the 20th of December the defendant's solicitor wrote a letter, observing that he had taken an objection to the freehold title, and should not have thought anything more of the purchase but for the covenant of indemnity from the trustees, inserted in the draft by him, and approved by one of the trustees of the stock; but as that had been struck out by another trustee, he could not advise his client to accept the title, and he should call for the deposit.

<sup>1</sup> If I should buy an house, and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house.—Sir Joseph Jekyll, M.R., *Stent v. Bailis*, 2 P. Wms. 217, 220.—ED.

The bill was then filed, praying a specific performance of the contract ; and a decree was made by the late Lord Chancellor, simply referring it to the Master, to see whether a good title could be made. This decree was dissatisfactory to both parties as not deciding the question ; and a petition of rehearing was presented by the plaintiff.

*Mr. Mansfield* and *Mr. Cox* for the plaintiff.

*Mr. Sutton* and *Mr. Lewis* for the defendant.

LORD CHANCELLOR. The abstract first delivered was undoubtedly imperfect in certain respects. It did not go back farther than forty-three years, and there was no specific mention of the property in Ratcliffe Highway in the abstract. There was also the objection upon the annuities. Unquestionably that abstract was not satisfactory, and the express condition of the sale could not be complied with. Of course the defendant could not be called on to pay his purchase-money. Then it was with the vendee to choose to go on with the bargain or to put an end to the contract. The agent, however, chose not to put an end to it, and though a circumstance took place at Michaelmas sufficient to put an end to any action of law, the contract was kept alive, at least to the 10th of December. It is clear the objection was given up as to the freehold title ; and the only difference was as to the indemnity against the annuities, affecting these with other premises. I do not consider whether this objection is of form or substance, but leave it to be determined, when it may be necessary, whether the purchaser under such circumstances has not a right to insist that the annuitants shall release the premises ; or, whether this court will say, under all the circumstances, the purchasers shall take the premises burdened with the annuities with a great number of others, and seek their indemnity against the trust property and the trustees ; if they preferred a personal covenant by the trustees. If in equity these premises belonged to the vendee, he would have a title to the rents and profits at Michaelmas by relation ; and he must pay the purchase-money with interest from that time. First, it is said, the title was never accepted in fact ; secondly, if not, under these circumstances a court of equity will not compel a specific performance. As to the second point the objection is grounded upon two circumstances : First, the simple fact of the fire ; secondly, that the premises had been insured prior to the contract ; that that fact, and the fact that the insurance expired at Michaelmas, 1796, were not disclosed, and that the premises afterwards remained uncovered by any insurance. The authority of Sir Joseph Jekyll has been mentioned ; but no case has been cited in support of that *dictum*, and it is in a degree suggested, not admitted at the bar, that it may be considered overruled by subsequent cases. As to the mere effect of the accident itself no solid objection can be founded upon

that simply, for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London docks, and that house was burned, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it. As to the annuity cases and all the others the true answer has been given, that the party has the thing he bought, though no payment may have been made, for he bought subject to contingency. If it is a real estate, he, of course, has it. Then as to the non-communication, I cannot say, that in my judgment forms an objection, for I do not see how I can allow it, unless I say this court warrants to every buyer of a house that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value or near it. The question, whether insured or not, is with the vendor solely, not with the vendee, unless he proposes something upon that and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured. I am therefore of opinion that if the agent on behalf of this purchaser did accept this title previously to the destruction of the premises, the vendors are in the situation in which they would have been if the title and the conveyance were ready at Michaelmas, 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burned down on the quarter day. As to the fact where there has been a great deal of treaty, and a considerable hardship must fall upon one party, if the case is to be put entirely upon the fact, the court must guard against surprise; and I am not sure even the plaintiff's witnesses accurately understand the nature of the facts they depose to. It is to be observed they are all the plaintiff's agents, subject to the influence necessarily belonging to that situation. The case is, therefore, not sufficiently clear upon the fact, and there ought to be some reference to the Master, or an inquiry before a jury; but that must not be upon the validity of the title, for it is clear, the objection to the freehold title, that it was not old enough, and the other objection, that the purchaser had a right to insist upon a release of the annuities, were waived. The question between them is whether the parties agreed that an indemnity should be given in any form, and if so, in what form. The inquiry must be whether the title had been accepted by the agent on behalf of the

defendant on or before the 18th of December, 1796. That inquiry will miscarry unless the Master or the jury, if satisfied that there was an acquiescence in the proposal, shall be of opinion that is an acceptance of the proposal. I should think a court of law would hold that; but if there is any doubt of it I would rather refer it to the Master to inquire whether the agent, on behalf of the defendant, had accepted or acquiesced in the proposal, with a direction that he should be examined; and they will appreciate the credit due to him, and will not forget that he was bartering for himself for eleven guineas; if that appears.

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The decree was reversed, and the reference to the Master directed accordingly.

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SAMUEL THOMPSON v. THOMAS GOULD.

[IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1838.]

[Reported in 20 Pickering 134.]

*Indebitatus assumpsit* to recover back from the defendant the sums of money mentioned in the receipts hereafter set forth. The parties stated a case.

On April 11, 1835, the defendant purchased of Edward Page a parcel of land with a dwelling-house thereon, in Salem Street, in Boston. The estate was subject to a mortgage to the Massachusetts Hospital Life Insurance Company for \$1,800, and as collateral security Page had procured a policy of insurance on the house for one year from October 1, 1834, payable to the mortgagees. The policy was not assigned by Page to the defendant. On May 18, 1835, at about four o'clock in the afternoon, the house was totally destroyed by fire.

About the 8th of May, 1835, the defendant offered to sell the estate to the plaintiff for \$3,700, and the plaintiff agreed to take it at that price. The defendant undertook to procure a discharge of the mortgage, it being a part of the agreement that the plaintiff should have the estate free from incumbrance. The plaintiff requested the defendant to make certain repairs on the house, and agreed to pay for them. These agreements were parol. Between the 8th of May and the time of the fire on the 18th the plaintiff carried into the house articles of furniture and all the things which he intended to place in

the house. During the same period he was frequently at the house superintending and directing the repairs. On the 14th of May the plaintiff paid the defendant \$2,000, and took a receipt as follows: "Boston, May 14, 1835. Received of Samuel Thompson \$1,600 in part pay for estate sold him by me, in Salem Street. Do. \$400. Thomas Gould." On the 16th of May the defendant told the plaintiff that he could not get the mortgage discharged, and asked the plaintiff what he should do. The plaintiff replied that he would pay him the rest of the money if he wished it, but he must get the mortgage discharged the best way he could. On the same day the plaintiff paid the defendant \$1,848, and took a receipt as follows: "Boston, May 16, 1835. Received of Samuel Thompson \$1,848. Thomas Gould." The payments by the plaintiff exceeded the price of the estate and the cost of repairs by the sum of \$82.33. Between ten and twelve o'clock on the 18th of May the defendant paid the mortgage and received the mortgage deed and policy of insurance, with an indorsement on the policy as follows: "May 18, 1825. Value received, the M. H. Life Ins. Co. hereby release all their claim on this policy. N. Bowditch, Actuary." And before two o'clock of the same day the actuary discharged the mortgage on the record. The policy was not assignable except with the assent of the assurers, and no application for their assent was made.

While the house was on fire, one Low, a witness, asked the plaintiff if he had not better have taken the witness's advice, to get the house insured. The defendant replied that he did not know whether he had or not. The witness said, "Your house is on fire." The defendant said he did not know that it was his house. On being asked if he had not told the witness that he had bought and paid for the house, and that his men were at work on it, he replied that he had never had the papers. On the same afternoon the plaintiff told one Jones that he had moved the last load of his goods into the house about half an hour before it took fire, and that he had just purchased it of the defendant and paid for it. Jones asked him if he had any insurance on the house. The plaintiff replied that he did not know whether there was any or not, and added that his loss must be at least \$4,000.

A day or two after the fire the plaintiff threw into the cellar some bricks which had fallen upon the sidewalk from the walls of the house, and he requested the defendant to take care of some iron and copper among the ruins, and they were carried into the defendant's yard.

On the first or second day after the fire the defendant offered the plaintiff a deed of the estate and the policy above mentioned. The

plaintiff declined receiving them, and said he must know more about it before he did anything.

If in the opinion of the court the plaintiff was entitled to recover the whole or any part of his demands, the defendant was to be defaulted; if not, the plaintiff was to be non-suited.

*Sprague* and *Peabody* for the plaintiff.

*S. D. Parker* for the defendant.

WILDE, J., delivered the opinion of the court. This is an action of *assumpsit*, in which the plaintiff claims a certain sum of money paid by him to the defendant on a consideration which has failed. The money was paid on a parol agreement to purchase of the defendant a certain house and estate, which were to be conveyed to the plaintiff free and clear of all incumbrances, the defendant undertaking to discharge a mortgage on the estate, which was subsequently done, but before the estate was conveyed to the plaintiff the house was consumed by fire; and the material question is, which of the parties shall eventually sustain this loss?

A previous question is interposed, arising from an objection to the form of the action, which, although it does not affect the merits of case, is nevertheless sufficient, if well founded, to defeat the present action. It is contended by the defendant's counsel that the money was paid on an executory contract still subsisting, and that the plaintiff's remedy, if he has any, is by an action on the contract or by a bill in equity.

It cannot be denied that if the money demanded were paid on a valid subsisting contract, the plaintiff's remedy for the non-performance by the defendant would be by an action on the contract, and that a general *indebitatus assumpsit* to recover the purchase-money could not be maintained. But it is very clear that the parol contract in the present case is void by the Statute of Frauds, and that a part performance of the agreement by payment of the purchase-money does not take the case out of the statute. In the case of *Davenport v. Mason*<sup>1</sup> it was said that the statute does not wholly vacate the contract, but only inhibits all actions brought to enforce it, and that the doctrine of courts of equity as to the effect of part performance of a parol agreement for the conveyance of real estate seemed to have been recognized by the courts of law; and the case of *Crosby v. Wadsworth*<sup>2</sup> was referred to as a case turning upon this principle. But the case of *Davenport v. Mason* was decided on a different point. And no case can be found where in an action on the contract it has been decided that part performance of a parol agreement for the conveyance of land would take a case out of the statute. On the con-

<sup>1</sup> 15 Mass. R. 94.

<sup>2</sup> 6 East 602.



trary, it was decided in the case of *Kidder v. Hunt*<sup>1</sup> that no action would lie on such a contract, and that part performance would not take it out of the statute.

It has been argued that this contract may be enforced in equity. But if it might be, that would not affect the plaintiff's legal rights. This court, however, has no authority to decree a specific performance of a parol contract. Nor could this contract be enforced by a court of equity having jurisdiction of the subject matter, for by the destruction of the house the defendant is no longer able to perform his part of the contract. He may make compensation for the destruction of the house, but generally a purchaser, independently of special circumstances, is not to be compelled to take an indemnity, but he may elect to recover back the purchase-money, if paid in advance, and if the vendor refuses or is unable on his part to perform the contract, and the purchaser has no legal remedy to recover damages.<sup>2</sup>

The only question, therefore, is, whether the plaintiff or the defendant is to sustain the loss by fire. In respect to the loss of personal property under the like circumstances the principle of law is perfectly clear and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of its destruction.<sup>3</sup> No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respect depends on the nature and quality of the property, and there can therefore be no distinction between personal and real estate. And so it is laid down by Chancellor Kent in his Commentaries. "Thus if A sells his horse to B, and it turns out that the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. So if A, at New York, sells to B his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties equally ignorant of the fact, the foundation of the contract fails, provided the house, and not the ground on which it stood, was the essential inducement to the purchase."<sup>4</sup>

The same principle applies to an agreement to purchase a house,

<sup>1</sup> 1 Pick. 328.

<sup>2</sup> 1 Sugd. Vend (9th ed.) 304; *Hepburn v. Auld*, 5 Cranch 262; *Waters v. Travis*, 9 Johns. R. 464.

<sup>3</sup> *Tarling v. Baxter*, 9 Dowl. and Ryl. 276; *Hinde v. Whitehouse*, 7 East 558; *Rugg v. Minett*, 11 East 210.

<sup>4</sup> 2 Kent's Comm. (2d ed.) 367.

as in the present case, the house being casually destroyed before the purchase is completed. Neither party being in fault, the loss must be borne by the owner of the property.

A different doctrine has been adopted in equity, founded on the fiction that whatever is agreed to be done shall be considered as actually done. So that if there is an agreement to purchase, it is equivalent to an actual purchase in contemplation of equity; and the purchaser must bear any loss which may happen to the estate between the agreement and the conveyance. In *Paine v. Meller*,<sup>1</sup> where A had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee. Upon this decision Sugden remarks that it proceeded on the only principle upon which it could be supported, that the purchaser was in equity the owner of the estate.<sup>2</sup> And in *Ex parte Minor*,<sup>3</sup> where a similar accident happened to an estate sold before a Master, and the report had only been confirmed *nisi*, the loss was holden to fall on the vendor.

Formerly, however, a different doctrine was admitted in courts of equity. In *Stent v. Bailis*<sup>4</sup> the Master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again." So upon a sale of a leasehold for lives, and previously to the conveyance one of the lives dropped, although a specific performance was decreed, the Lord Keeper intimated that if all the lives had been dropped before the conveyance the decision might be different, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance. Thus it appears that formerly the principle was the same in equity as it ever has been in law. And in one respect the principle still remains the same, namely, that the loss of the property under similar circumstances as those in the present case must be borne by the owner of the property at the time the loss happened; and it seems impossible that any different principle can be adopted. As we, therefore, cannot recognize the fiction in equity, by which a purchase and an agreement to purchase are held to be similar and indeed identical in respect to the present question, we must hold that the defendant is bound to repay the purchase-money, as the consideration upon which it was paid has wholly failed, the plaintiff not being bound under the circumstances

<sup>1</sup> 6 Ves. 349.

<sup>3</sup> 11 Ves. 559.

<sup>2</sup> Sugd. Vend. (9th ed.) 278.

<sup>4</sup> 2 P. Wms. 220.

of the case to accept a deed of the land. Where the contract is entire the vendor cannot recover or retain part of the purchase-money where he cannot convey or make a good title to the whole estate sold.

The rule in chancery on this point also is somewhat different, and depends more on the discretion of the court, which has given rise to many conflicting opinions and decisions.

In the case of the Cambridge wharf, upon which Lord Kenyon, when sitting in Chancery, in the case of *Poole v. Shergold*,<sup>1</sup> made some remarks, the vendor made title to all the estate but the wharf, and that part of the land was the principal object of the vendee in making the purchase, yet the purchaser, who had contracted for the house and wharf, was compelled to complete the purchase. This decision, as Lord Kenyon truly remarked, was contrary to all justice and reason. In other cases a more reasonable doctrine has prevailed, which is, "that if there be a failure of title to part, and that appears to be so essential to the residue that it cannot reasonably be supposed the purchase would have been made without it, or as in case of the loss of a mine, or of water necessary to a mill, or of a valuable fishery attached to a parcel of poor land, and by the loss of which the residue of the land was of little value, the contract may be dissolved *in toto*." This rule was adopted in Pennsylvania in the case of *Stoddart v. Smith*,<sup>2</sup> and a similar rule has been adopted in South Carolina.<sup>3</sup>

"The good sense and equity of the law on this subject is," as Chancellor Kent remarks, "that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether. But if the defects were not so great as to rescind the contract entirely, there might be a just abatement of price."<sup>4</sup>

This rule, if applied to the present case, would not alter the result. But it is not necessary to consider the case in reference to this rule, however reasonable it may be, as the plaintiff cannot be compelled to perform the contract; and as no fault can be imputed to him he is entitled to recover back the purchase-money. If the house had not been destroyed, and the plaintiff had refused to perform the contract, the case would have required a different decision.

Judgment for plaintiff.

<sup>1</sup> 1 Cox's Rep. 273.

<sup>2</sup> 5 Binney 355.

<sup>3</sup> *Pringle v. Executors of Witten*, 1 Bay 256; *Tunno v. Fludd*, 1 McCord 121.

<sup>4</sup> 2 Kent's Comm. (2d ed.) 373.

JOHN COUNTER, APPELLANT, v. JOHN MACPHERSON AND  
OTHERS, RESPONDENTS.

IN THE PRIVY COUNCIL, FEBRUARY 12, MARCH 1, 1845.

[*Reported in 5 Moore, Privy Council Cases, 83.*]

*Mr. Bethell, Q.C., and Mr. Shebbeare* for the appellant.

*Mr. Kindersley, Q.C., Mr. Turner, Q.C., and Mr. E. J. Lloyd* for the respondents.

The Right Hon. T. PEMBERTON LEIGH.<sup>1</sup> In this case a bill was filed by the appellant in the Court of Chancery in Canada, seeking the specific performance of an agreement entered into by the respondents. The Vice-Chancellor made a decree in favor of the plaintiff: from this decision, the defendant appealed to the Governor-General in Council, who reversed the decision of the Vice-Chancellor, and dismissed the plaintiff's bill, with costs. From this order the present appeal is brought.

The terms of the agreement between the parties are to be collected from a correspondence which began in the month of August, 1839, and terminated on the 3d of January, 1840. That these letters constitute a valid agreement is not disputed by the respondents, although it has been contended on their behalf, at the bar, that the contract is one with respect to which a court of equity ought not to interfere, and that the parties should be left to their legal rights and remedies.

The case appears to be this. The appellant was the owner of a wharf and three stores at Kingston in Upper Canada; upon part of the property, the appellant carried on what is called a forwarding business; one of the stores was in the occupation of a Mr. Jackson, and another in the possession of the respondents, under a sub-contract with a public company (who had taken a lease from the appellant), and whose interest would expire on the 1st of April, 1840. In this state of circumstances the respondents entered into a negotiation for a lease of the whole of the premises for a term of five years, from the 1st of April, 1840. After much discussion it was finally agreed between the appellant and respondents, that the appellant should put in order the existing stores, and should build a new store or warehouse, according to a plan referred to in the correspondence, but not proved in the cause; that these works should be completed by the 1st of April, 1840, and that the respondents should then take a lease for the period of five years from that day, at a rent of £250 per annum, if the sum expended by the appellant in the erection of the new building should not exceed £600;

<sup>1</sup> The statement of facts by the Reporter has been omitted.—ED.

and if the sum so expended should exceed £600, then at an additional rent calculated at the rate of 12 per cent. upon the excess. Possession of the whole of the property was to be delivered to the respondents on the 1st of April, 1840, and they were to engage to restore the premises, at the end of the term, in as good a condition as that in which they were when possession was taken. It appears also that the appellant was to relinquish his forwarding business in favor of the respondents.

In pursuance of this arrangement the building of the new warehouse was commenced, but when the 1st of April arrived, it is admitted on all hands that the warehouse was far from being completed; and the evidence shows, in our opinion, that the necessary repairs to the old buildings had not been done, and as to part of those buildings, had not been commenced. No complaint, however, or at all events no objection, to the completion of the contract was made on that ground by the respondents; and if time was the essence of the contract, we have no doubt that all right of objection on that score was waived by them. They continued in possession of that part of the premises which they previously held, and which, but for the contract, they should have given up on the 1st of April, and the works in progress were continued with their approbation.

In this state of things, on the 1st of April, 1840, the rights of the parties stood thus: The appellant was bound by his contract to perform his agreement, by putting the old stores in order, and completing the new building within a reasonable time, and upon this being done, the respondents were bound to accept a lease according to their agreement. But they could not be required to accept a lease until the works were done, nor could the rent, until that time, be ascertained. If the appellant refused to perform the works, or neglected to do so within a reasonable time after notice, the respondents would be at liberty to put an end to the agreement. The obligation on the respondents to accept the lease was conditional on the appellant's putting the premises into the state in which he had contracted to demise them to the respondents. The waiver of the respondents extended not to the works being done, but only to the time within which they were to be completed.

After the 1st of April the appellant accordingly continued the works which had been begun, and commenced repairs upon the old buildings, but while the works were in progress an accident occurred, which has given rise to the present litigation. On the 18th of April, 1840, a fire broke out upon the premises, which destroyed, or materially injured, all the stores. The appellant insisted that the respondents, at their own expense, should rebuild and restore what had been

destroyed or injured, and accept a lease on the terms of their agreement. This the respondents refused to do, and on the 27th of July, 1840, the present bill was filed.

It is material to attend to the allegations of the bill, and the relief sought by it, in order to understand the real nature of the question, and the only question which it raised.

After stating the correspondence and some other matters, with respect to which there is no dispute between the parties, it alleged that "the respondents, in the month of April, 1840, entered into possession of the premises, and continued in possession up to the time of filing the bill." It then stated that, in the same month of April, part of the premises were destroyed by fire, and other parts materially injured thereby, and that the appellant had applied to the respondents specifically to perform their agreement, and to accept a lease upon the terms of such agreement, "and to rebuild and repair the said premises accordingly," which they refused to do.

After some charges, not material to the present purpose, the bill charged "that the said warehouse was erected and fit for occupation on the 1st day of April, or within a few days thereafter, and that the respondents had actually taken possession of the said warehouse for many days before the same was burned down and destroyed, and had actually caused the inside thereof to be boarded up or lined, for the reception of wheat in bulk, and had erected, or were erecting, machinery to convey wheat in bulk to the upper stories, whereby the appellant was prevented from completing the said warehouse"; and the bill charged "that the respondents received goods as custom-house warehousemen after the 1st of April, 1840, and deposited the same in the said warehouse, and also deposited therein a considerable quantity of flour, and not less than 4,000, 3,000, or 2,000 barrels, and accepted, took, and retained the possession of the key of the said warehouse."

These allegations, though not, perhaps, in all respects, quite consistent with each other, appear to amount to this: that, previously to the fire, the appellant had substantially performed his agreement by erecting and making fit for occupation the new warehouse, and the bill, accordingly, contained no suggestion of anything remaining to be done in that respect by him.

The prayer of the bill was, "that the said agreement might be specially performed and carried into execution, and that the said respondents might be decreed to accept a lease of the said premises from the said appellant, and to execute to the said appellant a counterpart thereof, upon the terms of the aforesaid agreement, the said appellant being ready and willing, and thereby offering, to execute such lease, and in all other respects to perform his part of the said agreement; and that

an account might be taken by and under the direction and decree of the court, of all sum and sums of money paid, laid out, and expended for or on account of the said improvements, and that in the said lease, the rent of the said premises might be fixed and determined at the said sum of £250, and together with an addition thereto, at the rate of £12 per cent. per annum upon such sum of money as should appear to have been expended upon the said improvements over and above the said sum of £600; and that the said respondents might be decreed to repair and rebuild the said premises, and to enter into all usual and necessary covenants, and to keep and leave the same in good and sufficient repair, and for general relief."

The respondents denied that they had ever taken possession of any part of the property under the agreement, and they insisted that they were not bound under the circumstances either to rebuild the stores or warehouse, or to accept any lease with that obligation.

Upon a record so framed, the substantial question between the parties was this: which of them was to suffer by the fire which had taken place, and unless the appellant was justified in requiring the restoration of the premises by the respondents at their own expense, he was not entitled to any relief upon his bill.

With respect to the only question of fact in dispute, viz., the condition of the building when the fire took place, and the acceptance of possession by the respondents, the parties went into evidence, the result of which appears to us to be as follows:

We think that after the 1st of April the possession remained very much the same as it had done before.

The respondents continued in the occupation of that portion of which they were previously in possession, although their old title to such possession had ceased. The appellant remained in possession of that part which he held, and a part seems to have been unoccupied. The old buildings had not been repaired, and the new warehouse was so far from being completed and fit for occupation, that, at the time of the fire, it had neither doors nor windows, the floor of the second story was not laid, and that of the first was not complete.

On the other hand, it appears that the delay had arisen in part from some alterations in the plan which had been suggested by the respondents, to which the appellant had assented, provided they were done at the expense of the respondents; of the unfinished building (as far as any possession could be had of it), both the appellant and the respondents seem to have had the use, by placing under the shelter of the roof such goods as they found it convenient to deposit there.

Upon this state of the record the Vice-Chancellor pronounced the following decree: That the agreement contained in the letters set forth

in the bill, and bearing date the 19th of August, 1839, and the 1st, 2d, and 3d of January, 1840, ought to be carried into execution, save and except the putting in order of the stores therein mentioned, before the commencement of the lease thereby agreed to be executed, which was waived by the defendants, and did decree the same accordingly. And it was ordered that it be referred to the Master of the said court to inquire and state to the court what amount was expended by the plaintiff on the new buildings, in the pleadings mentioned, beyond the sum of £600; and it was further ordered that a lease should be executed by the appellant to the respondents, of the premises in question in the said cause mentioned, for the term of five years, from the 1st day of April in the year of our Lord, 1840, at the yearly rent of £250, and £12 per centum per annum on such sum as the said Master should find to be expended by the plaintiff on such new building, as aforesaid, beyond the sum of £600, such lease to contain a covenant on the part of the defendants for the payment of the said rent during the said term, and to restore the said premises at the expiration thereof, in the same plight and condition as the same were at the commencement of the lease, and such other provisions as should be conformable to the said agreement, save as aforesaid; and the said respondents were to execute a counterpart of the said lease, and they were thereby enjoined from showing, in any action at law, that such lease was not delivered on the day of the date thereof; and it was further ordered that the said lease should be settled by the Master, in case the parties should differ about the same, and that the respondent should pay unto the appellant or his solicitor the costs of the said suit, to be taxed by the said Master.

An appeal was brought by the present respondents against this decision to the Governor-General in Council, who, on the 20th of February, 1843, reversed the decree, and dismissed the bill, with costs. The propriety of this last order we have now to consider.

The case was argued on both sides before us with great ingenuity and ability. On the part of the appellant, it was contended that he was entitled to have the buildings restored by the respondents to the condition in which they were when the fire broke out, but as upon the evidence it was impossible to argue that the appellant had completed the work which he had contracted to perform, it was admitted that after the respondents had restored the buildings to their imperfect state, the obligation of completing them would rest with the appellant.

The appellant's claim was rested upon the principle that a party who entered into a binding contract for the purchase of an estate, becomes in equity the owner of it, and is entitled to any profit, and subject to any loss which may afterwards occur to it; and it was said that in this case, although the period at which the works were to be done had



passed before they were completed, yet that the respondents, having waived any objection on that score, the contract was still subsisting, and the principle was to be applied. The case of *Paine v. Meller*<sup>1</sup> was particularly relied on. In that case the defendant had contracted for the purchase of a house ; the house was destroyed after the period had passed within which the title was to be made out and the contract completed, but further time to make out the title had been allowed by the purchaser, who had accepted it before the fire took place, and under these circumstances the purchaser was held bound to pay his purchase-money.

The more familiar cases of the purchase of a life annuity, and the annuity dropping before the assignment ; and the purchase of estates held upon a life, and the life dropping, were also referred to.<sup>2</sup> We have carefully examined these cases, and several subsequent authorities on the same subject, the last of which is *Vesey v. Elwood*.<sup>3</sup>

Of the general doctrine so stated, we apprehend that there is no doubt ; but the question is, whether that principle or any doctrine to be found in any of the authorities maintained the appellant's claim in this case. In ordinary cases of absolute and unconditional contracts, the risk is the risk of the purchaser, because that which is the subject of the risk is, in equity, considered to be the property of the purchaser. But treating the contract to take a lease as a contract to purchase, the warehouse was never to be in that sense purchased by the lessees until it was completed by the lessor ; and until that had been done, therefore, it was not the property of the lessees. They had never contracted to take an unfinished warehouse ; they had never engaged to do any repairs, or to accept or restore any unfinished or dilapidated buildings ; and although after the 1st of April, 1840, the contract was still binding in equity, provided the appellant performed it on his part, yet until he had so performed it, no obligation attached on the lessees. They could not object that the lessor had not performed his engagement within the time limited, but they had a right to require that he should perform it before they were called upon to accept a lease. They were to receive a complete building at the commencement of the term, and to restore a complete building at the end of it, and to pay a rent calculated upon the amount of the expenditure. The accident of the fire interrupted and delayed the completion of the work, but it could not relieve the appellant from his obligation to complete it.

It was said that this case was decided by the judges of appeal, upon some rules acted upon by the courts of common law, but inconsistent

<sup>1</sup> 6 Ves. 349.

<sup>2</sup> *Mortimer v. Capper*, 1 Bro. 156 ; and *Kenney v. Wexham*, 6 Mad. 355.

<sup>3</sup> 3 Drury & Warren 76 ; also reported 2 Con. & Law 47.

with the principles of courts of equity. We are not aware that, upon the main question in this case, there could be any difference between the decision of a court of law and of a court of equity. The question is, was it, or not, incumbent upon the appellant to repair the old buildings, and complete the new, before he could require the respondents to accept a lease according to their agreement? If he was so bound, there is, in our opinion, nothing in the circumstances of this case which could relieve him from that obligation; the fire could have no such effect, nor would the circumstance that the delay in the completion of the building was in part attributable to the appellant's compliance with the suggestions of the respondents. The contract in equity was subsisting, although by the omission of the appellant to complete his part of it by the time stipulated, it might have become void at law, and if the appellant had been willing to restore the buildings, the obligation of the respondents to accept a lease might have been differently determined in law and in equity; but the construction of the contract, or the liability of the appellant within some time to perform what he had engaged to do before he called upon the respondents to accept a lease, was not at all altered.

Had our opinion upon the main question been different from that which we have formed, it would have been necessary to consider several points of great importance which have been discussed at the bar, and in particular, whether, as has been contended on the one hand, the court ought so to modify the decree as to do substantial justice between the parties, or whether, as has been insisted on the other hand, having regard to some of the terms of this contract, the alleged want of mutuality of remedy, and the difficulty (or, as it has been called, impossibility) of placing the parties, by any decree, in the situation in which they ought, by the contract, to stand, the appellant should have been left to any legal remedy which he might have.

The view which we take of the rights of the parties makes it unnecessary for us to enter into any discussion of these questions, further than as an examination of the relief which it has been proposed to ask appears to us to elucidate the principle upon which our decision is founded.

It was said that there were two modes in which substantial justice might be done; one was by decreeing a lease to be executed, dated on the 1st of April, 1840, containing covenants by the appellant to repair and complete the buildings, and by the respondents to keep in repair, and restore them at the end of the term; and it was said that there would then be a subsisting lease, and an action might be maintained against the appellant for the non-performance of his engagement to build and repair.

But, in the first place, the respondents never entered into any such engagement ; they never agreed to accept the appellant's covenant to do the work after the commencement of the term ; and if they had the obligation on the appellant to complete the building, notwithstanding the fire, would have remained precisely the same.

Another mode suggested was this : that the lease should be dated as on the day of the fire, and that the respondents should be considered as taking the premises as they stood before the accident on that day, and should undertake, by some covenant, an obligation to restore them to that condition, and that the appellant, on the other hand, should covenant to complete them when restored. Now it is obvious that this is to impose upon the parties a contract which they never entered into, either by expression or implication ; and, although, where a binding contract is subsisting, the completion of which, in its exact terms, becomes impossible through accident, without any default of the party seeking relief, a court of equity will struggle with points of form, it cannot, for that purpose, alter the substance of the agreement, or impose upon either party obligations totally different from those which, by the agreement, he had contracted.

In this case there is no reason why the court, upon any principle of moral justice, should at all desire to interfere ; both parties are equally innocent, and the only question is upon which of them the loss arising from an inevitable accident is to fall. The claim to relief has accordingly been very fairly rested in argument by the appellant, upon the general principle that the buildings, when the fire took place, were, in equity, the property, and, therefore, standing at the risk of the respondents.

For the reasons assigned, we are of opinion that this principle is not applicable to the case, and that the decision appealed from is right, and must be affirmed.

With respect to the costs, as there have been conflicting decisions below, the case was very naturally brought here by appeal. But we think that, upon the main question, the respondents have, from the beginning, been right, and that some material allegations of the bill, which must have been within the knowledge of the appellant, are directly contradicted by the evidence ; we do not think, therefore, that there is any reason for excepting this case from the ordinary rule ; and we think that the appeal must be dismissed with costs.

## MINOR, EX PARTE.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE 20, 1855.

[*Reported in 11 Vesey 559.*]

UPON the 27th of August, 1804, the King's Head Inn, and other premises, in Pershore, part of the estate of a lunatic, were sold before the Master. Under a petition, presented by the petitioner upon the 28th of November, the biddings were opened, and the petitioner was reported the best bidder at the resale, which took place upon the 9th of February, 1805, at the price of £720. On the 26th of February he presented a petition, that the report might be confirmed, etc. On the 28th of February, before any order made upon that petition, a barn and stable, part of the premises comprised in the lot sold, were destroyed by fire; not having been insured. The purchaser presented a petition to have the value of the premises destroyed ascertained, and the amount deducted from the purchase-money.

*Mr. Dowdeswell* in support of the petition.

*Mr. Thomson* for the committee.

THE LORD CHANCELLOR. The question must depend upon the point, what is the date and time of the contract; at which it can be said to have been complete. Is the bidding in the Master's office the contract between the court and the bidder; or only an authority to the Master to tell the court, that if the court approves, the court may make a contract with him upon the terms proposed? Let the Master certify to me what were the conditions of sale; and what has been the deterioration in value by the fire, and reserve the question; for, though the sum is not large, the question is one of the most considerable that has occurred for some time. In some of the cases that have been cited, the change of property is said to be from the date of the report; in others from the time of the conveyance; so that, though confirmed as the best purchaser, if he had not got the conveyance, he would have been entitled to say the estate was not his. That cannot be according to the principle. Suppose this person had insured the premises, while in the Master's office, from fire, would he, according to the cases in late times, have had an insurable interest? His interest is not near so thin as many that have been considered insurable.

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The Master's report having ascertained the deterioration in value of the premises, in consequence of the fire, at £75 16s., another petition was presented to have that sum deducted from the purchase-money.

The LORD CHANCELLOR stopped Mr. Romilly and Mr. Dowdeswell in support of the petition, declaring his opinion that the loss occasioned by the fire must fall upon the vendor, and made the order accordingly, with costs. On a subsequent day his Lordship said, that since he made the decision, he found it confirmed by what Lord Hardwicke says in *The Attorney-General v. Day*, as to carrying a purchase into execution against the representative, after the report is confirmed.

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JOHN A. K. BREWER v. F. DORSEY HERBERT.

IN THE COURT OF APPEALS OF MARYLAND, MARCH 11, 1869.

[*Reported in 30 Maryland Reports 301.*]

APPEAL from the Circuit Court for Washington County, as a court of equity.

The bill in this case was filed by the appellee for an injunction to restrain proceedings at law, and for the specific performance of a contract. The appellee was the owner of a dwelling-house and half-lot of ground situate in Hagerstown, and sold the same to the appellant on the 9th of October, 1865, by their agreement in writing, as follows, to wit: "Articles of agreement made and concluded this 9th day of October, 1865, between F. Dorsey Herbert and John A. K. Brewer, both of Washington County and State of Maryland, witnesseth, that in consideration of the sum of \$4,000, to be paid as hereinafter mentioned, the said Herbert has this day sold to the said Brewer his house and half-lot of ground, situated on the corner of West Washington and Prospect Streets, in Hagerstown; and the said John A. K. Brewer on his part agrees to pay the said sum of \$4,000, as follows: \$2,000 on the first day of April, 1866, and \$1,000 on the 1st day of April, 1867, and \$1,000 on the 1st day of April, 1868, with interest from the 1st day of April, 1866; and the said Herbert doth further agree to give the said Brewer possession of the same on the 1st day of April, 1866, and on payment of the whole purchase-money to make a good and sufficient deed for the same, clear of all incumbrances, to the said Brewer. In witness whereof, the parties hereto have set their hands and seals on the day and year first above written.

"Signed: F. DORSEY HERBERT. [SEAL.]

"J. A. K. BREWER. [SEAL.]"

Of the \$2,000 to be paid by the agreement on the 1st day of April, 1866, the appellant, at the request of the appellee, paid \$1,000 on the 10th day of October, 1865. At the time of sale the said premises were

under lease by Herbert to Dr. Berry, whose term expired on the first day of April, 1866. The appellee held a policy of insurance for \$1,000 on the house at the time of sale, which was allowed by him to expire about the last of January, 1866. On the 5th day of February, 1866, the house was totally destroyed by fire, but without any fault on the part of the appellee or his tenant, Berry. On Monday, the 2d day of April, 1866, the first being Sunday, the appellee made a tender of the premises, then a vacant lot, to the appellant, which he refused to receive in its destroyed condition. The appellant having refused to receive the ground, and holding that the appellee was unable to perform his part of the contract by reason of the destruction of the house, brought suit on the law side of the court to recover from the appellee the said \$1,000, so as aforesaid paid to him. Whereupon the appellee filed the bill in this cause to enjoin said proceedings at law, and for a specific execution of the agreement. The court below by its decree enjoined said proceedings at law, and decreed a specific execution. From this decree the present appeal was taken.

The cause was argued before BARTOL, C.J., GRASON, MILLER, and ROBINSON, J.

*Wm. T. Hamilton* for the appellant.

*A. K. Syester* for the appellee.

MILLER, J., delivered the opinion of the court.

After the execution of the written contract for the sale of the house and lot, and before the day fixed for delivery of possession and payment of the first installment of purchase-money, the house was accidentally destroyed by fire, without fault of either party or of the tenant then in possession of the same. The vendor had a fee simple title to the property, and at the proper time, under the contract, offered to deliver possession of the premises in the condition in which they then were. This the vendee refused to receive because of the destruction of the house by fire, and the main question in the case is, can he on this ground successfully resist this application in equity by the vendor for a specific performance of the contract? <sup>1</sup>

In contracts of this kind between private parties the vendee is in equity the owner of the estate from the time of the contract of sale, and must sustain the loss if the estate be destroyed between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interim. This doctrine, notwithstanding the *dictum* in *Stent v. Bailis* <sup>2</sup> to the contrary, was plainly announced and settled by the decision of Lord Eldon in *Paine v. Meller*, <sup>3</sup> a case very similar in its circumstances to the present, where it was held that if there was

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

<sup>2</sup> 2 P. Wms. 219.

<sup>3</sup> 6 Ves. 349.

no objection to the title of the vendor, or it had been accepted in fact by the vendee before the houses were burned, no solid objection to the bill for specific performance could be founded on the mere effect of the accident before conveyance. "For if the party," says the Lord Chancellor, "by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be devised as his; they may be assets; and they would descend to his heir." This decision has always been regarded as fixing the true equitable rule in such cases. It was recognized by Sir Thomas Plumer in *Harford v. Purrier*,<sup>1</sup> and in *Rawlins v. Burgis*,<sup>2</sup> and by Lord Chancellor Manners in *Revell v. Hussey*.<sup>3</sup> From these and other authorities of equal weight announcing the maxim that equity regards as done that which was agreed to be done, is deduced as the established doctrine in equity, that from the time the owner of an estate enters into a binding agreement for its sale he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase-money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the interim between the agreement and the conveyance.\* The contract here is not for a sale at a future day; it does not use in this respect prospective or contingent terms. Its language is, the vendor "has this day sold to" the vendee his house and lot, which clearly imports a binding contract then executed and consummated. By such terms the title in equity passes from the date of the contract, and if there were nothing else in it there would be no room for argument, for it would be impossible to withdraw the case from the operation of the rule above stated.

But it has been earnestly and strenuously urged by the appellant's counsel that as the contract contains an agreement by the vendor to deliver possession of the house and lot to the vendee on the first of April, 1866, the destruction of the house by fire before that period rendered performance by the vendor of this part of the contract impossible, and he cannot, therefore, either in law or equity, ask the vendee to perform his part of it; and this circumstance, it is insisted, distinguishes the case from those cited, and prevents it from falling within the principle established by them. Let us test the soundness of this argument. The vendee knew before and at the time of the contract there was a tenant in possession, whose term would not expire until the first of April, and the first installment of the purchase-money is made payable

<sup>1</sup> 1 Madd. Ch. 287.

<sup>2</sup> 2 Ves. & Bea. 387.

<sup>3</sup> 2 Ball & Beatt. 287.

<sup>4</sup> 1 Sug. on Vend. 228, 388 to 391; 2 Powell on Cont. 69; Dart on Vend. & Purchasers 114 to 118; 2 Story's Eq., § 1212.

on, and interest on the deferred payments runs from that day. The subject matter of sale is realty—a lot of ground with a house upon it, described as a house and lot. The agreement as to delivery is not like the usual covenant by a tenant in a lease, to deliver in as good condition and repair as when the contract was made. There is also no difficulty about delivery, except that the premises were not, as to the buildings upon them, in the same condition as at the date of the contract. The question then resolves itself into this: Does the fact of the insertion into a contract like the present for the sale of real estate of an agreement to deliver possession at a future day make any difference in the application of the rule? It is true it does not appear in the cases cited there were in the contracts any stipulations as to delivery of possession at a future day, nor is this circumstance alluded to, but they explicitly say it is the passing of the title in equity which throws the risk of loss upon the vendee, and entitles him to accruing benefits. To this, as we have seen, a conveyance is not necessary, nor is payment of the purchase-money or any part of it; for in *Hampson v. Edelen*<sup>1</sup> this court has decided that “a contract for land *bona fide* made for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time.”<sup>2</sup> Neither can possession nor delivery of possession be necessary, for if the contract had been silent on this subject the vendor would have had the right to retain possession at least until the first of April, when the first installment of the purchase-money was payable, and if the vendee had obtained possession before, he would have been restrained in equity from exercising any acts of ownership prejudicial to the inheritance; and yet the equitable title would all the while have been in him, subject to his disposition by deed or will, and liable for his debts. If, then, in the absence of a stipulation to deliver at a future day there is an implied right in the vendor to retain possession until that period, and this would make no difference as to the liability of the vendee for an intermediate loss, how can the insertion of such a stipulation have in equity any different effect? The whole foundation of this doctrine of equity is that the equitable title and interest passes by the contract of sale, and from the time of its execution, and it contemplates delivery of possession as well as payment of purchase-money, and a conveyance at a future period. Hence Sir Edward Sugden and Sir Thomas Plumer both cite, as in exact accord with the decision of Lord Eldon, the rule of the civil law, where the very case is put in the Institutes: “*Cum autem emptio et venditio contracta sit, periculum rei ven-*

<sup>1</sup> 2 H. & J. 66.

<sup>2</sup> See also *Siter, James & Co.'s Appeal*, 26 Penn. State Rep. 180.

<sup>3</sup> *Crockford v. Alexander*, 15 Ves. 138; *Reed v. Lukens*, 44 Penn. Rep. 202.



*ditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit: Itaque, si ædes totæ vel aliqua ex parte incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere."* In sales of personal property, delivery of the goods sold is not necessary to pass the title as between the parties, where the Statute of Frauds has been gratified by giving something in earnest, or payment of the whole or part of the purchase-money, or a sufficient note or memorandum in writing of the bargain; and in such case the property is at the buyer's risk before delivery.<sup>1</sup> And even where the seller remaining in actual possession agrees to deliver the property at a particular place, and it is destroyed by fire before such delivery, the loss will fall on the purchaser.<sup>2</sup> Where sales are made under authority of a court the contract is not regarded as consummated until it has received the court's sanction or ratification, and, therefore, any loss happening before confirmation falls upon the vendor.<sup>3</sup> But where a loss occurs after confirmation by which the contract is consummated it falls upon the vendee, even though no purchase-money has been paid, and the vendor remains in possession. This was expressly decided in *Robertson v. Skelton*,<sup>4</sup> where Lord Langdale also said: "In equity the estate belongs to the purchaser from the date of the order to confirm the report, and the right of possession belongs to the vendor till the purchase-money, for which it is security, has been paid." Again, if we look to the contract itself, and gather therefrom the intent of the parties, it is clear from the language used their intention was that the equitable title and interest should pass from the day of its execution. Upon this point its terms are too positive and explicit to admit of doubt. Delivery of possession and payment of purchase-money were postponed to a future day for the convenience of each party respectively, and we cannot construe the agreement to deliver into a condition that the contract shall be void if there is any change in the state or value of the property on the day of delivery, nor interpolate any such words into the instrument. We are, therefore, constrained to hold the argument founded on this delivery clause to be unavailing to the appellant.

Decree affirmed.

<sup>1</sup> *Franklin & Armfield v. Long*, 7 G. & J. 418.

<sup>2</sup> *Terry v. Wheeler*, 25 N. Y. Rep. 520.

<sup>3</sup> *Ex parte Minor*, 11 Ves. 559; *Wagner & Marshall v. Cohen*, 6 Gill 102.

<sup>4</sup> 12 Beav. 260.

## ELIAS G. GOULD v. LEWIS W. MURCH.

IN THE SUPREME JUDICIAL COURT OF MAINE, OCTOBER 29, 1879.

[*Reported in 70 Maine Reports 288.*]

ASSUMPSIT brought to recover the amount of two promissory notes, dated December 17, 1875, given by defendant to plaintiff. The consideration for said notes with other notes was a bond in common form, dated December 17, 1875, to convey certain real estate described therein, when said notes were paid according to their tenor. Defendant took possession of said premises when said notes and bond were given and was in possession at the time of the fire.

In the fall of 1876 the buildings on said premises were destroyed by fire. Defendant claims that by reason of the loss of said buildings the consideration for said notes has failed, and that this suit cannot be maintained. It is agreed that if the law court consider the grounds assigned as any defense in this suit the same is to come back for trial to this court, otherwise the defendant is to be defaulted.

*C. L. Jones* for the plaintiff.

*Walton & Walton* for the defendant.

LIBBEY, J. The notes in suit, with three others, were given in payment for a lot of land on which were a dwelling-house and other buildings; and on payment of the notes at maturity the plaintiff agreed to convey the premises to the defendant. The defendant was to have possession of the premises till he made default of payment as agreed, and he entered into possession under the agreement. Within a year from that time the buildings were burnt without the fault of either party.

The question presented to the court is whether the destruction of the buildings can be set up by the defendant as a defense to the notes. We think it can be.

When the owner of a lot of land with buildings upon it agrees to convey it at a future day on payment of the purchase-money by the purchaser, and before payment and conveyance the buildings are destroyed by fire without the fault of either party, the loss must fall upon the vendor; and if the buildings formed a material part of the value of the premises the vendee cannot be compelled to take a deed of the land alone and pay the purchase-money; and if he has paid it he may recover it back. *Thompson v. Gould*<sup>1</sup> and cases there cited; *Gould v. Thompson*; <sup>2</sup> *Wells v. Calnan*.<sup>3</sup>

In *Thompson v. Gould* the authorities bearing upon the question were elaborately examined and considered, and Wilde, J., in the opinion of the court, says: "In respect to the loss of personal property, under

<sup>1</sup> 20 Pick. 134.

<sup>2</sup> 4 Met. 224.

<sup>3</sup> 107 Mass. 514.

the like circumstances, the principle of law is perfectly clear and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement and before the sale is completed the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of the destruction. *Tarling v. Baxter*,<sup>1</sup> *Hinde v. Whitehouse*,<sup>2</sup> *Rugg v. Minett*.<sup>3</sup> No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respect depends upon the nature and quality of the property, and there can therefore be no distinction between personal and real estate."

In *Wells v. Calnan* the same rule was affirmed. Gray, J., in the opinion of the court, very clearly and tersely states it as follows: "When property, real or personal, is destroyed by fire the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase-money."

The reasons upon which the rule is based are clearly and fully stated in the cases cited, and it is unnecessary to repeat them here.

But the use and occupation of the premises by the defendant, from the time the agreement for the sale and purchase was made, formed a part of the consideration for the notes; and the plaintiff can recover in this action a sum equal to the value of the use of the premises while the defendant occupied them.<sup>4</sup>

In accordance with the stipulations in the report, the action must stand for trial.

APPLETON, C.J., WALTON, BARROWS, and DANFORTH, JJ., concurred.  
SYMONDS, J., did not sit.

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### CASTELLAIN v. PRESTON AND OTHERS.

IN THE COURT OF APPEAL, MARCH 12, 1883.

[*Reported in Law Reports, 11 Queen's Bench Division 380.*]

APPEAL of the plaintiff from the judgment of Chitty, J., in favor of the defendants. The facts are fully stated in the report of the proceedings before Chitty, J.,<sup>5</sup> and it is necessary here only to briefly recapitulate them.

The plaintiff sued on behalf of the London, Liverpool, and Globe

<sup>1</sup> 9 Dowl. and Ryl. 276.

<sup>2</sup> 7 East 558.

<sup>3</sup> 11 East 210.

<sup>4</sup> *Wells v. Calnan*, *subra*.

<sup>5</sup> 8 Q. B. D. 613.

Insurance Company to recover a sum of £330, with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings against loss by fire, and they kept the policy on foot by payment of the premiums until after the fire hereinafter mentioned occurred. The policy was in the usual form, giving the insurers the option of reinstating the property. On the 31st of July, 1878, the defendants contracted to sell the land and the buildings to their tenants, Messrs. Rayner, for the sum of £3,100, and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name. On the 15th of August in the same year a fire occurred damaging part of the buildings. A claim was made on behalf of the defendants, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at £330, and that sum was in fact paid on the 25th of September, 1878, by the insurers, who were at that time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase-money paid.

The present action was commenced on the 31st of October, 1881.

March 6, 10, 12. *Charles Russell*, Q.C., and *A. Aspinall Tobin* for the plaintiff.

*Gully*, Q.C., and *W. R. Kennedy* for the defendants.

BRETT, L.J. In this case the action is brought by the plaintiff as representing an insurance company against the defendants in respect of money which has been paid by that company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly, at all events, of a house, and the defendants had made a contract of sale of that property with third persons, which contract, upon the giving of a certain notice as to the time of payment would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that property, a part of which was a house, and according to the peculiarity of such a sale and purchase of land or real property the vendees would have to pay the purchase-money, whether the house was, before the date of the payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The vendors, the defendants, having insured the house in the ordinary form with the plaintiff's company, it is not suggested that upon the house being burnt down the defendants had not an insurable interest. They had an insurable interest, as it seems to me, first, because they were at all events the legal owners of the property; and, secondly,

because the vendees or third persons might not carry out the contract, and if, for any reason, they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire the defendants made a claim on the insurance company represented by the plaintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants and the third persons, the vendees of the property, was carried out, and the full amount of the purchase-money was paid by the third persons to the defendants, notwithstanding the fire. Under those circumstances the plaintiff representing the insurance company brings this action; I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried by Chitty, J., and he, in a very careful and elaborate judgment,<sup>1</sup> has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to me that the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits, which prevent it from extending to the present case. I must now consider whether I can agree with him.

I fail to see, at present, if the present defendants would have a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned brother, who knows much more of the law as to specific performance than I do, is at all events not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage, therefore, of that right, and by that right, not by a gift which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain whether this building was burnt or not.<sup>2</sup>

Judgment reversed.

<sup>1</sup> 8 Q. B. D. 613, at p. 615.

<sup>2</sup> The opinions of Cotton and Bowen, L.JJ., have been omitted, as well as a portion of the opinion of Brett, L.J.—ED.

## MARKS v. TICHENOR.

IN THE COURT OF APPEALS OF KENTUCKY, MAY 5, 1887.

[*Reported in 85 Kentucky Reports 536.*]*Owen & Ellis and W. B. Noe* for appellants.*Jep. C. Jonson* for appellee.

JUDGE LEWIS delivered the opinion of the court.

Appellee having sold and, by deed executed October 24, 1884, conveyed to appellants three tracts of land adjoining and constituting one farm, instituted an action to recover judgment on the notes given for the purchase-money, and to subject the land to satisfy it.

In defense, appellants state that the deed as written does not contain the whole contract entered into between the parties, but a portion of it was by mistake omitted, and that they accepted the deed upon the condition of the execution by appellee of the following writing, which embraces the omitted part :

"I have this day sold to James A. and Samuel C. Marks my farm, known as the Daniel McFarland farm. I agree to cover said house and put two coats of paint on the outside, and deliver the same to said parties by or on the first day of January, 1885 ; eleven thousand of the shingles is to be hand-shaved shingles, and the remainder to be cut shingles. I also agreed to furnish as much as two hundred feet of sheeting, if needed, on said house, and if any more is needed said Marks is to furnish it.

T. C. TICHENOR."

It is further stated that about November 29, 1884, the dwelling-house mentioned was destroyed by fire, in consequence of which appellee never did deliver it, and they therefore ask that the notes sued on be credited by the value of the house, which they aver was one thousand dollars.

It is stated in the reply, and not controverted, that at the time of the sale of the land it was in the possession of a tenant of appellee, whose term did not expire until January 1, 1885, of which fact appellants were aware, and that time for delivering possession was agreed on in view of such tenancy.

In the sale of land, it becomes the real property of the vendee from the execution, delivery and acceptance of the written contract. "It is vendible as his, chargeable as his, and capable of being devised or descending as his." Consequently, it is a well-established and reasonable rule that the destruction of buildings thereon by fire between the time of such contract of sale and the time fixed upon in the contract

for the delivery of possession by the vendor to the vendee must be the loss of the latter and not of the former.<sup>1</sup>

There are only two exceptions to this rule. The first is when, as was the case in *Combs v. Fisher*,<sup>2</sup> there is an express contract to deliver the possession of the land, with the improvements or buildings thereon, in the same situation as was the case when the sale was made.

The second is when, as was the case in *Cornish v. Strutton*,<sup>3</sup> the building has been destroyed by the culpable negligence of the vendor.

There is no allegation or proof that the destruction of the dwelling-house in this case was caused by the negligence of the vendor or any other person. Nor do we think the contract, fairly construed, amounts to an express agreement by the vendor to assume the risk of the destruction of the buildings by fire.

The purpose of the supplemental contract executed by appellee was to provide for the repair by him of the house as therein agreed, and which the evidence shows he did do, but not to insure it against destruction by fire, or to shift the risk from appellants to himself. He simply covenanted to deliver possession, without any express undertaking to sustain any loss that might arise from the burning of the house.

Judgment affirmed.

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JULIUS GOLDMAN, RESPONDENT, v. HERMAN ROSENBERG  
ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK (SECOND DIVISION),  
OCTOBER 8, 1889.

[Reported in 116 *New York Reports* 78.]

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made June 9, 1886, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

*Julius J. Frank* for appellants.

*E. H. Benn* and *J. Alexander Koonen* for respondents.

HAIGHT, J. This action was brought for an accounting between co-partners. On the 19th of November, 1877, the parties hereto entered into a written contract to form a copartnership to manufacture and sell varnishes and japans. The copartnership was to continue until the 31st of December, 1880. The plaintiff was to put in \$75,000 in cash, and

<sup>1</sup> *Calhoon v. Belden*, 3 Bush 674.

<sup>2</sup> 3 Bibb 51.

<sup>3</sup> 8 B. M. 586.

the defendants their factory buildings and the grounds upon which the same were situated, which were to be contributed as a part of their capital stock, at a valuation agreed upon of \$15,000, at which sum they agreed, on the liquidation of the business, to take the property back. The defendants executed a deed conveying said property to the plaintiff as copartners. Thereafter, and on the 6th day of February, 1879, the buildings upon the factory property were destroyed by fire. At the time the buildings were insured on behalf of the firm, who collected of the insurance companies as damages the sum of \$2,942.65. On the termination of the copartnership the plaintiff claimed that it was the duty of the defendants to take the real estate back at the sum of \$15,000, less the amount of insurance collected as the damages on account of the fire. The defendants claiming that the buildings upon the premises having been destroyed by the fire they were released from the provisions of the contract, and were not obliged to take the premises back. The value of the premises at the time of the dissolution appears to have been about \$6,000.

In determining this question it becomes important to have in mind the relation of the parties under the contract in order that we may properly distinguish between the different line of authorities relied upon by the opposing parties. When the articles of copartnership were entered into the defendants executed and delivered a deed of the premises to the individuals composing the firm. The title, therefore, vested in the firm. Under the articles of copartnership the defendants agreed to take the premises back at the stipulated sum of \$15,000. The firm having the title would have to reconvey the property to the defendants. The agreement was, therefore, in effect an agreement to purchase the property at the termination of the copartnership, and to pay therefor the stipulated price.

Benjamin, on Sales, at section 570, states the rule as follows: "It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfill it if the performance be in its nature possible. But if a thing physically impossible, *quod natura fieri non concedit*, or be rendered impossible by the act of God, the obligation is at an end."

Story, in his work on Contracts, at page 1076, says: "But in contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that if the performance become impossible from the perishing of the person or thing, that shall excuse such performance."

In the case of *Wells v. Calnan*<sup>1</sup> the plaintiff had agreed to sell the

<sup>1</sup> 107 Mass. 514.



defendant a farm at a price agreed upon, to be paid for at a future day specified, and on the payment of the purchase-price the plaintiff was to execute and deliver the defendant a deed of the premises. Subsequently the buildings upon the farm were destroyed by fire. Thereafter, and at the time agreed upon, the plaintiff tendered a deed and demanded the contract price, which was refused, and subsequently action was brought to recover the amount. It was held that he could not recover. Gray, J., in delivering the opinion of the court, says: "When property, real or personal, is destroyed by fire the loss falls upon the party who is the owner at the time, and if the owner of the house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase-money."

In the case of *Dexter v. Norton*<sup>1</sup> the action was brought to recover damages for a breach of contract to sell and deliver a quantity of cotton. The defendant had agreed to sell to the plaintiff six hundred and seven bales of cotton at a price agreed upon. A portion had been delivered, but one hundred and sixty-one bales were accidentally destroyed by fire without fault or negligence on the part of the defendants. Subsequently cotton rose in value, and the plaintiff claimed the right to recover the increase in value on the bales destroyed. It was held that the cotton did not vest in the vendee at the time it was destroyed by fire; that thereafter delivery was impossible, and that the plaintiff was not entitled to recover.

In the case of *Kein v. Tupper*<sup>2</sup> the plaintiff had contracted to sell the defendant one hundred and nineteen bales of cotton. The cotton was to be weighed and samples taken and compared with the original before delivery, and the plaintiff delivered to the defendants an order upon the warehouse where the cotton was stored for the same, and the defendants indorsed upon the order a direction to re-store for them and delivered it to the warehouseman. Upon the next day seventy bales of the cotton were weighed and samples taken; that night forty-two of the bales, together with those not weighed, were destroyed by fire. It was held that there was no delivery and acceptance so as to pass the title; that the compliance which was to precede delivery was not complete until the samples taken out had been compared with the original samples; that a destruction of the cotton without fault of the plaintiff relieved him from an action for damages for non-performance.

In the case of *Smyth v. Sturges*<sup>3</sup> the plaintiff's assignor entered into

<sup>1</sup> 47 N. Y. 62.

<sup>2</sup> 52 N. Y. 350.

<sup>3</sup> 108 N. Y. 495.

a contract with the defendant in which he agreed to sell certain lots upon which there were stores. At the time of the agreement there were various fixtures, consisting of partitions, gas pipes, plumbing, etc., in the stores, which had been put in by tenants, who afterwards, and before the deed was tendered, removed them from the stores. In an action to recover damages it was held that the defendant was entitled to the stores in the condition that they were in when the agreement was made, and that a refusal to take them after the fixtures had been removed was not a breach of the contract.

In the case of Clark's Appeal<sup>1</sup> the parties had entered into a partnership agreement, by which one had contributed real estate at an estimated value which was carried into the firm's stock account to his credit, he still retaining the legal title and reserving the right to withdraw the property upon the dissolution of the firm. Subsequently the buildings were destroyed by fire, but were rebuilt with new and more expensive buildings by the firm. It was held that he could not thereafter withdraw the property; that the fire had rendered it impossible to perform the conditions of the contract; that the loss fell upon the partnership, and it having reconstructed the buildings, that they were new and different from those existing at the time the contract was made, and that he did not have the right to withdraw them.<sup>2</sup>

It will be observed that, under the authorities to which we have referred, the question as to who shall sustain the loss depends largely upon the determination of the question of ownership, and this rule is expressly recognized by Pomeroy in his work on Specific Performance, at section 322, cited by the respondent, in which he states that "The effect of events occurring after the point of time which fixes the interest of the parties is wholly different from that of prior events. At that period, although the contract is executory in form and is treated as wholly executory at law, the equitable beneficial estate in the subject-matter passes to the purchaser, and he becomes, in contemplation of equity, the real owner. He, therefore, takes the benefit of all subsequent improvements, increases, gains, rises in value, and other advantages happening to the property. On the other hand, the subject-matter is at his risk and he must bear all losses, total or partial, from fire or other accidental causes, or from trespassers and all depreciations in value and other disadvantages, *res perit domoni*." But the latter proposition is subject to the most important modification, namely: "That the loss or depreciation does not happen from the neglect, de-

<sup>1</sup> 72 Pa. St. 142.

<sup>2</sup> See also Rugg v. Minett, 11 East 210; Clinton v. The Hope Ins. Co., 45 N. Y. 454, 466; Thompson v. Gould, 20 Pick. 134; Herring v. Hoppock, 15 N. Y. 409.

fault, or unwarrantable delay of the vendor in carrying out the contract."

Applying the principle stated in these authorities to the question under consideration we find that the copartnership was the owner of the premises, having the legal title thereto at the time the fire occurred, and had the premises insured. That the defendants were not the owners, legal or equitable. They did not have an insurable interest in the premises. It is true that they had agreed to purchase the premises at a time fixed upon in the future at a stipulated price, but that agreement had reference to the existence of the property in substantially the same condition, reasonable use and wear excepted, that it was in at the time the agreement was made, and at that time the factory buildings were in existence. Since then they have been destroyed by fire, and the value of the property has largely depreciated in consequence thereof. The defendants did not agree to purchase the premises without the buildings, and it is no longer possible for the plaintiff or the members of the copartnership to convey and give title to that portion of the premises destroyed by the fire.

We are, therefore, of the opinion that performance of the contract in that regard can no longer be enforced.

The respondent states that the burning of the buildings did not harm the defendants, as the insurance companies offered to rebuild the buildings. No such fact, however, appears to have been found by the referee. It does appear that he was requested to so find by the plaintiff, but that the request was refused. We have examined the authorities referred to by the respondent, and those relied upon by the referee, but it does not appear to us that they are in point or bear upon the question under consideration.

A tenant does not occupy the position of a purchaser under a contract of sale, or come within the same rule. Neither does a contractor who has undertaken to furnish the material and construct a house on the land of another, where the same has been destroyed by fire before the house was finished and delivered, as was the case of *Tompkins v. Dudley*.<sup>1</sup> There can be no doubt about that rule. If you go to a wagon-maker and order a carriage made, he cannot recover the contract price until he delivers the carriage. The fact that it was burned or destroyed when partially built is his loss, not yours. It does not, however, appear to us that this or kindred cases cited are in point or bear upon the question under consideration.

The case of *Paine v. Meller*<sup>2</sup> was disposed of upon the ground that the party had become in equity the owner of the premises at the time

<sup>1</sup> 25 N. Y. 272.

<sup>2</sup> 6 Ves. 349, 352.

of the fire, and is, consequently, in harmony with the cases to which we have already referred.

Some question has been made in reference to the form of the exceptions taken by the appellants. The criticism is well founded as to most of them, but an exception to the third conclusion of law, in that the item, factory account, \$12,961.88, should have been stated therein at \$6,000, we think is good and sufficient in form. It is the item in controversy, and which is involved in the question which we have discussed.

We are, therefore, of the opinion that the judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

### SECTION III.—RIGHTS AND LIABILITIES OF THIRD PERSONS.

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#### CROSBIE *v.* TOOKE.

IN CHANCERY, BEFORE LORD BROUGHAM, C., FEBRUARY 23, 28, 1833.

[*Reported in 1 Mylne & Keen 431.*]

IN the month of September, 1831, the defendant Tooke and a person of the name of Bickmore entered into an agreement (which, on the 26th of the same month, was reduced to writing and signed by the parties), whereby Tooke agreed to grant, and Bickmore to accept, a lease of a farm and premises at Little Burstead for a term of fourteen years, at a yearly rent of £140. Under this contract Bickmore took possession of the farm; and in the month of April, 1832, he, for valuable consideration, executed an assignment of all his interest in the farm and premises, and in the benefit of his contract for a lease thereof, to William Crosbie, who was thereupon let into possession; and Tooke having soon afterwards brought an ejectment against Crosbie, the present bill was filed by the latter for a specific performance of the agreement for the lease, and for an injunction against legal proceedings in the meantime. From the answer of Tooke it appeared that Bickmore, at, or shortly after the date of the assignment to Crosbie, had become insolvent; and the Vice-Chancellor, being of opinion that Tooke was released from his contract in consequence of the insolvency of Bickmore before any lease had been executed, His Honor dissolved the injunction.

A motion by way of appeal was now made on behalf of the plaintiff, that the Vice-Chancellor's order might be discharged and the injunction revived.

*Mr. Pepys* and *Mr. Bethell* for the motion contended that the subsequent insolvency of Bickmore, the original lessee, afforded no valid

reason why the defendant should not be now compelled to perform his contract specifically for the benefit of the plaintiff, whose solvency was not disputed, and who claimed by a title derived from that lessee. If the lease had been executed, it must have been drawn in the common form, and would not have contained a covenant against alienation, for no such stipulation was to be found in the agreement. As the lease to be granted, therefore, would have been assignable, the contract itself must be equally so. It was true that if the lease had been executed immediately after the parties entered into the contract, the defendant would have had the covenant of Bickmore for the rent; but as Bickmore had become insolvent, instead of that covenant of which the event proved the worthlessness, the defendant would now have the covenant of Crosbie, a responsible and solvent tenant, and would, in truth, stand in a better situation than if the lease had been made to the party with whom he originally contracted.

*Sir Edward Sugden* and *Mr. Jemmett, contra*, insisted that as the defendant's agreement with Bickmore contained no authority to assign, it was of a purely personal character; and, so long as matters rested in *feri*, that character continued. Bickmore, it was admitted, was not in a situation to call for a specific performance inasmuch as his insolvency had disabled him from executing his part of the agreement, and the plaintiff, who claimed by assignment from him, could have no better equity than his assignor. There was no mutuality between these parties. If the plaintiff, notwithstanding Bickmore's assignment, had chosen to repudiate the contract, the defendant could never have compelled him to complete it; nor could the execution of a lease, in which were inserted the usual covenants by the plaintiff for payment of the rent, etc., be, with any propriety of speech, described as a specific performance of the defendant's original contract with Bickmore, which the present bill pretended to enforce. The insolvency of Bickmore, therefore, must be considered, as the Vice-Chancellor had considered it, to operate as determining the agreement altogether.

THE LORD CHANCELLOR. I have looked minutely into the circumstances of this case with a view to ascertain whether there was anything, either in the dealing of the parties or in the instrument itself, to justify the defendant's contention that this was a contract made by the landlord specially and personally with Bickmore. But I have been unable to discover anything which should differ the interest here contracted to be given from that which any tenant would have under a common farming lease. The case is, therefore, left to rest upon the ground upon which it was decided in the court below;

and I am clearly of opinion that the circumstance of the party who originally contracted having assigned his interest cannot be taken into consideration, provided (which is the fact here) the assignee be admitted to be a person in solvent circumstances, and able to enter into the covenants in the proposed lease, and that the insolvency of the assignor cannot be set up with effect for the purpose of releasing the defendant from the specific performance of his agreement. That doctrine, which seems to have been approved by Lord Loughborough in *Brooke v. Hewitt*,<sup>1</sup> has been since fully recognized and adopted in *Powell v. Lloyd*<sup>2</sup>; and the case of *Weatherall v. Geering*<sup>3</sup> is no authority against the general principle, for the agreement there was for a lease which should contain a covenant not to assign. It may further be observed that, even in cases where alienation without license from the landlord is expressly prohibited and guarded by a clause of forfeiture, such a clause has been held to furnish no protection against an assignment of the lease by operation of law, under a commission of bankrupt, for example, or upon an execution for debt.<sup>4</sup>

I am therefore of opinion that the Vice-Chancellor's order must be discharged, and the injunction revived; but, having regard to the intention of the parties, I shall annex, as a condition to my order, that the plaintiff obtain the injunction on paying the defendant the sum due for rent from Michaelmas, 1831, to Michaelmas, 1832.

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The cause was afterwards brought to a hearing at the Rolls, when the defendant abandoned the objection on the ground of the original tenant's insolvency; and a decree was made according to the prayer of the bill.

<sup>1</sup> 3 Ves. 253.

<sup>2</sup> 1 Y. & Jerv. 427; 2 Y. & Jerv. 372.

<sup>3</sup> 12 Ves. 504.

<sup>4</sup> 3 Doe dem. *Mitchinson v. Carter*, 8 T. R. 57, 300; *Lord Stanhope v. Skeggs*, 8 T. R. 59.

## MORGAN v. RHODES.

IN CHANCERY, BEFORE LORD BROUGHAM, C., MARCH 21, 27, 1834.

[*Reported in 1 Mylne & Keen 435.*]

THE defendant William Rhodes on the 23d of February, 1822, entered into a contract to grant to Charles Auckland, his executors, administrators, and assigns, at a rent of £20 a year, a lease for ninety-seven years of a certain parcel of land, upon which Auckland agreed to build six messuages. The building of these messuages was, with the rent reserved, the consideration given for the lease. Auckland's agreement (amongst other things) was to erect, build, and completely finish, fit for habitation, the six messuages on or before the 1st of March, 1823; and, in the event of Auckland duly performing his part of the contract, Rhodes on his part undertook to demise to Auckland, his executors, administrators, or assigns, by one or more lease or leases, the parcel of land in question, with the messuages to be erected thereon, for the term and at the rent before-mentioned, or at such apportioned rents as might be afterwards agreed. The contract further contained a stipulation that in case of breach or non-performance of the agreement by Auckland, or if Auckland should become bankrupt or execute a general assignment of his effects for the benefit of his creditors, or if the intended erections and buildings should be abandoned or left in an unfinished state, it should be lawful for Rhodes to take possession of the premises and to sell the agreement with all benefit and advantage thereof, and the said parcel of ground, buildings, erections, and materials, for the residue of the term, and to receive the purchase-money; and that, after executing all proper conveyances to purchasers, he should pay over to Auckland the overplus (if any) of the moneys produced by such sale, after retaining thereout his necessary charges and expenses, and also all such sums of money and interest, not exceeding in the whole £400, as should be then due to him from Auckland. The whole of the conditions and stipulations already stated were contained in a printed form with the blanks filled up, being the form adopted with respect to all leases upon the Beauvoir estate, in which Rhodes had obtained a large interest. But, in addition to the printed contract, and immediately preceding the signature of the parties and the attestation of the witnesses, was inserted a written proviso, whereby Rhodes agreed to provide the bricks for building the six messuages at the usual prices, and to give credit for them until the granting of the leases, not exceeding three years; and further to grant a lease of each house when covered in and certified by Auck-



land's surveyor to be so, upon payment of the money due upon such house.

In the month of October, 1822, Auckland sold his interest in the contract, as to three of the six messuages, to the plaintiff, Mrs. Morgan, for £600, and an improved ground rent, and £204 of the purchase-money were immediately paid. In May, 1823, Auckland became bankrupt; and Rhodes subsequently purchased from the assignees under his commission all Auckland's interest in the premises contracted to be demised. The plaintiff, by her bill (among other things), prayed that Rhodes might be decreed specifically to perform his agreement with Auckland, by executing to her, as Auckland's assignee, a lease of the three houses.

The Vice-Chancellor dismissed the bill on the ground of Auckland's bankruptcy, and the plaintiff now appealed from His Honor's decision.

The *Solicitor-General* (*Sir C. Pepys*) and *Mr. Jacob* for the plaintiff. *Mr. Knight* and *Mr. Ching* for the defendant.

The LORD CHANCELLOR [after stating the case and the material parts of the agreement] delivered the following judgment: That the written proviso is a most material variation of the contract, as that would have stood upon the preceding printed portion of the instrument, there can be no doubt. For, first it contemplates a granting of the lease, not when the houses are finished or before the first of March, 1823, which is twelve months from the date, but at any time within three years from that date; and, next, it obliges Rhodes to grant the leases as the houses are roofed in, and not when the whole six are finished. The proviso not only puts an end to the finishing in twelve months as a condition precedent to the demise, if such would have been the sound construction upon the former part of the agreement, but it also destroys the entirety of the contract, by giving Auckland a right to have his lease of the houses severally, as they were covered in. Now, the evidence in the cause is clear, that the three houses, for which a lease is prayed by this bill, were covered in and certified to be so.

The court below proceeded chiefly, indeed almost entirely, on the ground that the bankruptcy of Auckland had determined his right to the lease. The case of *Crosbie v. Tooke* removes this ground; and of the point in that decision I entertain not the least doubt, and never did.

But it is said that there is a clause of forfeiture in this agreement. It is, however, not such a clause as, if inserted in the lease to be granted, would have worked a cesser of the term. On the contrary, such an effect is carefully avoided. Rhodes is only, in that and the

other cases provided for, to enter and take possession, and sell and dispose of the agreement and all benefit thereof, and the premises for the term agreed to be demised, subject to the rent, and to receive the purchase-money for the term or agreement, and pay over the residue to Auckland, his executors, administrators, or assigns, after deducting the expenses incurred by the proceeding. The bankruptcy, therefore, far from extinguishing the term or right to have a term demised, keeps alive the former, if the agreement shall have been executed, and the latter, if it remains still in *feri*. It is needless to add any observations upon the fact, not unimportant, that Rhodes, by the purchase which he afterwards made from the assignees under C. Auckland's commission, is now, in truth, to be considered as standing in the shoes of Auckland himself; and that he allowed Mrs. Morgan to lay out her money on the premises after the supposed forfeiture, whether by the lapse of time before finishing the houses, or by the bankruptcy.

The decree of His Honor, dismissing the bill, must therefore be reversed.

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BUCKLAND v. PAPILLON.

IN CHANCERY, BEFORE LORD ROMILLY, M.R., JANUARY 13, 18,  
FEBRUARY 8, 1866.

[*Reported in Law Reports, 1 Equity Cases 477.*]

THE defendant, John Papillon, was the owner of certain offices and cellars on the basement of No. 5 Waterloo Place, Pall Mall, for a long term of years. By a memorandum in writing, dated the 27th day of September, 1856, the defendant agreed to let, and George Frederick Bloxam agreed to take, these offices and cellars for a term of three years at a rent of £60, from the 29th of September, 1856. The memorandum then proceeded: "And it is further agreed that the said John Papillon shall, whenever called upon so to do by the said George Frederick Bloxam, grant a lease to him at his, the said George Frederick Bloxam's expense, of the before-named offices and cellars at the rent of £60 per annum for a period of three years, seven years, or the remainder of the term from this date that the said John Papillon has at present in his power to grant, such lease to contain all the usual covenants for protecting the interest of the said John Papillon." Then followed provisos that Bloxam should not carry on any business of an offensive description, or that might be contrary to the covenants in the

lease under which Papillon held : that Bloxam should give six calendar months' notice in writing of his intention to leave or give up possession of the premises previous to the expiration of the terms of three years or seven years, or any other term that might be granted to him, and that he should on quitting deliver up the premises in as good a condition as then existing, reasonable wear and tear excepted.

Bloxam entered into possession of the premises and continued to occupy them till October, 1864, without applying for a lease. On the 13th of that month he became bankrupt. In December, 1864, the assignee in bankruptcy sold the interest of Bloxam under the above agreement to the plaintiff, and by a memorandum in writing, dated the 31st day of January, 1865, agreed, when so required, to do and execute all such acts, deeds, matters and things in the law for the purpose of assigning and assuring his estate and interest as such assignee in the premises comprised and described in the agreement of the 27th of September, 1856, and also in and under the same agreement as the plaintiff, his executors, administrators or assigns should be advised to be necessary for carrying the sale into effect.

The plaintiff took possession of the premises, and shortly afterward the defendant caused a notice to quit to be served upon him. Thereupon he filed this bill for specific performance of the agreement of the 27th of September, 1856.

The defendant demurred for want of equity, and also, *ore tenus*, for want of parties.

*Mr. Jessel*, Q.C., and *Mr. Willan* for the demurrer.

*Mr. Hobhouse*, Q.C., and *Mr. W. W. Cooper* for the bill.

Feb. 8. LORD ROMILLY, M.R., after stating the facts, continued :

The defendant has demurred to this bill, contending that there is nothing to be found in the Bankrupt Act of 1849 which enables the assignee to assign an option of this character. The section which relates to this matter is the 141st section of 12 and 13 Vict. c. 106, which is not repealed or affected by the subsequent Bankrupt Act, 24 and 25 Vict. c. 134. This section is in these words. [His Lordship then read the section.] This is followed by the 147th section as to powers. I think that the original lessee who became bankrupt did nothing to disentitle himself to exercise the option he had of calling on the defendant to grant him such a lease as is stated in the agreement. I had recently to consider a similar point in *Moss v. Barton*,<sup>1</sup> where I held that the fact of the lessee holding on with the consent of the lessor did not destroy the original agreement, or enable the lessor successfully to contend that it had been waived.

<sup>1</sup> Law Rep. 1 Eq. 474.

I think the only question upon this demurrer is whether the option which belonged to the bankrupt passed to his assignees.

The proviso to grant a new lease at the option of the lessee forms part of the agreement of the 27th of September, 1856, which is entered into for a valuable consideration. It is therefore, in my opinion, a contract made with Bloxam by the defendant, and the performance of which Bloxam might have enforced at any time before his bankruptcy unless he had waived or abandoned it, which, as I have already stated, in my opinion he did not on the facts stated in this bill.

I am of opinion that the whole of his interest in this contract must be included in the words "personal estate and effects present and future," of the 141st section of the Act of 1849.

I should have considerable doubt whether the bankrupt's option to take a lease could be held to be a power within the 147th section of that Act, but I think that the option is part of the interest contained in the agreement, and that the whole of the interest in that agreement is part of the personal estate of the bankrupt.

The agreement of the 27th of September, 1856, is not one which requires any skill or discretion for its performance by Bloxam, and it could therefore be assigned by him, unless an intention to the contrary can be collected from the contents of the agreement itself. If the agreement had contained a proviso that the lease should not be assigned, then I think that the option to take a new lease would not have passed to the assignees, unless with the consent of the defendant.

In *Weatherall v. Geering*<sup>1</sup> Sir William Grant refused to order the intended lessors to execute such a lease when the intended lessee had assigned his interest under the agreement and had also taken the benefit of an Act for the relief of insolvent debtors. In this judgment Sir William Grant appears to doubt whether the specific performance of an agreement for a lease not containing such a proviso could be enforced in favor of the assigns of the intended lessee; but if that was his opinion, it is in that respect overruled by the Lord Chancellor in the case of *Crosbie v. Tooke*,<sup>2</sup> where he enforced specific performance of such an agreement in favor of the assignee of the intended lessee who had become bankrupt; and at the same time he distinguished that case from *Weatherall v. Geering*<sup>1</sup> by the circumstance that, in that latter case, the lease to be granted was to contain a covenant not to assign without the license of the lessor; and the next case of *Morgan v. Rhodes*<sup>3</sup> is to the same effect. And this seems to have been the principle also which governed the case of *Dowell v. Dew*,<sup>4</sup> on which the

<sup>1</sup> 12 Ves. 504.

<sup>2</sup> 1 My. & K. 435.

<sup>3</sup> 1 My. & K. 431.

<sup>4</sup> 1 Y. & C. Ch. 345.

defendant relied. In that case a lease for fourteen years was granted to William Dowell, which contained a proviso that the same should be forfeited if the lessee, his executors, administrators or assigns should alien, etc., without the consent of the lessors. A short time before the determination of the lease an agreement was entered into by the lessors with John Dowell, in whom the lease was then vested, to grant to him another lease for fourteen years "on the same terms as the last." On a suit for specific performance brought by Thomas Dowell, the brother and alienee of John Dowell, the Lord Justice Knight Bruce, who was then Vice-Chancellor, held that the plaintiff was not entitled to have a lease granted to him without giving to the lessors the personal liability of John Dowell for the due performance of the covenants. This case was brought by appeal before Lord Lyndhurst as Chancellor, who affirmed the decree of the Vice-Chancellor, but, as appears by the report,<sup>1</sup> expressly upon the ground that a clause against alienation had been inserted in the first lease, which governed the agreement with John Dowell. He says: "I am of opinion that if John Dowell had continued in possession under the agreement his possession could not have been disturbed, and he might have enforced the granting of the renewal lease. The next objection is founded upon the assignment, without license, of John Dowell, the tenant, to his brother Thomas. If a lease had been granted in pursuance of the agreement, and that lease had been assigned, it would have been a forfeiture, but such forfeiture might have been waived. The question, however, remains to be decided whether, with reference to the object of the present suit, the same principle would apply to this agreement. It is clear that, if it were not for the clause against assigning without leave, the agreement would be binding, and might be enforced by Thomas Dowell, the assignee."

In the agreement in the case before me of the 27th of September, 1856, there is no intimation that the lease to be granted is to contain any clause against assignment, unless it be in the proviso that the lease shall contain the usual covenants for the protection of the lessor, and in the absence of the word "assigns." With regard to the first, I am of opinion that a proviso that the lessee shall not assign without the consent or license of the lessor is not a usual covenant; and as to the absence of the word "assigns" from the agreement, having regard to the case of *Church v. Brown*,<sup>2</sup> I am of opinion that the absence of this word from an agreement for a lease (which is not, I apprehend, very unusual) cannot have the effect of preventing the agreement and interest under it from vesting in the assignees in bankruptcy of the intended lessee; and if it vests in the assignees in bankruptcy, it is clear that it may be assigned by them.

<sup>1</sup> 12 N. J. (N. S.) Ch. 164.

<sup>2</sup> 15 Ves. 258.

I am also of opinion that the instrument which purports to assign this interest from the assignee in bankruptcy to the plaintiff is sufficient for that purpose, and that the right to enforce the option is, upon the statements contained in this bill, vested in the plaintiff. I am of opinion, therefore, that the demurrer must be overruled.<sup>1</sup>

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WEIS v. MEYER.

IN THE SUPREME COURT OF ARKANSAS, OCTOBER 9, 1886.

[*Reported in 1 Southwestern Reporter 679.*]

APPEAL from Circuit Court, Chicot County.

Specific performance.

*D. H. Reynolds* for appellant.

COCKRILL, C.J. Weis' complaint in equity, for the specific performance of a contract to convey lands, was dismissed upon general demurrer, and he has appealed. He was not a party to the contract which he sought to enforce, but was the vendee of one who was named in it as a beneficiary of its provisions. The only question seems to be, did this give Weis the right to enforce the contract?

The complaint alleges that the owners of a plantation in Chicot County conveyed a part of it to Isaac Hilliard in 1879, and sold or leased other parts of the place to divers other persons, among whom were the mercantile firm of Dryfus & Meyer; that afterwards, when the lands were about to be sold under a decree foreclosing a lien superior to the rights of the vendees, the vendors, in order to protect them from injury, entered into an agreement in writing with Dryfus & Meyer, by which it was arranged that the latter parties should buy in all of the lands subject to be sold under the decree, the greater part of which still belonged to the original vendors, and immediately convey, by quit-claim deeds, to the parties who had already purchased parts of the plantation referred to; an arrangement being made by which Dryfus & Meyer should be made whole for the amount paid by them in discharging the decree. It also alleged that Dryfus & Meyer purchased the land under the decree, and took a conveyance to themselves in execution of the agreement; and that afterwards Dryfus conveyed to Meyer all his right, title, and interest in the premises, and that Meyer bound himself to carry out the agreement entered into by the firm, but that he now refuses to execute a deed to Hilliard, or to the appellant, who is Hilliard's vendee.

Taking the allegations of the complaint as true, Dryfus & Meyer,

<sup>1</sup> Affirmed on appeal.—L. R. 2 Ch. 67.—ED.

upon their purchase under the decree, held the naked legal title to the lands that had been previously conveyed to Hilliard in trust for him, and it was their legal duty to execute a deed to him in accordance with their contract. After the conveyance by Dryfus to Meyer, the latter held the legal title subject to the same duty. The obligation of Dryfus & Meyer was assumed for their own as well as for the express benefit of Hilliard and others in similar circumstances, and was induced by their common grantors, who were resting under a legal obligation to protect from harm the interests in the lands they had sold.

The right of a party to maintain an action on an agreement made with another for his benefit is a doctrine to which this court has given its assent, and it entitled Hilliard to maintain suit in his own right to enforce the contract set forth.<sup>1</sup> The appellant, by Hilliard's

<sup>1</sup> *Hecht v. Caughron*, 46 Ark. 132. "Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B would, in a court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated. The general rule is undisputed, but the question is whether this case is within any of the exceptions to that rule."—COTTON, L.J., *Gandy v. Gandy*, L. R. 30 Ch. Div. 57-66.

"Supposing, however, that there was, it is then contended that a mere contract between two parties, that one of them shall pay a certain sum to a third person not a party to the contract, will make that third person a *cestui que trust*. As a general rule that will not be so. A mere agreement between A and B that B shall pay C (an agreement to which C is not a party either directly or indirectly) will not prevent A and B from coming to a new agreement the next day releasing the old one. If C were a *cestui que trust* it would have that effect. I am far from saying that there may not be agreements which may make C a *cestui que trust*. There may be an agreement like that in *Gregory v. Williams*,\* where the agreement was to pay out of property, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party. So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As Lord Justice James suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract. It appears to me, therefore, that on both the grounds mentioned by the Vice-Chancellor this claim cannot be supported."—JESSEL, M.R., *In re Empress Engineering Company*, L. R. 16 Ch. Div. 125-129.—ED.

\* 3 Mer. 582.

conveyance to him of his entire interest, succeeded to his rights, and was entitled to file the complaint in his own name.

The decree must be reversed, and the cause remanded, with instructions to overrule the demurrer

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### HOUSE v. JACKSON.

IN THE SUPREME COURT OF OREGON, APRIL 24, 1893.

(Reported in 24 Oregon Reports 89.)

MULTNOMAH COUNTY—GEO. H. BURNETT, Judge.

Action by E. House against Ellen L. Jackson and William R. Jackson for the specific performance of a contract to convey certain land. From a decree dismissing the complaint, plaintiff appeals. Reversed.

*William W. Thayer* and *Lawrence A. McNary* (*Chas. H. Carey* on the brief) for appellant.

*Samuel B. Houston* for respondent.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit brought by the appellant against the respondents to compel the specific performance of a contract to sell real property, contained in the following agreement :

" This indenture of lease made and entered into on this nineteenth day of January, 1887, by and between Ellen L. Jackson and Wm. R. Jackson, her husband, of Washington County, Oregon, parties of the first part, and J. B. Haley, of Multnomah County, Oregon, party of the second part, witnesseth : That the said parties of the first part, for and in consideration of the yearly rental of one hundred and fifty dollars, and the covenants and agreements hereinafter mentioned, lease unto said party of the second part, for the term of five years and three months from the first day of January, 1887, the following described premises to wit : That certain tract of land situated on Sauvies Island, and known as the Jackson Ranch, and more particularly described in certain deeds from Meir & Frank and Richard Hall to W. R. Jackson, and recorded in the records of Multnomah and Columbia Counties, Oregon, and containing two hundred and eighty-seven (287) acres, more or less. And the said party of the second part herein agrees to pay the said yearly rental of one hundred and fifty (\$150) dollars, in the following manner to wit : Seventy-five (75) dollars on the first day of July and the thirty-first (31st) day of December of each and every year during the continuance of this lease. And the said parties of the first part further agree to sell said tract of land and convey the same by



a good and valid deed to the said party of the second part at any time before the expiration of this lease for the sum of twenty-five hundred (\$2,500) dollars. And the said party of the second part hereby agrees that in case he fails to purchase said tract of land before the expiration of this lease, for the above stipulated consideration, he shall forfeit to the said parties of the first part all rights and claims to any improvements that he shall have made thereon. And the parties to this agreement and lease hereby bind themselves, their heirs, executors, administrators, or assigns to the faithful performance of the covenants and agreements herein mentioned.

"In witness whereof we have hereunto set our hands and seals on the day and year above written.

"ELLEN L. JACKSON. [SEAL.]

"WM. R. JACKSON. [SEAL.]

"JOHN B. HALEY. [SEAL.]

"Executed in the presence of

"CHAS. A. BUTLER,

"J. W. MORGAN.

"It is further stipulated and agreed by and between the parties of the first and second part in the above and foregoing lease, that all said sums of money therein agreed to be paid by said J. B. Haley, for rent or otherwise, shall be paid to the said Ellen L. Jackson, her heirs and assigns.

"ELLEN L. JACKSON. [SEAL.]

"WM. R. JACKSON. [SEAL.]

"JOHN B. HALEY. [SEAL.]

"Executed in the presence of

"CHAS. A. BUTLER,

"J. W. MORGAN."

It appears that J. B. Haley went into possession and occupied said premises and paid the rent due thereon until about November 30, 1889, when, in consideration of two hundred dollars, he assigned all his interest therein to one W. G. Pomeroy, that Pomeroy went into possession, paid the rent and occupied the premises until about September 12, 1890, when, in consideration of five hundred dollars, he assigned all his interest therein to D. Reghitto and plaintiff, who went into possession thereof; that said Reghitto about December —, 1891, assigned his interest to plaintiff, who continued to occupy the premises and paid the rent due thereon, and on January —, 1892, tendered to defendants two thousand five hundred dollars, and demanded a deed thereto; that the defendants refused to accept said tender, or to execute said deed, whereupon plaintiff deposited said amount with the clerk and com-

menced this suit. After the issues were completed the cause was referred to Geo. A. Brodie, Esq., who found that the equities were with the plaintiff, and that he was entitled to a decree, but the court set aside said findings, and entered a decree dismissing the complaint, from which the plaintiff appeals.

To support the decree the respondents contend : Third, such contracts cannot be enforced by an assignee.<sup>1</sup>

The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed; and when an agreement has been made for the sale of lands, the vendor is deemed the trustee of the purchaser of the estate sold, and the purchaser as trustee of the purchase-money for the vendor. The vendee, in equity, is actually seized of the estate, and, as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser.<sup>2</sup> Haley had an estate in the premises, and was equitably the owner thereof, and could transfer this right, and his assignee can enforce the option to the same extent as his assignor.

The decree of the court below will be reversed, and a decree here entered for the specific performance of the contract.

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TAYLOR v. STIBBERT.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., JULY 27, 28,  
30, 1794.

[*Reported in 2 Vesey, Jr., 437.*]

THOMAS WOOD seised in fee of the manor of Portswood on the marriage of his son settled it (subject to certain trust terms) to the use of the father for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of the son for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to trustees for 500 years; remainder to the use of the first and other sons of the marriage in tail male; remainder to trustees for 600 years; remainder to Wood the elder in fee. Power is given to Wood the elder for life, and after his death to his son for life, to let either in possession or reversion such parts, as had been usually let for life or lives, and also

<sup>1</sup> Only so much of the opinion is given as relates to this contention.—ED.

<sup>2</sup> *Kerr v. Day*, 14 Pa. St. 112 (53 Am. Dec. 526).

to demise by copy of court roll such parts as were usually granted that way for life or lives, for one, two, or three lives, or any number of years determinable on the dropping of one, two, or three lives, then in being, upon the ancient and usual rent, or as great or beneficial rent as they were last demised at. There was also a power to Wood and his son to appoint new uses for the purpose of sale. Wood the elder afterwards let several parts of these premises to Taylor for 99 years, if he and two others should so long live. All the leases were by deed except one, which was by grant entered upon the court roll and copy of court roll. Upon these demises it was covenanted and agreed that upon the death of either of the persons named Taylor, his executors or administrators, would surrender the lease thereby granted to Wood, his heirs and assigns, that a new lease might be granted; and so upon the death of either of the persons to be named in any future lease or leases. After these leases Wood, his son, and the trustees sold the manor to Stibbert. One of the lives having dropped, the bill was filed by the tenant praying that the defendant Stibbert should specifically perform the covenants in the leases, and the agreement in the admission, and grant new leases.

The tenant had laid out a considerable sum of money. The bill charged that the covenant ran with the land and that Stibbert had notice. The defendant Stibbert insisted that Wood, being only tenant for life, had not power to enter into such covenant for renewal. The facts as to notice were that Stibbert, when the conveyance to him was executed, the leases and tenants being described, asked whether there were not covenants for renewal in the leases to Taylor, and was answered in the affirmative, and counterparts were produced to him; but Wood the elder said that as he was tenant for life, and his son had not concurred, that covenant was of no effect; upon which they executed. In the conveyance there was a covenant against incumbrances particularly excepting the subsisting leases.

LORD CHANCELLOR:

As to the demise by grant entered upon the court roll, and copy of court roll delivered as evidence of the title of the lessee, it is not proper to call this a copyhold estate. No custom attaches upon it; but the owner may grant, or not, at his pleasure. There is no right in the person who owns the estate to compel the lord to act. I take it (it does not appear in the leases by deed) that the covenants for renewal were mutual. Whether it extends to the new lives will be a question of future consideration probably, which it is not proper now to determine. The plaintiff has contracted with Wood the elder not only for the estate executed by him, but upon valuable consideration paid by him and received by Wood and upon consideration of mutual

covenants that Wood shall upon a given event execute to him the estate he demands by his bill. As between these two it is only the common bill for a specific performance of a contract upon consideration actually paid and executed. It is one of the most ordinary subjects of relief. On the part of Wood it is impossible to support any objection to the performance of that engagement, in which he has bound himself and all his assets. It is not competent to him to say he has not a sufficient estate to support the estate he contracted to make. He is bound to procure to the utmost extent of his means. The rule that affects the purchaser is just as plain as that which would entitle the plaintiff to a specific performance against Wood: if he is a purchaser with notice he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. It is admitted that during the life of Wood, with regard to the leases by deed, Stibbert cannot decline the performance, at least to a certain extent, of the engagement entered into by Wood; that is, that he is bound to renew the life that has dropped in these leases; but that is not the decree I must have made against Wood. I should not have decreed Wood to accept the nomination of a new life by Taylor and to add that to the lives in being; but the decree against Wood would have been specifically to perform his covenant; that is, to execute a new lease specifying the covenants in the former *in totidem verbis*. It is a fallacy to state that he is bound to a certain extent and not to the whole. He is either not bound at all, or if as standing in the place of Wood, the engagement can be neither greater nor less than that of the person he represents. The plaintiff being entitled to a specific performance of a definite covenant to grant particular leases has the same right against Stibbert, who cannot say he will do somewhat less than Wood engaged to do. The right against Stibbert, if any, is co-extensive with that against Wood. The first question offering itself to the consideration of a court of equity is, whether the purchaser had notice. I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have. It has been determined that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer

the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire. In this particular case there is not merely that general knowledge, but in the treaty the particular leases and tenants were described, and the leases described were all exhibited; but if not exhibited the case would not have stood the worse. The question of notice, therefore, proceeds one step farther. Stibbert has not only the general notice that the estate is in tenancy, but an account was given that there were particular tenants, who held particular parts; and he was told they held by lease; that it was not a mere occupation, though the terms were not particularly specified. Leases by deed are usually attended with counterparts; those by copy of court roll are still better; for the evidence remains upon the rolls of the manor in possession of the owner or steward. Therefore all the information is with regard to both descriptions easily come at; and more easily, with less trouble, as to those entered upon the rental of the manor than the others. If he has notice of the lease, does not that necessarily import notice of all the covenants in it? He ought to inquire into the lease to know the terms on which it was granted and the rent paid, always speaking of it with regard to the tenant. He must look at the whole of it. It is important with regard to the interest he purchases, with regard to the engagements he is about to contract with the tenants, that he should inform himself completely what their rights are with regard to him and his rights with regard to them. Therefore I have no difficulty to say that in a case much less strong a purchaser knowing the estate is in tenancy, and being informed specifically that it is in lease, is bound to know all the contents of the leases, and cannot take upon himself a partial knowledge. But when he was told that Taylor had several leases with covenants for renewal it is absurd to allow him to say he looked at but one. That awakened his caution at least to look at the others. He was satisfied with Wood's opinion, and proceeded without further consideration to complete the contract, when he had abundance of information as to the facts. I cannot relieve him against that. It was urged with great force that the exception of the subsisting leases in the covenant against incumbrances could not be confined to those past all attain and impeachment at law. The effect of that exception is to protect the person conveying from the consequences of any act to tenants having subsisting leases, which, though they might be liable to legal objections, yet would give a title to the lessee to recover upon the covenant for quiet enjoyment against the person from whom he derived. It is said Stibbert could not avail himself much of the information he received so late as the time appointed for execution, because the son and the trustees were parties,

and he was bound to pay the money. There were other parties; but Wood the father was the essential party, the *sine qua non*, and if the purchaser was deceived by that party, from whom principally the conveyance was to move, whose consent to sell was a necessary quality, and could have had a right to a recompense as against him, this court, if he had held back and had stated a substantial ground, would not have compelled him to go on and take a worse title or more incumbered estate than he contracted for. It was very ingeniously said that the effect of the notice could only be notice; that the party had executed a lease, and being tenant for life, the notice could only convey this idea, that the lease was such as in equity and according to his estate the tenant for life was enabled to make. The notice in all these cases is not the title to make it, but that such lease in fact exists; but the argument cannot apply against actual notice interposed before payment of the money and execution of the deed. The matter was entire, and he might have retained if he could have qualified his refusal. The great argument is that as the leases would have been void as against the son and issue in tail, they cannot extend farther than such an interest as Wood the tenant for life could give under the terms of the power. It is supposed under that that the son would have had a right to decline performance of the covenant, and even to enter upon the tenants claiming under the leases if they were a contravention of the power; for they were void at law; and that the trustees, to protect the interests of the issue in tail, would have had a right to enter to avoid these leases. I admit it; but upon what ground does Stibbert take to himself that right? These leases are not void undoubtedly; they are good for the life of Wood; and if the intermediate estates should fail in his life, and an estate should be taken after his death under his reversion in fee, they would be good to all intents and purposes. They are not void, therefore, in themselves; but they are voidable unquestionably where they interfere with the interests of parties claiming under the consideration of the marriage settlement. Therefore the issue in tail may avoid them; but how that consideration can reach a person not standing under that consideration, how it can affect the interest of an estate taken totally out of the settlement by execution of the power to sell I cannot conceive. When that power is executed the estate is taken out of the settlement; the only claim under the settlement is as to the price. It is supposed the estate was rendered less valuable and a worse price was obtained, by which the parties claiming under the consideration of the settlement would suffer. That ground, if proper parties were before me, would do; but how, against whom, and upon what terms? Stibbert must argue upon this supposition: that he paid less than the

estate was worth; that he had notice of the settlement, and paid an inferior price to the injury of those claiming under the settlement. The consequence is that he and the trustees are answerable to the objects of the settlement, and ought to make good what he had no right to purchase, nor they to sell, at an inferior price. The case put is strong, and the consequence undeniable, that if the trustees and the father and son had granted a long lease at a pepper-corn rent, and had conveyed to Stibbert, and he had paid the small value of that reversion, it could not displace the term; it would have no effect as between the persons entitled to that long term and the person who purchased only the reversion and subject to that term. It is impossible for him to say the interest for years is void, and he has a right to take it, not for the purposes of the settlement, but for his own profit; that he had a right to take the estate as of more value by setting that aside than the consideration he had paid. The true consequence as to the settlement is this: When the parties to the settlement chose to execute the power reserved to the father and son to appoint new uses of the fee, the settlement with regard to the estate was a nullity; it was gone; and the purchaser under that power cannot claim anything under the settlement. It is not true in fact that less was paid on account of these leases; but if so, it is not competent to the purchaser to claim it, not in order to carry the value over to the uses of the settlement, but to his own pocket. He takes the legal fee from the trustees and by the appointment of the father and son. It moves from them. If the son's interest can be conceived in existence, I doubt whether he could after joining dispute it. Therefore on payment of the fine by the plaintiff Stibbert shall execute the covenant in the several indentures under which the plaintiff holds, and the agreement contained in the admission by copy of court roll. I am not now to determine what will be the construction of the covenant. I find there have been opinions which I think require a good deal of consideration, perhaps reconsideration, as to the effect of such covenants, and cases decided which may require a review; but I would not decide it here. When the thing I have ordered is done it becomes a legal interest; then I should think it necessary as to the construction of the covenant to have the opinion of a court of law. The defendant Stibbert must pay the costs.

Though covenants for renewal may obtain in leases, I think it not well considered in any court to imply them against express words. I would rather bear a leaning against the construction; and therefore one or two of the cases strike me as requiring a good deal of consideration. I allude particularly to the cases upon leases granted by Mr. Booth of Lancashire, in which the covenant was held to exist.

## DANIELS v. DAVISON.

IN CHANCERY, BEFORE LORD ELDON, C., MARCH 1, 1811.

[*Reported in 17 Vesey 433.*]

IN this case the LORD CHANCELLOR pronounced the following judgment.

I have already expressed my opinion that the plaintiff is entitled to a specific performance of the agreement for the sale of these premises to him; and, with regard to the subsequent sale by the defendant Davison to the other defendant Cole, my notion is, that the plaintiff has an equity to have a conveyance of the premises from Cole, upon the ground that Cole must be considered in equity as having notice of the plaintiff's equitable title under the agreement; that Cole was bound to inquire; and therefore, without going into the circumstances to ascertain whether he had or had not actual notice, he is to be considered as a purchaser of the other defendant's title, subject to the equity of the plaintiff to have the premises conveyed to him, at the price which he had by the agreement stipulated to pay to that defendant; and that it is competent to the court to make that arrangement as between co-defendants.

The plaintiff, therefore, deducting his costs out of the money he is to pay, must have such conveyance from one or both the defendants, as the Master shall settle, if they differ; but I can go no further than to regulate as between the defendants the payment of that money which the plaintiff is to pay.

KEEGAN v. WILLIAMS *et ux.*

IN THE SUPREME COURT OF IOWA, JUNE 18, 1867.

[*Reported in 22 Iowa Reports 378.*]*Appeal from Des Moines District Court.*

A BILL for a specific performance, in which the relief asked is denied, and the plaintiff appeals. The necessary facts will be found in the opinion.

*Strong & Smyth* for the appellant.

*J. C. & B. J. Hall* for the appellees.

LOWE, Ch.J. The testimony clearly establishes the following facts: That the defendants were owners of lots 154, 155, 156 and 157 in Hibernia, near Burlington; that the legal title of these lots was in Elizabeth Williams, the wife of her co-defendant; that they resided in Ot-



tumwa, while the plaintiff lived in Burlington; that in 1864, one Laydon, an agent and friend of plaintiff, wrote to Williams to know if the lots were for sale, and at what price; the reply was that they were, and could be had at \$250; Laydon again wrote that the plaintiff, Keegan, would take them at \$200, paying \$100 down and the balance in \$25 installments every two months thereafter till paid. Williams again replied that he would take \$210 for the lots—\$10 to be sent and paid in advance to bind the contract, and the other payments to be made as stated in Laydon's letter. This proposition was accepted by plaintiff, and the \$10 sent out, which was received; also a blank deed was sent out, which was filled up in the name of plaintiff as grantee, and signed by Williams and wife, the latter being cognizant of and acquiescing in the trade. Williams at once took the deed to Burlington to carry out the contract as made.

One Pat Bayles was in possession of the lots under Williams and wife, and refused to give possession unless he should be paid \$40 for certain improvements made thereon. Williams wanted Keegan to pay this \$40 in addition to the purchase-money. This Keegan would not do; but, according to the terms of the contract, tendered to Williams \$100 and demanded his deed and the possession of the property. Williams refused to carry out the contract, except upon the condition that Keegan would pay the \$40 to Bayles; this Keegan was unwilling to do, and Williams sold and conveyed the property to Bayles, who had full notice at the time of the contract of sale to Keegan. In this state of the case the court denied the relief asked and dismissed plaintiff's bill.

This was error. A specific performance of the contract as made by the parties should have been ordered. The acceptance by Keegan of the proposition of sale made by Williams, and a part performance thereof, at once completed the sale and purchase of the property between them, and it was not competent for Williams afterward to alter the terms or to impose new conditions. Equity requires its execution upon the specific terms specified, and as it was clearly and distinctly understood between them. Bayles now holds the legal title to these lots. He took it with full knowledge of plaintiff's equities. He is made a party defendant to this proceeding. Counsel representing all the defendants ask that in the event a specific performance is decreed, the purchase-money may be ordered to be paid to Bayles; this order will accordingly be made. And we further order that when the same is tendered and paid, the defendant, Bayles, shall make to the plaintiff a special warranty deed for the property in question, and surrender the possession thereof. The costs of the proceeding to be paid by the defendants.

Reversed.

## HENRY J. LOVEJOY v. NATHAN S. POTTER.

IN THE SUPREME COURT OF MICHIGAN, FEBRUARY 17, 1886.

[Reported in 60 Michigan Reports 95.]

APPEAL from Jackson. GRIDLEY, J. Argued January 7, 1886. Decided February 17, 1886.

Bill filed for specific performance of contract assigned to defendant, to whom land is also conveyed. Complainant appeals. Reversed. The facts are stated in the opinion.

*Grove H. Wolcott* for complainant.

*Eugene Pringle* for defendant.

MORSE, J. The complainant's bill is for the specific performance of a written contract, under seal (but without witnesses), made between the complainant and the Central Car & Manufacturing Company, a corporation, for the sale of certain real estate to the complainant as vendee, the land having been conveyed subject to the contract, and the contract, when about half paid, assigned to the defendant by a deed containing full covenants. The defendant, having tendered a deed containing a covenant against his own acts, for delivery on the payment of the remainder of the purchase price, the complainant refused to receive it, and comes into court to compel the defendant to execute a deed with full covenants. The defendant demurred, and the court below dismissed the bill.

The agreement, or contract for a deed, provided: "And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall, at its own proper cost and expense, execute and deliver to the said party of the second part, or to his assigns, a good and sufficient conveyance in fee simple of said described lands, free and clear from and of all liens and incumbrances, except such as may have accrued thereon, subsequent to the date hereof, by or through the acts or negligence of said party of the second part, his heirs, or assigns."

The bill shows that, upon the execution of the contract, the complainant paid some money upon it, and went into possession of the lands, which possession he has ever since held.

The Central Car & Manufacturing Company, by its properly executed and delivered deed, conveyed this land to the defendant, subject to complainant's contract, which deed contained all the covenants called for by the contract. After the deed and assignment aforesaid, the complainant paid to defendant all the money due upon the contract, except about \$60. On the twentieth day of January, 1885, he tendered to said defendant the balance upon the contract,

and demanded a deed according to the terms of the agreement. Defendant prepared and executed a deed of the premises, but the same was not a deed with general covenants of warranty, or a warranty deed of usual form, but a deed, being a release or quit-claim, with covenants only against the acts of said defendant. This deed the complainant refused to accept. He then, on the thirtieth of the same month, prepared a deed of the premises, containing the usual covenants of warranty, to be signed by defendant and his wife, and presented the same to said Potter for execution, at the same time tendering him one dollar for expenses, and offered him sixty-one dollars, being the amount claimed to be due by the defendant upon the contract. Potter refused to accept the money or execute the deed, declaring that he would make no other than the quit-claim aforesaid.

The controversy, therefore, is whether complainant is entitled to the deed he demands of defendant.

There is no averment in the bill expressly stating that complainant has ever consented to the release of the Car Company from its obligation under the contract, and the substitution of defendant in its stead ; but the bill shows that complainant, after the assignment of the contract to the defendant, paid him a large amount upon the contract, which defendant accepted, establishing a virtual substitution and a privity between the parties to this suit.

It has been held in this State that, where a vendor, in a contract like the one under consideration, had conveyed the land to a third person, in possession of the premises under a contract with the vendee in disregard of the rights of the vendee, the vendee had a right to a specific performance of the vendor's contract by such third person holding the title.<sup>1</sup> The original vendor was made a party in that case, because there were no contract relations between the vendee and the vendor's assignee ; and so, also, in *Daily v. Litchfield*.<sup>2</sup> But in this case it was not necessary to make the Car Company a party, as the complainant had fully accepted the defendant in its stead.

In equity, the corporation in this case was a trustee of the title of these premises, holding the same for the complainant, to be conveyed to him upon the performance upon his part of the contract. The defendant purchased the premises of the corporation, subject to its contract, and with notice of the complainant's rights. He must therefore be deemed as standing in the shoes of the vendor, and is as much a trustee for the vendee, the complainant, as was the corporation before its assignment of the contract.<sup>3</sup> The complainant is therefore

<sup>1</sup> *Bird v. Hall*, 30 Mich. 374.

<sup>2</sup> 10 Mich. 29.

<sup>3</sup> *Murray v. Ballou*, 1 Johns. Ch. 566 ; *Saunders v. Dehew*, 2 Vern. 271 ; *Laverty v. Moore*, 33 N. Y. 658 ; *Smoot v. Rea*, 19 Md. 398.

entitled to a specific performance from the defendant. Taking the conveyance with a full knowledge of complainant's equities, and succeeding to the interest of the vendor in the premises, and having been tendered the full amount of the balance due upon the contract, he must transfer the title to complainant, and transfer it in substantial compliance with the terms of the contract. The complainant has a right to demand and obtain as good a title in every respect as he would have been entitled to receive had the vendor not parted with it.<sup>1</sup>

It seems to us that the demurrer should have been overruled. The complainant was entitled, under his contract, to a deed containing the usual covenants. The covenant against incumbrances and for seizin not running with the land, a quit-claim deed from defendant would not give him the title his contract guaranteed him.<sup>2</sup> The defendant has received from the vendor, the Car Company, a warranty deed with full covenants, and the complainant asks from him only the same covenants. There is no good reason why he should not make such a deed. The case set out in complainant's bill is equitable, and the defendant should comply with his demand or make answer, if he has any defense upon the merits.

We cannot agree with the counsel for the defendant that his client became, by the deed and assignment of the Car Company, the trustee of the corporation, in the sense of being a mere agent whose only duty was to pass over to the complainant the deed of the Car Company to him with his own quit-claim, but he became a trustee, in the sense of succeeding to the rights and also the obligations of his vendor and assignor—standing in its place—and bound by the Car Company's contract, which became his own, to give to the complainant as good a conveyance in every sense as the corporation must have done had he not taken its place.

If equity can allow the defendant to substitute his quit-claim deed for the warranty that complainant demands, the record title of these premises, which is the guide of purchasers, will not show the complete and perfect chain of warranties which dispenses with extrinsic evidence to the buyer that the title is good. There can be no hurt to the defendant in executing the deed required by complainant, unless there is something wrong in the title; and, if there is, the contract to which he has become a party cannot be fulfilled without such a deed.

<sup>1</sup> *Keegan v. Williams*, 22 Iowa 378; *Smoot v. Rea*, 19 Md. 398; 2 Story Eq. Jur., 6th ed., § 784; *Downing v. Risley*, 15 N. J. Eq. 93.

<sup>2</sup> *Rawle*, Cov. 318, 320; *Davenport v. Davenport*, 52 Mich. 587; *Matteson v. Vaughn*, 38 Mich. 373.

The decree of the court below is reversed, and the demurrer of defendant overruled, with costs of both courts to complainant. Defendant will be allowed twenty days in which to answer.

The other justices concurred.<sup>1</sup>

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BARROW v. RICHARD AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, MAY 5, 1840.

[*Reported in 8 Paige 351.*]

THIS was an appeal from a decision of the Vice-Chancellor of the First Circuit, overruling the demurrer of the defendants to the complainant's bill. In 1825 T. R. Mercein was the owner of a block of ground in the city of New York, between McDougal Street and the Sixth Avenue, on the south side of Waverly Place, which he divided into thirty-nine building lots, and made a map of such division, and filed it in the office of the register of deeds. On the 22d of March, 1825, Mercein sold and conveyed five of the lots to four different persons in severalty. In each of the conveyances a condition was inserted, that the conveyance should be void if there should at any time be erected, made, carried on, permitted or suffered, upon any part of the premises so conveyed, any livery stable, slaughter-house, tallow chandlery, smith's forge, furnace, brass or other foundry, nail or other iron factory, or any manufactory for the making of glue, varnish, vitriol, ink or turpentine, or for dressing or keeping skins or hides, or any distillery or brewery, or any other manufactory, trade or business whatsoever which should or might be in anywise offensive to the neighboring inhabitants. And Mercein subsequently sold more than twenty other lots in the same block to different persons; and among them the lot No. 11, subsequently purchased by the complainant, and lots No. 12 and 13, on which the defendants afterwards established their coal-yard. In the conveyances of all of these lots, a similar provision was inserted, against the use of the lots for any noxious business, or any trade or business which might be offensive to the neigh-

<sup>1</sup> "My opinion is that in such a case as this a suit to enforce performance of an executory contract, where the vendor has passed title to a second purchaser with notice, the proper decree is to direct a conveyance by the vendor with such warranty as he stipulated, and from the second purchaser without warranty, in one or separate deeds. As the legal title passed, a conveyance from the second purchaser would be sufficient to give the first one such title; but you want the warranty of the first and the estoppel created by it."—Brannon, J. *Bates v. Swiger*, 21 S. E. 874, 877 (Supreme Court of Appeals of West Virginia, April 6, 1895); see also *White v. Moores*, 86 Maine 62, 64.—ED.

boring inhabitants ; except that in these subsequent conveyances, the provision was in the shape of a mutual covenant between the grantor and grantee, instead of being in the form of a condition, as in the deeds for the first five lots.

The complainant had erected a valuable dwelling-house, of the first class, upon his lot No. 11. And the defendants had established a coal-yard on the adjoining lots, 12 and 13, which the complainant insisted was offensive to the neighboring inhabitants, and was a violation of the covenants contained in the deeds of those lots from Mercein. The object of the bill, therefore, was to compel the defendants to remove their coal-yard, and for a perpetual injunction against the use of the lots for any noxious or offensive purpose, contrary to those covenants.

The following opinion was delivered by the Vice-Chancellor upon overruling the demurrer :

MCCOUN, V.C. The great question is, upon the effects of the covenants in the deeds against offensive trades and business, and how far the complainant can avail himself of them. This is an important question, not only as respects this particular property, but in regard to other parts of the city, where a large amount of real estate is held under deeds and leases containing similar covenants or conditions. The clauses inserted in a few of the deeds executed by Mr. Mercein for the lots which he first sold are in the form of conditions—the legal effect of which would be to defeat the estate granted, in case of a breach of the condition, but no other person than the grantor or his heirs can, at law, take advantage of the condition and re-enter for a forfeiture or breach. In the subsequent deeds under which both the complainants and defendants hold, this provision is introduced by way of covenant. And though it is expressed to be a covenant mutually made between the parties to the deed, their heirs and assigns, its only object can be to restrain the grantee and his heirs and assigns, and not the grantor and his heirs. For having sold and conveyed the fee simple of the lots, the grantor and his heirs can have no use or enjoyment of the property afterwards, and therefore no need of covenants on their part, restricting them in the use or enjoyment. We are therefore to regard it as a several covenant of the grantee, made to and with the grantor, but it is nevertheless a covenant running with the land, and as such is binding upon the heir of the covenantor, and any subsequent purchaser under him, as assignee of the land ; for the covenant follows the land, and becomes obligatory upon those who succeed to the same land, whether by descent or purchase.<sup>1</sup>

The object of these covenants on the part of purchasers, and the

<sup>1</sup> 2 Sugden on Vend. 78 ; Platt on Cov. 461.

reason for making it either a condition of the sale of each lot, or requiring such covenants, is very manifest. Mr. Mercein owned all the lots in the block, which from their location were calculated for good dwelling-houses, and to form a respectable neighborhood. In disposing of the lots it was very important to him that the sale of one or more should not impair the value or prejudice the sales of the rest; and hence he took care to lay the purchasers under the restrictions contained in the covenants, as to the use to be made of the lots; thus endeavoring to enhance the value, and to encourage the erection of elegant houses, instead of suffering any of the lots to be depreciated by the introduction of stables or manufactories or business of any kind that might prove offensive or injurious to the character of adjoining lots or of the immediate neighborhood. In this respect the covenants were to operate for the personal benefit of Mr. Mercein while he remained the owner of any lot in the block, but if he has or shall sell off every lot, and part with all his interest in the property (and it does not appear by the bill how the fact is), then he would seem to have no longer any interest in the covenants, since by a breach which might subsequently be committed he would not be injured. But the question is not now upon the continuing effect of the covenants in favor of Mr. Mercein, or as to his rights and the remedies which he could pursue for a non-performance. The question now is between the different grantees of Mr. Mercein in respect to their several lots, whether one of such grantees or a purchaser under him can claim any benefit of the covenant made to and with Mr. Mercein, or can have any remedy against another grantee for a breach of such covenant. These covenants upon their face purport to include the "heirs and assigns" of both contracting parties. It has already been shown how far these covenants bind the heirs and assigns of the covenantor or purchaser, as covenants running with the land. They bind in respect to the particular lot conveyed to which the covenant relates; but where is the land to which the covenant attaches itself in the hands of Mercein, and follows upon his transfer or conveyance to a third person, so as to give that third person the benefit of the covenant as his assignee? There is none. Selling one lot to A in fee, and taking A's covenant restricting the use to be made of the lot, and then conveying an adjoining lot to B upon similar terms, does not constitute B the assignee of A's covenant. If Mr. Mercein, as the owner of land, had granted a term of years to A, taking his covenant as to the manner of using the land, and had then sold the reversion of the same land to B in fee, here the covenant of A would follow the conveyance of the reversion to B, and the latter would be the assignee entitled to sue at law for a viola-

tion subsequent to his purchase. It is very obvious that the present complainant does not stand in the situation, nor is he clothed with the legal rights of such an assignee.

There is one case which I have met with that bears some analogy to the present—the case of *The Duke of Bedford v. Trustees of the British Museum*, in 2 Sugden on Vendors, App. 361, but nowhere else reported. There the duke had become the owner of Southampton House, the former owner of which, in selling other ground on which the museum stood, had taken a covenant from the purchaser that he, the purchaser, would not erect buildings on the ground conveyed to him, to the northward of the line of Southampton House. Southampton House was afterwards pulled down, and on the site of it, adjacent to the museum gardens, houses had been built by the Duke of Bedford, and the question was, whether in equity he had a right to restrain the trustees of the British Museum from erecting buildings in the museum gardens to the northward of the line designated, contrary to the letter of the covenant. The Vice-Chancellor, before whom the cause was first heard, had difficulty in his own mind as to the construction to be given to the covenant, whether it was a covenant which was intended to afford additional security for certain rents reserved out of the lands conveyed to the covenantor, and if so, then he appears to have considered that it was not a covenant which ran with the land not granted, that is, with the land upon which Southampton House was built, so as to give the subsequent owners of this land a right of action at law, as assignee of the covenant; and if no action at law could be sustained, then he considered there could be no remedy in equity. Another view, however, was urged, as the one which might be taken of the covenant, viz., that it was intended not to secure the rents merely, but to prevent such a use of the land granted as might tend to diminish either the valuable or pleasurable enjoyment of the land adjoining, on which Southampton House was built. The Vice-Chancellor therefore stated the question to be, whether upon the whole of the deed it did appear that the covenant had been so framed as to afford evidence of an agreement between the parties and those who should represent them, on the one hand as being the owners of Southampton House, and on the other of the land adjoining, that the latter would never use this land but in the manner prescribed, either to the prejudice of the profit or pleasure of Southampton House. If the deed afforded evidence that such were the intentions of the parties to the instrument, then he said there was a clear remedy at law against the act sought to be performed, and a clear remedy in a court of equity, by way of injunction to restrain the commission of that act. But a court of equity would only follow



the law upon such an agreement and give the same construction to it, and restrain only where a court of law could give damages. He therefore concluded to send the case to a court of law, to determine what the intention of the party really was. On the hearing before Lord Eldon, it is stated that he ultimately decided that under the circumstances, considering the acts of the parties, the alteration of the property and the right to relief in equity was at an end. The grounds of Lord Eldon's determination are not given, which perhaps is to be regretted ; but from the reasoning of the Vice-Chancellor in the case, it would seem that the principle on which that case proceeded was, that the remedy in equity was to be graduated by the remedy at law upon the covenant or agreement, and where no right of action at law could be traced to the party asking the injunction, he was not entitled to it. It appears to me, however, that this is too narrow and limited a view to be taken of the powers and jurisdiction of this court in cases of this sort ; and that after all, the true doctrine which governs this case is to be found in *Hills v. Miller*,<sup>1</sup> and in cases of that class.

With respect to the question whether the business of a coal-yard is an offensive trade or business, or is among the number of things guarded against by the covenants, depends upon evidence. Enough is shown by the bill to bring it within the prohibition as a private nuisance, if not a public one. The defendants cannot, upon demurrer, gainsay the facts alleged in the bill. How far this court interferes to restrain a nuisance of any sort, I will not now inquire. Upon the ground of a privilege, or easement created by the covenant, which it is competent for this court to protect the parties in the enjoyment of, and which constitute an equity in this bill, the demurrer must be overruled.

*W. H. Harrison* and *D. B. Ogden* for the appellants.

*C. Bushnell* for the respondent.

THE CHANCELLOR.<sup>2</sup> From the averments in the complainant's bill in this case, which, upon the demurrer, must be taken as true, there can be no doubt that the object of Mercein in having this restriction inserted in his conveyances to Richard and others, was to enhance the value of the lots to all the purchasers in the block, and was intended to be enforced for their benefit. In this respect the case is different from that of the Duke of Bedford relative to the buildings erecting in the British Museum gardens, cited in the opinion of the Vice-Chancellor, from the 9th London edition of Sugden on Vendors. I have not access to that edition of Sugden at present, and therefore only recollect the case as read by the counsel, upon the argument ;

<sup>1</sup> 3 Paige 254.

<sup>2</sup> Reuben H. Walworth.—ED.

and from the statement of it in the opinion of the Vice-Chancellor. At the time that case came before the court of chancery in England, the splendid mansion called "Southampton House," once the residence of Rachel De Rouvigny, Countess of Southampton, "*La belle et vertueuse Huguenotte*," and afterwards of her son-in-law, the amiable and talented Lord William Russel, who was beheaded in 1683 for his alleged participation in the Rye House plot, was no longer in existence; but his descendant, the Duke of Bedford, had caused a number of other houses to be erected upon the lot upon which it formerly stood. A question therefore naturally arose, whether a covenant with Lady Russel, who was temporarily the equitable owner of Southampton House, was intended for the benefit of the subsequent owners of the land on which that mansion stood at the time the covenant was entered into. And, if I recollect right, the court offered to the duke an issue, to ascertain whether the covenant not to build upon the lands to the northward of Southampton House was intended as an easement to the lands upon which the new buildings of the duke were subsequently erected or not.

In the present case, I think, no one can doubt that the object of the covenants in the deeds from Mercein was to secure all the purchasers of lots in the block against an offensive use of any other of those lots. And if lots No. 12 and 13 had been conveyed to the defendants, or to those under whom they claim, while Mercein was still the owner of lot No. 11, I am not sure that any technical difficulty would have arisen in the maintaining an action at law, upon the covenants of the grantees of the two first-mentioned lots, by the complainant, as the subsequent purchaser of lot No. 11, and the assignee of the covenant for an easement for the benefit of that lot. But as No. 11 was first conveyed, and the mutual covenants in the deed refer to that lot only, and not to other lots which still remained in the hands of Mercein, the subsequent purchasers from him of lots No. 12 and 13 would have taken their lots entirely discharged of the easement in favor of No. 11, had it not been for their covenants in their own deeds for the benefit of the "neighboring inhabitants"; that is, the owners of other lots in the block. Although the complainant could not maintain a suit at law on that covenant, in his own name, and would, perhaps, be only entitled to nominal damages if the suit was brought in the name of Mercein, this court can give full effect to the covenant, by a suit in the name of the party for whose benefit and protection the covenant was intended.<sup>1</sup>

There can be no doubt, if the allegations in the bill are true, that the use of lots No. 12 and 13 as a coal-yard is a clear violation of the

<sup>1</sup> See *Bleecker v. Bingham*, 3 Paige's Rep. 246.

covenants of the grantees of those lots. The language of the covenant shows that several other uses of the lots, far less offensive than this, are in terms prohibited, on the ground that they would probably be offensive to the neighborhood. The allegation in the bill on this subject, though it is a little poetical, cannot be considered a mere poetic fiction, as it is sworn to by the complainant and is admitted by the demurrer. He there states that large quantities of volatile and offensive dust and smut from the coal rise in the air, and are diffused by the wind into the premises of the neighboring inhabitants. And in spite of all their care, such coal-dust and smut not only settles upon their walks and their grass-plats, but also on their fragrant plants and flowers, "beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man." But what must be still more offensive to the ladies of the neighborhood, "this filthy coal-dust settles upon their door-steps, thresholds, and windows, and enters into their dwellings, and into their carpets, their cups, their kneeding-troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stainless raiment and robes of beauty and comfort, defacing their furniture, and blackening, besmearing and injuring every object of utility, of beauty, and of taste." Making all due allowance for the *coloring* which the pleader has given to this naturally *dark* picture, it is perfectly certain that this keeping of a coal-yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants.

The Vice-Chancellor was therefore right in overruling the demurrer. And the order appealed from is affirmed with costs.

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### CHILD v. DOUGLAS.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., MAY 5, 8, 1854.

[*Reported in Kay 560.*]

By indentures of lease and release, dated in 1836, certain land in the neighborhood of Bradford, in Yorkshire, stood limited to such uses as the Rev. Godfrey Wright and Charles Swaine Wright should jointly appoint; and in default thereof, subject to an annuity during the joint lives of them both, and a term of ninety-nine years for securing the same to the use of the Rev. Godfrey Wright for life; with remainder to trustees to preserve contingent remainders, with remainder to the use of Charles

Swaine Wright for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of Charles Swaine Wright in tail, with divers remainders over; and by the latter indenture a power of sale and exchange over all the settled property was given, by a proviso in the usual form, to a trustee, to be exercised at the joint request of the said Godfrey Wright and Charles Swaine Wright, or at the request of the survivor of them.

The Rev. Godfrey Wright and Charles Swaine Wright laid out this land for building purposes, and projected two parallel roads across it, one of which was afterwards called Houghton Place, and also a third road connecting the two former and called the back road.

In 1845, James Douglas, the defendant in this suit, entered into a contract with the Rev. Godfrey Wright and Charles Swaine Wright for the purchase of a portion of the land included in the settlement. The land so contracted to be purchased abutted to the north upon the said back road, then intended and since constructed, to the east upon the street since called Houghton Place, to the west upon the other street parallel thereto, and to the south upon other land, which the defendant had previously purchased from another person. The purchase was completed in the year 1845, by an appointment by the said Godfrey Wright and Charles Swaine Wright under their joint power to the defendant, his heirs and assigns, of this plot of land, with the appurtenances, together with a right of way over the projected roads, reserving to the appointors a right of way over the road in front of the plot so sold. The defendant built a dwelling-house and surgery for his own use upon this land and upon the adjoining land which he had purchased, and this building was erected, northwards, close up to the back road; but a space of nine feet seven inches was left between the east side of it and the street called Houghton Place, on which no building was erected except a wall about five feet high, which was built close up to the back road, and extended in a line with the back wall of the house eastwards for a distance of nine feet seven inches, that is, just up to Houghton Place. In the contract entered into by the defendant with the said Godfrey Wright and Charles Swaine Wright, which was a printed form, there was a stipulation that the defendant should not erect any buildings within six feet from the streets on the east and west of the plot so purchased by him; and in the conveyance of the land to him the defendant entered into a covenant, "that he the said James Douglas, his heirs or assigns, shall not nor will erect on the said plot of land any buildings within the distance of — from the said intended streets," meaning Houghton Place and the other street parallel to it.

It appeared that in the draft of this deed, prepared by the purchaser, the blank was filled up with the words "six feet"; but these words were

struck out by a clerk of the vendor's solicitor, and no explanation was given of the object of the erasure, or of the covenant being left in blank.

In 1853, the plaintiff John Child purchased from the said Godfrey Wright (who had survived Charles Swaine Wright) and from John Hamerton, the trustee of the power of sale in the said settlement, another portion of the land therein comprised, which was only divided from the back of the house built by the defendant on the land sold to him by the said back road, and abutted to the east upon Houghton Place. This plot was conveyed to the plaintiff by the said John Hamerton, with the concurrence of the said G. Wright in exercise of the power of sale and exchange in the said settlement; and in the deed of conveyance was contained a covenant by the plaintiff with the said Godfrey Wright not to erect any building of any description upon the land purchased within the distance of six feet from the causeway or footpath in Houghton Place.

Upon the negotiation of the plaintiff's purchase his agent inquired from the agent of Godfrey Wright upon what conditions the land was to be sold, and was informed that the purchasers would not be allowed to build nearer than six feet to Houghton Place; and a plan of the land was shown to him, on which a line was drawn on either side of Houghton Place, which was marked as the building line, and indicated that the buildings were to be six feet distant from the causeway of that street.

Upon the land so purchased the plaintiff built a dwelling-house, one side of which was close to the back road, and the front towards Houghton Place, but at a distance of six feet from the causeway.

No complaint was made of the wall five feet high which had been built up to Houghton Place by the defendant; but in the present year he began to raise this wall, and had built it two feet higher, intending to carry it to the height of fifteen feet, and threatening, if any objection were made, to raise it to the height of his house.

The plaintiff objected to this, and, after some correspondence between their solicitors, the present bill was filed, for an injunction to restrain the defendant and his servants, agents, and workmen from proceeding with the building of the said wall from the northeast corner of his said dwelling-house, within the distance of six feet from Houghton Place, and from allowing the wall already erected on the plot of land of the defendant, within the said distance, to continue thereon, and from erecting any other building upon the said plot of land within the said distance.

The plaintiff had obtained an interim injunction *ex parte*, and now moved with notice for an injunction in the terms of the prayer.

It was in evidence that the basement of the plaintiff's own house pro-

jected two inches and a half within the distance of six feet from Houghton Place, and he had built a porch which projected ten inches further.

The defendant's covenant was stated in the bill as a perfect covenant not to build within "six feet" of the streets. The facts concerning the blank in the covenant appeared from the affidavits only.

*Mr. Rolt, Q.C., and Mr. Mackeson* for the plaintiff.

*Mr. Daniel, Q.C., and Mr. Amphlett, contra.*

VICE-CHANCELLOR SIR W. PAGE WOOD: <sup>1</sup>

Several ingenious arguments have been offered by the defendant's counsel upon the title to this property. The whole property was originally comprised in a settlement, by which the first use was limited to such persons as Godfrey Wright and Charles Swaine Wright should jointly appoint; and then there were a series of limitations under which the survivor of them took the property for life, with remainders over, and with a power to a trustee, with his consent, to sell or exchange. It is argued that the conveyance of part of this land to the defendant Douglas, having been made under the operation of the joint power of the Wrights, and his covenant having been entered into with the donees of the power only, it in no way binds the land with regard to those persons who come in subject to the power under the limitations in the settlement; and therefore, although the question whether the covenant runs with the land may be immaterial, in no sense can the covenantees be considered to be trustees of the covenant for the persons who take under the subsequent limitations. I think, however, that any remainderman, for example Godfrey Wright, the tenant for life, would be extremely surprised if he were told that, though he had joined in executing this conveyance and imposing this condition on the purchaser, yet, when he came into possession of the rest of the property under the settlement, the whole benefit of this condition, which he had endeavored to obtain, was at an end, and that he could have no advantage from it; except it might be in the case of Godfrey Wright that the covenant might survive to him at law.

The real truth is, that the court invariably regards stipulations of this kind with reference to the benefit to the property which is reserved by the vendor; and, looking at every possible analogy, even at law, I think I am bound to hold that a covenant of this kind, though not strictly a reservation, is yet so analogous to it, that it would clearly inure to the benefit of all parties interested under the settlement, like the reservation of a right of way in a similar conveyance. There was a learned discussion in *Isherwood v. Oldknow* \* upon this subject, and

<sup>1</sup> A portion of the opinion has been omitted.—ED.

<sup>2</sup> 3 M. & Selw. 382.

it was there held, that, even at law, a remainderman in such cases must be treated as an assign of the covenantee, for a reason which would be applicable equally to this case, and which will remove the objection in the case of a party even coming into possession under an adverse title in consequence of the uses of the settlement having failed. It was there held that all the estates under a settlement, and by the exercise of the powers therein contained, take effect as from the settlor himself, and they are one series of uses limited by the settlement. In this case those uses having been so limited, and there being a power to dispose of the whole fee simple, the parties who exercised that power as to the land sold to the defendant having reserved the benefit of this covenant, it operates for the advantage of all persons coming in under the uses of the settlement, including the appointees under the power of sale and exchange, and therefore they are entitled to have this agreement for their benefit specifically performed by an injunction in equity. That will give the title to the persons who conveyed to the plaintiff in such a manner that he must also have a right to insist upon the benefit of this covenant.

Another objection which has been made is that there were no reciprocal covenants from the parties interested in the rest of the land for the benefit of the purchaser of a particular portion, as it was said was the case in *Whatman v. Gibson*,<sup>1</sup> but only this covenant by the purchaser with the owner of the rest of the land which was unsold, that the particular purchaser should be bound not to make certain erections upon the land which he had purchased, leaving it open to the owner of the unsold land to make or abandon the projected street, and to impose or not to impose upon future purchasers from him a similar condition. But I think that this is no real objection. It only amounts to this, that the defendant Douglas has covenanted with the vendor not to perform certain acts, and has not thought fit to make the vendor enter into a covenant with him to take similar covenants from future purchasers of the remaining land.

The reciprocal advantage here obtained by Douglas is really the conveyance of the land; and it cannot be said that, for want of a reciprocal benefit which he did not stipulate for, he cannot be compelled to perform that which he has expressly covenanted to do. The case of *Tulk v. Moxhay*<sup>2</sup> was in this respect a case of a similar description. Tulk had not bound himself to the purchaser from him of Leicester Square, but the purchaser had bound himself to Tulk to keep the Square in good order. Tulk did not covenant to keep houses built round the Square, nor that the persons who had houses should be com-

<sup>1</sup> 9 Sim. 196.

<sup>2</sup> 2 Ph. 774.

pelled to pay a reasonable compensation for keeping the Square in order. And at the Rolls<sup>1</sup> it was used as an argument against the covenant being enforced, that this was not secured ; and it was contended that for that reason the inclosure had been allowed to get out of order, and that there was in that sense no reciprocity ; but this argument was of no avail ; and if Tulk had afterwards assigned the remaining land to others, the parties to whom he assigned would no doubt have had a right to have the agreement specifically performed by an injunction to restrain the purchaser of the square from allowing it to remain in its neglected condition.

In this case it is not necessary to carry it so far, for the plaintiff has himself entered into a similar covenant. If the defendant Douglas were pressed to perform this covenant by the owners of other property, who had not entered into similar covenants, it is possible that he might have a right to say "I am released from my engagement." But he has acquired certain easements upon the unsold property, for instance, a right of way over the intended new road in front of the houses ; and it may be doubtful under these circumstances whether he would be entitled to insist that it was part of his contract that the whole property should be placed under similar conditions to those by which he was bound.

Then it is argued that if the landlord assign to other persons the reserved property, the assigns cannot have the benefit of this covenant. But that was the very case of *Whatman v. Gibson*.<sup>2</sup> Each party there was an assign under those who were parties to the original covenant ; and though there were reciprocal covenants in that case, yet there can be no doubt, supposing that the plaintiff there had been the purchaser of the last house, and the vendor had entered into no covenants with him, he would still have been entitled to the benefit of the defendant's covenant.

I have felt some difficulty throughout in seeing how reciprocity could have anything to do with the question. Where part of the remaining property of the original vendor has been sold to another person, who must be considered to have bought the benefit of the former purchaser's covenant, and more especially when the subsequent purchaser has entered into a similar covenant on his own part, he must be considered to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant was in fact inserted in the other purchase deeds, because he must be taken to have bought all the rights connected with his portion of the land.

My attention was called during the argument to the case of *Roper v.*

<sup>1</sup> 11 Beav. 578

<sup>2</sup> 9 Sim. 196.



Williams,<sup>1</sup> in which Lord Eldon observed that in the case of the Duke of Bedford's leases, containing covenants similar to the present, if the landlord had released some of the tenants from their covenants, all would have been set free ; and therefore it was argued that it cannot be said that the purchasers of the different portions of the land had any specific rights against one another, but only as between themselves and the landlord, and that he alone would have the power of releasing this covenant. That only amounts to this, that the Duke of Bedford might release the covenant if the party who entered into the covenant did not, as in this case he did not, secure a reciprocal covenant from the landlord that he would cause the other tenants to enter into similar covenants. But if he had taken such a covenant from the landlord, or if the landlord had afterwards made grants of other portions of the land, in which the tenants had entered into like covenants with him, as here, then, if the landlord released the covenant of the first tenant, the others might be entitled to say that the whole scheme was that there should be a system of uniformity throughout the land to be built on ; and if the vendor released one tenant from such a covenant, the others would have a right to claim similar releases. However, I think that the better view is, that the landlord, in such a case, having secured from the purchaser or lessee of part a particular benefit in respect of all the land, if he afterwards sell the rest of that land, he must be taken to sell the benefit of that covenant also ; and that was the effect of the decision in *Whatman v. Gibson*.<sup>2</sup>

The VICE-CHANCELLOR granted an interim injunction.

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OLIVER H. BADGER v. BENJAMIN G. BOARDMAN.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER,  
1860.

[*Reported in 16 Gray 559.*]

BILL IN EQUITY to enforce a restriction in a deed from Oliver Downing to the defendant of one of several parcels of land on the westerly side of Bowdoin Street in Boston.

From the bill and answer and evidence it appeared that Downing, being the owner of all these parcels of land, which were described on a plan thereof, dated the 12th of December, 1843, and recorded in the registry of deeds on the 21st of March, 1844, conveyed to the defendant in fee simple the parcel or lot numbered 3 on the plan, with the building

<sup>1</sup> T. & R. 18.

<sup>2</sup> Sim. 196.

thereon standing, by metes and bounds and "subject to the following restriction: That no outbuildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon"; and that on the 25th of December, 1844, Downing conveyed the parcel or lot numbered 4 on the plan to George Roberts, with all the rights, easements, privileges and appurtenances thereto belonging, which afterwards came by mesne conveyances to the plaintiff. The bill was dismissed, and the plaintiff appealed.

*J. A. Andrew* for the plaintiff.

*J. A. Loring* for the defendant.

BIGELOW, C.J. The infirmity of the plaintiff's case is that there is nothing from which the court can infer that the restriction in the deed from Downing to Boardman was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney v. Union Railway*,<sup>1</sup> that the plaintiff would be entitled to insist on its enjoyment and to enforce his rights by a remedy in equity. But there is an entire absence of any language in the deeds under which the parties claim, from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to inure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed. Nor is there any language in the deeds under which the plaintiff claims title which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate. Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it might have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that con-

<sup>1</sup> 11 Gray 359.

veyed to the plaintiff originally formed a part. However this may be, it is certain that the defendant took his grant without any notice, either express or constructive, that this restriction was intended for the benefit of the plaintiff's estate. This is the material distinction between the case at bar and that of Whitney Union Railway, above cited. And it is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff, which in equity by accepting the grant the defendant would be bound to observe. We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit.

Bill dismissed with costs.

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SAMUEL H. PARKER AND OTHERS v. JAMES NIGHTINGALE AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1863.

[Reported in 6 Allen 341.]

BILL IN EQUITY, setting forth that before the erection of houses upon Hayward Place, in the city of Boston, the land upon and adjoining the same was owned by Lemuel Hayward; that upon his decease it was arranged among his heirs that the said land should be laid out into a court or street, to be occupied exclusively for dwelling-houses; that for this purpose the land was surveyed and laid out into a court, with house lots of convenient size, and numbered, following the course of the court; that this agreement was made to facilitate the sale and enhance the value of the lots, by rendering them quiet and desirable places of abode; that it was further agreed among the heirs and those who represented such as were not *sui juris* that in conveying the lots the grantees should be laid under an express obligation or duty, by way of condition or limitation of the use thereof, that "no other building, except one of brick or stone, of not less than three stories in height, and for a dwelling-house only," should be erected by them; that the deeds of all the lots were made upon this condition, and the same was either repeated or referred to in the subsequent conveyances thereof; that lot No. 2 was set to Charles Hay-

ward, one of the heirs, and, being under the control of trustees, was by them conveyed in 1822, upon condition "that no other building shall be erected or built on the lot except one of brick or stone, not less than three stories in height, and for a dwelling-house only," and the same came by intermediate conveyances to James Nightingale, one of the defendants, who now owns the same; that early in 1862 said Nightingale leased said premises, consisting of a three-story dwelling-house and convenient and comfortable accessory erections, to Frederick Loeber, the other defendant; that the plaintiffs believe and charge the fact to be that the said lease contains the same condition above recited, but they also insist that said Loeber is bound by the conditions of the tenure of his lessor, whether he had actual knowledge thereof or not; that said Loeber has taken steps to convert said dwelling-house into a restaurant or eating-house; that the owners of other dwelling-houses in Hayward Place thereupon requested the defendant Nightingale to interfere and stop his tenant Loeber from such unlawful perversion and misuse of the premises; that Nightingale, being threatened with a suit by Loeber in case of such interference, thereupon said that "as he could not escape a lawsuit by any course which lay open before him, he might as well have the matter settled by the suit of the proprietors aforesaid as by the suit of Loeber"; that Loeber has since used the place as a restaurant, having large numbers of noisy and boisterous persons in and about the same, and has thus rendered Hayward Place almost unfit for quiet and comfortable residences; and that the plaintiff Parker, in behalf of himself and eleven others who were named, being each the proprietor of a lot on Hayward Place, with a dwelling-house thereon of the description above set forth, has brought this bill. The titles of some of the plaintiffs were set forth in detail. The prayer was for an injunction against such use of the premises and for other and further relief.

The defendants filed a general demurrer, and the case was thereupon reserved for the determination of the whole court.

*C. W. Storey and S. Wells, Jr.*, for the defendants.

*I. F. Redfield and W. A. Herrick* for the plaintiffs.

BIGELOW, C.J.<sup>1</sup> This brings us to a consideration of the most important and difficult question raised by the demurrer, which is, whether the present plaintiffs, or any of them, set forth in the bill any such claim or title as will enable them to enforce this restriction on the use and occupation of the premises in controversy as against the defendants. A satisfactory answer to this inquiry will, we think, be found in the fact, which is sufficiently apparent from the allegations

<sup>1</sup> A portion of the opinion has been omitted.—ED.

in the bill, that the purpose intended to be accomplished by the restrictions inserted in the deeds of the estate now owned and occupied by the defendants was for the benefit and advantage of other owners of lots situated on the same street or court. Indeed, it could have been designed for no other purpose. If we lay aside all the facts alleged in the bill which rest in parol evidence only, and look exclusively to the history of the title as shown by the deeds, the conclusion is unavoidable that the original grantors, in whom the title to the entire tract now owned by the several parties to this suit in different parcels was vested, intended, by limiting the use of the several lots and prescribing the kind of structures which are to be erected by the grantees thereon, to establish a permanent regulation and restriction by which to prevent each parcel from being appropriated to a purpose which might inure to the injury of any other parcel, or render it less agreeable as a place of residence. By excluding all erections for the purposes of trade, and appropriating each lot to a prescribed use as a dwelling-house, the entire neighborhood comprised within the limits of the original tract laid out for a street or court was secured against annoyances arising from occupations which would impair the value of the several lots as places of residence. Thus a right or privilege or amenity in each lot was permanently secured to the owners of all the other lots. While each was restrained in the use of his own estate, he had the benefit of a like restraint imposed on all the other estates. That this restriction or limitation was not imposed by the original grantors for their own benefit or advantage, and cannot be considered as personal to them, is manifest from the fact that they retained no right or interest in any of the parcels of land. The whole tract was conveyed by them. It does not appear that they retained the occupancy or ownership of any of the lots or of any adjoining estate, by means of which they could derive any personal benefit or advantage from the restrictions. But even if they had it would not change the result; because, by uniting in a scheme or joint enterprise for the division of the estate into lots or parcels on a street or court laid out by them, and annexing to the conveyance of each lot a restriction on its use, by the observance of which each parcel would be occupied for a similar purpose with every other, the legal inference is, in the absence of any evidence to the contrary, that the intention was to secure to each estate the benefit or advantage which might arise from the specific mode in which the adjoining premises were to be improved and occupied. The effect of such a restriction, inserted in contemporaneous conveyances of the several parcels under the circumstances alleged in the bill, was to confer on each owner a right or interest in the nature of a servitude in all the

lots situated on the same street which were conveyed subject to the restriction. Thus it entered into the consideration which each purchaser paid for his land, either by enhancing its price in view of the benefit secured to him in the restraint imposed on adjoining owners, or by lessening its value in consequence of the limitation affixed to its use. In this view of the case, it is quite immaterial to determine the precise legal nature or quality of the restriction in question. In strictness, perhaps, the right or interest created by the restrictions, being a qualification of the fee, did not pass out of the original grantors, and now remains vested in them or their heirs. But if so, they hold it only as a dry trust, in which they have no beneficial use or enjoyment, the entire usufruct being in their grantees and their assigns now holding the estates, for whose use and benefit it was intended. Such being the case, then the latter are proper parties to enforce the restriction; and the former, not having any present interest in it, need not be parties to the proceeding. The same result would follow if the restriction be construed as in the nature of a covenant by each grantee with the other owners of estates on the court or others holding under a similar restriction. In either view, the present plaintiffs, having a common interest in the subject matter of the bill, and the right to ask for the same remedy against the defendants, are rightly joined as parties.<sup>1</sup>

The case of *Badger v. Boardman*, 16 Gray 559, cited by the defendants, is unlike the case at bar. There was nothing in that case to show that the restriction on the use of certain premises was designed for the benefit of the owner of the estate who sought to enforce it. On the contrary, there was reason to believe that the restriction was inserted in the deed with a view to confer a privilege or easement exclusively upon another adjoining estate belonging to the grantor.

Looking at the merits of the case as disclosed by the bill, it seems to us that the plaintiffs are entitled to maintain their bill to enforce the restriction by enjoining the use of the premises for the purposes for which they are alleged to be occupied by the defendant Loeber.

<sup>1</sup> Story Eq. Pl. §§ 121, 126; *Adair v. New River Co.*, 11 Ves. 429, 444; *Gray v. Chaplin*, 2 Sim. and Stu. 267.

## HARVEY JEWELL v. JAMES LEE, JR.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1867.

[*Reported in 14 Allen 145*].

BILL IN EQUITY filed March 1, 1866, to restrain the defendant from erecting a dwelling-house upon a lot of land upon the southerly side of Orient Street in Swampscott, and to obtain a decree ordering him to remove all erections and structures of any kind which might be found to be in violation of the condition of a certain deed, as hereinafter set forth.

Upon the pleadings and report of Chapman, J., the case appeared to be as follows :

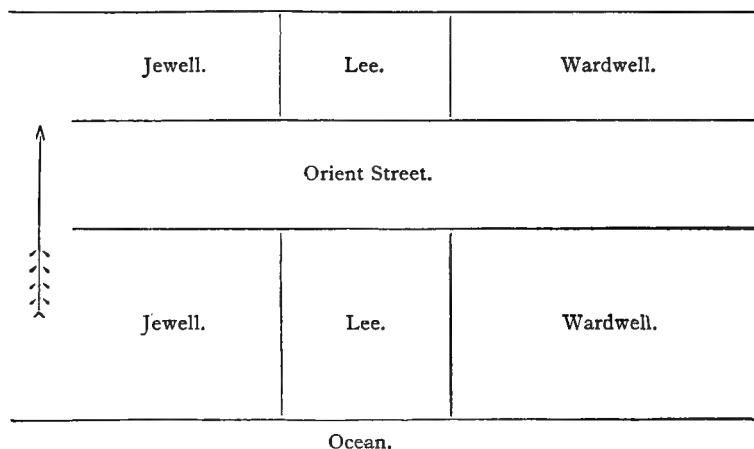
On the 15th of May, 1856, John D. Bates, being the owner of land lying on both sides of Orient Street, conveyed to Stephen H. Wardwell and Eben N. Wardwell the portion upon the southerly side, bordering upon the ocean, "upon condition that the granted premises shall be used for no other purpose or purposes than those for which they are now used, namely, for bathing and boating from the beach, excepting only that low bathing-houses may be built thereon ; it being understood and agreed that the grantee, his heirs or assigns may ornament the granted premises in such manner as shall not be inconsistent with the foregoing condition." On the 1st of May, 1863, Stephen H. Wardwell released his interest in the premises to Eben N. Wardwell ; and on the 29th of September, 1865, the latter conveyed a portion thereof, being the westerly end, to the plaintiff, subject to the condition expressed in the deed from Bates. On the 23d of January, 1866, Wardwell conveyed to Gorham Gray a lot next easterly of the lot conveyed to the plaintiff, subject to the same condition. And on the 5th of March, 1866, Gray conveyed the last-mentioned lot to the defendant by deed of quit-claim.

On the 15th of May, 1856, John D. Bates also by another deed conveyed to the two Wardwells a parcel of land lying on the north side of Orient Street, opposite to that conveyed by him to them on the same day, as mentioned above. On the 1st of May, 1863, Stephen H. Wardwell released his interest therein to Eben N. Wardwell. On the 23d of January, 1866, Eben N. Wardwell conveyed a portion thereof, being the westerly end, to Gorham Gray. And on the 5th of March, 1866, Gray conveyed said lot to the defendant.

By deeds dated November 22d, 1864, and January 5th, 1866, the plaintiff acquired a title to another lot, with a dwelling-house thereon,

upon the northerly side of the street, and lying next westerly of the lot conveyed to the defendant, as mentioned above.

The general situation of these various lots, in respect to each other, is shown by the following plan, in which no attempt is made to preserve the shape and relative dimensions of the lots.



John D. Bates died in 1856 or 1857, leaving a son, of the same name, as his sole heir, residuary devisee, and executor of his will.

At the time of Wardwell's deed to the plaintiff, the latter agreed to aid Wardwell in an endeavor to induce Bates to release the condition; but it was with the understanding that no buildings were to be erected on the land subject to the condition.

In February, 1866, Gorham Gray owned a house which stood on a lot belonging to him, on the north side of Orient Street, and had begun to move it to another lot on the same side. On the 22d of February the defendant agreed to purchase the house, and also the lot subsequently conveyed to him on the south side of the street, and made arrangements to place the house thereon. He knew of the condition in the deed to the Wardwells, and endeavored to procure a release of it from Bates, who gave him some encouragement that he would release it, and permit him to place the building on the land; but he did not give him any release or license to place the building thereon. On the 28th of February the plaintiff was informed that the defendant was moving the house, and on the same day gave notice to the defendant of the objections thereto, and on the following day filed this bill in equity.

On the 5th of March, 1866, the defendant procured from Bates, and shortly afterwards caused to be recorded, instruments releasing



all the owners of the land upon the south side of the street, and from the condition in the deed to the Wardwells, for which the defendant paid \$2,000, a portion of which Eben N. Wardwell is under some obligation by verbal promise to repay. The release to the plaintiff was never delivered to him. The release of the condition is of considerable pecuniary value to the defendant and Wardwell. The restriction was valuable to the plaintiff, independently of his lot on the north side of the street ; but still more valuable in connection with that lot.

The case was reserved for the determination of the whole court.

*H. W. Paine* and *W. Gaston* for the plaintiff.

*C. B. Goodrich* and *J. C. Ropes* for the defendant.

BIGELOW, C.J.<sup>1</sup> The main ground on which the plaintiff rests his claim to equitable relief is, that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist.

It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But, in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases inure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it or any part of it subject to the condition. Indeed, no restriction on the use of land and no condition annexed to its possession and enjoyment can be for the benefit of the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. Inasmuch as the grantee can restrict the use of land of

<sup>1</sup> A portion of the opinion has been omitted.—ED.

which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition as such imposed on its use or enjoyment by any prior grantor.

There is nothing in the case before us which in any degree tends to show that there was any intent on the part of the grantor and grantee in the original deed by which the condition was annexed to that grant of the land now owned by the parties to this suit, to give any other or different effect to the condition than that which would result from it at common law. It does not appear that the original grantor had in contemplation the division of the land into separate lots or parcels which would be held by different owners, or that the condition was inserted in the grant for the purpose of creating a restriction on the use of the land as between subsequent grantees of different lots or parcels thereof. And this constitutes the precise distinction between the case at bar and that of *Parker v. Nightingale*,<sup>1</sup> on which the plaintiff mainly relies in support of his case. There it was made to appear that a condition annexed to a grant of an estate was imposed in order to render the occupation of adjacent estates more convenient and advantageous, and that the existence of such condition entered into and formed part of the consideration of the grant of estates which were intended to be benefited thereby.<sup>2</sup> So far as we are able to see, there is nothing to indicate that the original grantor of the premises, in annexing the condition, had any intent to regulate or control the possession or enjoyment of the premises for the benefit of subsequent owners or grantees of the estate, or any part of it, but that it was imposed by him solely for his own private and personal benefit, as the owner of other lots in the vicinity, in which the present plaintiff has no interest whatever.

Bill dismissed.

<sup>1</sup> 6 Allen 341.

<sup>2</sup> See also *Badger v. Boardman*, 16 Gray 559.

## JOHN M. SCHWOERER v. BOYLSTON MARKET ASSOCIATION.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH,  
1868.*[Reported in 99 Massachusetts Reports 285.]*

BILL IN EQUITY, filed September 12, 1866, to restrain the defendants from constructing a building of the nature of a bridge across Boylston Square, in Boston.

The bill alleged that on April 19, 1809, the defendants, owning a lot of land on the corner of Boylston and Washington (then Orange) Streets (which lot was conveyed to them on the previous day by Ralph I. Reed and Joseph C. Dyer out of a large parcel of land, of the rest of which, adjoining the lot granted to the defendants on the south and west, Reed and Dyer continued owners in fee simple), executed to Reed and Dyer a deed, which was duly recorded on the same day and contained the following clause :

“Whereas the said Reed and Dyer are proprietors of the land adjoining the said association's land, as above described, and it is found convenient to the parties and necessary for the accommodation of the said Reed and Dyer's land aforesaid that a passageway of twenty feet wide adjoining the same be laid out and kept open on the said association's land aforesaid; now be it known that, in consideration of the premises and of the sum of two thousand seven hundred and thirteen dollars and fifty cents paid by the said Reed and Dyer, the receipt whereof the said association do hereby acknowledge, the said association do hereby give, grant, sell and convey to the said Reed and Dyer, their heirs and assigns, the rights, privileges, easements and benefits following, to wit : that all that part of the said association's land above described, which lies between the said southerly and westerly bounds thereof and two lines drawn parallel thereto, at a distance of twenty feet (the one line northerly and the other easterly) therefrom, shall not be subject to have any fence or building erected thereon; and that the said Reed and Dyer, and the future proprietors or occupants of said adjoining land, now owned by said Reed and Dyer, and of any part or parts thereof, shall have the right to the use in common with the said association of the said spaces of twenty feet wide for the accommodation of their said land or estates bounding thereon; provided that they, the said Reed and Dyer, or future proprietors of their said adjoining land or estates, shall not in any manner interfere with or obstruct the operation or effect of any by-laws or regulations which said association shall make and ordain; and provided, also, that the said Reed and

Dyer shall make a sidewalk of five feet wide into said passageway and pave a strip of five feet wide adjoining said sidewalk, and that the future proprietors of the estates aforesaid, now owned by said Reed and Dyer, adjoining the said twenty-foot passageway, shall keep in good repair, at their own expense, the said sidewalk and five feet of pavement adjoining the same, comprising one-half part of said twenty-foot passageway; and the said Reed and Dyer shall be permitted to have steps projecting one foot in width from their said estates into said sidewalk."

The bill further alleged that the provisos of this clause had always been complied with, and the spaces twenty feet wide therein described had ever since been used, without obstruction, by the public as well as the owners of the land bounding thereon, and had become known as Boylston Square; that on May 1, 1857, the plaintiff, through mesne conveyances from Reed and Dyer, became and had ever since been owner in fee simple of a lot of land, with a brick dwelling-house thereon, bounding on Boylston Square, with all the rights, easements, privileges and appurtenances thereto belonging; that all the rights as to this lot of land, which Reed and Dyer acquired by the defendants' deed to them of April 19, 1809, became thereby vested in the plaintiff on May 1, 1857, and had belonged to him ever since; and that the defendants, in violation of these rights and against the plaintiff's remonstrance, had begun to construct a building at some height above the ground across Boylston Square at the entrance thereof from Washington Street, which building would impair ingress to and egress from Boylston Square and obstruct the view of and from the plaintiff's lot and lessen the value of the lot.

The prayer was for an injunction on the defendants against erecting such a structure; and for general relief.

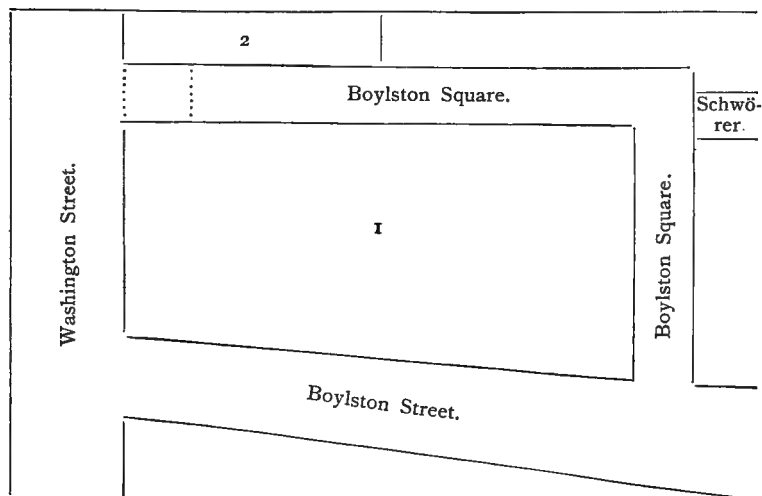
In their answer the defendants demurred to the bill on the ground that the case stated was not one which entitled the plaintiff to relief in equity; and, further answering, admitted their ownership by purchase from Reed and Dyer on April 18, 1809, of the lot on the corner of Boylston and Washington Streets, and of their deed of April 19, 1809, to Reed and Dyer, as above quoted; alleged their purchase and ownership for many years of a piece of land fronting on Washington Street (which also formed part of the original parcel of Reed and Dyer), so that at the entrance of Boylston Square from Washington Street they were owners of both the lots of land and of the buildings thereon, between and affixed to which the structure complained of was in process of erection; described this structure as a covered passageway twelve feet high, built fifteen feet and nine inches above the ground; alleged, also, that they "have a contract for a valuable lease of the said buildings

which requires them to erect said connecting structure, and that to be deprived of it would be a great and serious detriment to them"; admitted the plaintiff's ownership of a lot of land on Boylston Square; alleged that the structure in no way diminished the value of the plaintiff's premises; "that the nearest part of said elevated passage is distant from the nearest part of the premises of the plaintiff not less than one hundred and seventy-five feet; that it does not and cannot in any manner whatever obstruct the use of said strip of land [Boylston Square] as a passageway, or impede the circulation of air, or intercept therefrom the rays of light; that not a single ray of light passing to the premises of the plaintiff is in any manner interfered with by the same; that the premises of the plaintiff have their common and most usual and largest access, as well as abundant air and light, from that part of said strip of land which connects them with Boylston Street, and are in no manner prejudiced in these particulars by said structure, and that said structure leaves Washington Street in full and unimpeded view of the premises of the plaintiff, and in fact only screens from the view thereof a small portion, to wit: twelve feet square of the upper story of a building on the opposite of Washington Street, distant two hundred and fifty-six feet from the premises of the plaintiff, the view of which can be of no consequence or value to the premises of the plaintiff, and the screening of which only constitutes one of those limitations of prospect which must be reasonably considered as necessarily incident to a crowded city."

The answer further denied that, by the true construction of the clause quoted from the defendants' deed of April 19, 1809, to Reed and Dyer, any such rights were conferred on the plaintiff as were preferred in his bill, and alleged that the clause "was intended and understood by the parties to confer, and did in law and fact confer, only such easement or right of passage in the strip of land therein described as was necessary for the accommodation of said adjoining land," and no right of prospect or view whatever. It also denied that the provisos of that clause had been complied with; and that the sidewalks and pavement had ever been constructed or kept in repair as therein provided. And it is alleged that since April 19, 1809, the defendants erected a wooden structure in the same place with that complained of, and having substantially the same effect on Boylston Square, and maintained it for more than twenty years, and until within twenty years before the filing of the bill, without objection from anybody and with the full knowledge and acquiescence of the owners of the land bounding on Boylston Square.

The plaintiff filed a general replication, and at the hearing, before Gray, J., offered to prove, on the points at issue, the compliance by

Reed and Dyer, and the subsequent proprietors of their land bounding on Boylston Square, with all the provisos of the defendants' deed of April 9, 1809; that all the rights, easements, privileges and appurtenances which by that deed were attached to the lot of land of which he became owner on May 1, 1857, then vested in him, and ever since belonged to him; that ever since May 1, 1857, he had occupied the house on his lot as a residence for himself and his family, and as a boarding-house; that the house covered the whole front of the lot, was three stories high, and had no means of access in front except through



Boylston Square; that there had been no obstruction to the free use of Boylston Square by the owners of land bounding thereon and by the public ever since April 19, 1809; that before the filing of the bill he served on the defendants a written remonstrance against the erection of the structure which they had commenced to build; that this structure was planned to be twenty-six feet and six inches deep from the entrance of Boylston Square, fifteen feet and nine inches above the ground, and one story high; that at the time of the filing of the bill the defendants had made no further progress with it than to lay one or two joists across the square between the buildings at the entrance thereof, but had since made much further progress; that the structure would greatly lessen the value of his house and land, which prior to the beginning of the erection was upwards of \$15,000, and would obstruct the view of and from the house, prevent the ingress or egress through Boylston Square of anything more than fifteen feet and nine inches high, and greatly incommode the plaintiff. And this offer of proof was accompanied by

a plan of the premises, the accuracy of which it was agreed might be considered as proved for the purposes of the hearing, in which the relative situation of the proposed structure was represented substantially as in the following diagram, in which the land of the plaintiff is marked with his name; the land reserved by the defendants, after setting off Boylston Square out of the lot conveyed to them by Reed and Dyer on April 18, 1809, is marked with the figure 1, and the land afterwards acquired by them with the figure 2; and the position of the proposed structure is designated by dotted lines. The distance from Washington Street to the corner of Boylston Square was represented as two hundred feet, and of that corner from Boylston Street one hundred and twenty feet.

The case was reserved, on the pleadings and this offer of proof, for the consideration of the full court; the bill to be dismissed if it could not be maintained thereon, but if otherwise, the case to stand for hearing; and was argued in March, 1867.

*J. D. Ball* for the plaintiff.

*R. F. Fuller* for the defendants.

FOSTER, J.<sup>1</sup> The deed from the Boylston Market Association to Reed and Dyer, under which the plaintiff's title is derived, grants to them and their heirs and assigns, as to all that part of the association's land which is the passageway now in dispute, the right that it "shall not be subject to have any fence or building erected thereon."

In the opinion of the court this language requires that the entire space of the passageway shall be kept open and unobstructed by any building. It is not the case of a mere right of way where the owner of the soil may do any acts which do not interfere with the enjoyment of the easement; but it is a right to have the entire court or passageway kept open to the sky. This may be beneficial to the plaintiff's estate, not only as a way, which was doubtless the chief use contemplated by the parties to the deed, but also for light, air, and prospect, and every other accommodation and advantage which such an open court might furnish to an estate abutting upon it.

We cannot distinguish in this case between the obstruction of a building on the ground and one fifteen feet above. Either would for many purposes injure every estate on the passage. It is plain that dwelling-houses or other buildings on a court in a city are more valuable where the court is not arched or built over at its mouth than where it is entered by passing under cover of a building. The right to have the entire space kept open and not built upon is one that equity will protect; and the case must stand for trial.

After this decision the case was referred to a Master to take and

<sup>1</sup> Gray, J., did not sit at the argument.

report the evidence, upon whose report and the pleadings the case was submitted to the full court for final determination at the present session.

The testimony reported related, 1, to the completion of the structure ; and 2, to the relations of the defendants with Buckley & Bancroft, a co-partnership with which it appeared that prior to the filing of the bill the defendants made the contract mentioned in their answer as requiring the erection of the structure complained of. The substance of all which is material on these points is stated in the opinion. It further related, 3, to the plaintiff's title under the mesne conveyances of his lot from Reed and Dyer ; and on this point it appeared that in several of the deeds (including the deed of May 1, 1857, from Jacob Sleeper to the plaintiff) no express reference was made to Boylston Square except as a boundary, nor to any rights therein as appurtenant to the granted premises except as included under such a general phrase as "with all the rights, easements, privileges and appurtenances thereto belonging." Finally, the testimony reported related, 4, to the question whether there had been a forfeiture of the plaintiff's rights, if any, by non-compliance with the provisos of the defendants' grants, or whether any neglect in that respect had been waived by the defendants ; and 5, to the question whether the defendants had not obtained by prescription a right to maintain the structure over Boylston Square by reason of the previous maintenance of certain large sign-boards in substantially the same position.

*J. D. Ball* for the plaintiff.

*P. W. Chandler & R. F. Fuller* for the defendants.

COLT, J. Upon the plaintiff's offer to prove the facts stated in his bill, it was held at a former hearing that the deed from the defendants to Reed and Dyer, under whom the plaintiff claims title to a part of the land adjoining the strip or passageway therein described, conveyed the right to have the passage kept open to the sky ; and that this bill might be maintained to prevent the erection of a building or suspended bridge over it, though supported by the adjoining buildings solely, and leaving a passage fifteen feet high under the same.

Under this decision the parties proceeded to take evidence in support of the allegations in the bill and answer. It now appears that on July 1, 1866, the defendants entered into a contract with Buckley & Bancroft, by which they agreed to lease to them for a term of years the premises adjoining said strip on both sides thereof and fronting on Washington Street, to put the same in good tenantable condition, to construct at their own expense a covered way or bridge four or five feet wide across said passageway, and to permit Buckley & Bancroft to put up a counting-room on the east side thereof at their expense if they should choose to do so ; Buckley & Bancroft on their part agreeing to



take possession of said premises as soon as they should be made ready for occupancy, and to sign and execute leases of the same on the terms therein set forth.

This bill was filed September 12, 1866 ; and on the first of November following a lease of the premises named in the contract of July 1, together with the counting-room and passageway, which had then been erected, was executed. The structure extending across the twenty-foot strip or way was one story high, covering the same for a distance of twenty-six feet back from Washington Street, and leaving a space under it fifteen feet high.

Upon this state of facts it is claimed that this bill must now be dismissed for want of necessary parties ; and that Buckley & Bancroft should have been made defendants. As a general rule in equity proceedings, all persons materially interested must be made parties either plaintiff or defendant, in order that a complete and final decree may be made and a multiplicity of suits prevented. An objection to the non-joinder, if deemed necessary by the defendant to his own protection, and when apparent on the face of the bill, is taken by demurrer, or otherwise by plea or answer setting forth the facts by which other persons named therein are made necessary or proper parties. If the defendant does not for any reason think fit to take the objection before, the defect may be availed of, to a limited extent, at the final hearing upon the pleadings and proof. But when thus delayed the objection receives far less favor from the court, and its allowance is said to depend to some extent upon sound discretion. If there be an omission of an indispensable party, so that a complete decree cannot be made without him, the court will itself, *ex mero motu*, take notice of the fact and direct the cause to stand over, in order that such new party may be added ; or dismiss the bill, when the plaintiff is chargeable with laches. In such cases it must appear that the decree will have the effect of depriving the party omitted of his legal rights. Where the defect is formal and technical merely, and is only objected to at the hearing, and especially if other parties are needed only for the defendant's protection, the decree will not be delayed if the non-joinder produces no other prejudice to the rights of parties before the court. It is the familiar rule that some defenses cannot be made in all stages of the cause with equal effect, but will be regarded as waived when expense and delay have been incurred which might have been avoided.

In this case we are of opinion that there is no rule governing courts of equity in administering the relief peculiar to their jurisdiction, which requires us to delay final relief on account of the non-joinder of Buckley & Bancroft. At the time of the filing of this bill they were only parties to a contract with the defendants, one stipulation of which was that the

defendants should erect a structure over the passageway in question for their future use in connection with premises agreed to be leased. They then had no legal interest in the proposed building; were not at that time concerned in its erection; and the plaintiff then had no knowledge of the contract. Their rights are to be settled under this executory contract. The fact that they afterwards became lessees in pursuance of its terms does not affect the question. All leasehold or other titles acquired *pendente lite* are affected with notice; and parties claiming such titles need not be joined, but are bound by the decree. It is plain that the defendants' contract with third persons to erect a building for their future use in a place where they have no right to build does not imperatively require that such third parties should be made defendants in a bill brought for its removal before they have taken possession and entered upon its use, and when the objection of non-joinder is first made at the hearing. However proper it may have been to have joined them originally, they are not now indispensably necessary. Their legal rights are not affected by the decree, but remain unimpaired, if they have any, under the contract. They are not required to be joined on the ground that no effectual decree can be made against them; because a decree ordering the removal of the obstruction will afford adequate and complete relief, and can be enforced without naming them or requiring any act on their part.

The statement in the answer of the existence of a contract in general terms for the erection of this structure, without stating it to be in writing, or with whom or where made, or that it was made before the filing of the bill, is to be regarded rather as an inducement to the defendants' claim of injury, and is not, as suggested, a proper mode of raising the objection of a want of parties. A general demurrer with nothing in the bill to disclose the defect of course cannot aid the defendants.

There is another rule often laid down which leads to the same result. In a suit brought against a party whose title to real estate is disputed, the occupying tenants or lessees claiming possession under him are not deemed necessary parties, upon the ground that their rights are in some sort represented and so far protected.<sup>1</sup>

The further objection that the other persons who have become owners of lands adjoining the passageway, and who have the same privileges, are not joined, cannot prevail, for the reason above stated; and for the further reason that such owners have distinct and several interests. The rule requiring all parties having a community of interests to be joined, or proper reason shown for the non-joinder, does not apply, even if that rule would be enforced when the defendant does not suggest

<sup>1</sup> Story Eq. Pl. § 151.

the defect in his pleading. The remedy applied will obviate the need of any further litigation by other parties having similar rights.<sup>1</sup>

It is further claimed that the plaintiff fails in his evidence to show any title under the grant to Reed and Dyer to demand the removal of the obstruction. By acquiring title to the premises occupied by him bounding on the passageway he became entitled to the use of the way by virtue of the original grant as therein defined as appurtenant to his estate, even though the words privileges and appurtenances had not been added in his deed. To ascertain the extent and character of the incorporeal right to which he thus acquired title, resort is had to the terms of the original grant. The agreement not to make erections in the passageway was not, it is true, technically a covenant running with the land. There can be no covenant running with the land, it is said, where no land, but only an incorporeal hereditament, is granted.<sup>2</sup> But this is not an action upon the covenant. The defendants had the right to put such restrictions and limitations upon their own estate, in favor of adjoining estates, in granting this right of way, as they chose. And courts of equity, in determining the rights of the parties, will ascertain the intention by all the provisions and stipulations made. Between the original parties only, the agreements and stipulations may be enforced at law. But in equity those claiming title under them may resort to the whole instrument, including the covenants and agreements in gross, for the purpose of ascertaining the nature of the right intended to be conveyed; and, when ascertained, the court will enforce, in favor of such persons, that use or mode of enjoyment which the grantor has seen fit to impress upon it. The effect of a grant will thus be given to that which is in the form of an agreement binding at law only between the original parties.<sup>3</sup>

Two other grounds of defense remain to be considered. It is contended that the defendants' grant was upon conditions which the grantees have failed to perform; or at least that the stipulations in regard to sidewalks, paving and repairs were covenants which have been broken; and so that the plaintiff has no equity to demand the relief he seeks. The answer contains no allegation that the easement was granted on conditions, precedent or subsequent, by failure to per-

<sup>1</sup> 1 Dan. Ch. Pr. (3d Am. ed.) 305, *note*; Story Eq. Pl. §§ 74 a, 116, *note*, 279, 534, 535; *Townsend v. Auger*, 3 Conn. 354.

<sup>2</sup> *Hurd v. Curtis*, 19 Pick. 459.

<sup>3</sup> *Whitney v. Union Railway Co.*, 11 Gray 362; *Parker v. Nightingale*, 6 Allen 344; *Hubbell v. Warren*, 8 Allen 178; *Underwood v. Carney*, 1 Cush. 285; 1 Smith Lead. Cas. 27, *note*; *Hills v. Miller*, 3 Paige 254; *Watertown v. Cowen*, 4 Paige 510; *Hooper v. Cummings*, 45 Maine 364; *Willard v. Henry*, 2 N. H. 120; *Sharon Iron Co. v. Erie*, 41 Penn. State 342.

form which the rights described never vested or were subsequently forfeited. Such a defense, if sustained, would of course involve a forfeiture of the entire easement, including the passageway. The whole defense is inconsistent with such a result. The answer proceeds on the ground that the structure erected by the defendants is consistent with the right of passageway which the plaintiff claims, and which it is not distinctly denied that to some extent he possesses; and much of the evidence is directed to sustain the position.

The words "provided that" and "provided also" do not always constitute a condition, and the question whether there be a condition, as well as whether it be precedent or subsequent, is to be determined by ascertaining the intention of the parties from the whole language used and the nature of the act required. When for the purpose of its fulfilment it implies that the grantee is to have possession and control of the premises, it is ordinarily construed to be a condition subsequent.<sup>1</sup>

But upon a full consideration of the evidence we do not find it necessary to place the decision upon any alleged insufficiency of the pleadings or any careful construction of the terms of the alleged condition. The lapse of time, the acts and conduct of the defendants, preclude them from availing in this case of any past breaches of the stipulations in reference to sidewalks, paving and repairs. It is clearly competent to prove a waiver of the strict performance of the stipulations or conditions by parol evidence of the acts and declarations of the parties.<sup>2</sup> [Here followed in the opinion a summary of the evidence on the question of waiver, which is omitted, as it included no discussion of points of law.] We are satisfied that a literal compliance with the provisions of the grant now insisted on has been waived and dispensed with, to this time at least, by the defendants.<sup>3</sup>

And finally, in regard to the alleged right by prescription to maintain the erection, the evidence fails to satisfy us that such right was acquired by the defendants. [Here followed a similar summary of the evidence on the question of prescription, which is omitted for the same reason.]

All the evidence satisfies us that the present structure is a substantial damage to the plaintiff's estate; and a decree must therefore be entered directing its removal, with a perpetual injunction against its future erection, and with costs for the plaintiff.

<sup>1</sup> South Congregational Meeting House in *Lowell v. Hilton*, 11 Gray 409.

<sup>2</sup> *Leathe v. Bullard*, 8 Gray 545.

<sup>3</sup> *Merrifield v. Cobleigh*, 4 Cush. 178; *Hadley v. Hadley Manufacturing Co.*, 4 Gray 140; *Ludlow v. New York & Harlem Railroad Co.*, 12 Barb. 440.

## KEATES v. LYON.

IN THE COURT OF APPEAL, JANUARY 19, 20, 30, 1869.

[*Reported in Law Reports, 4 Chancery Appeals, 218.*]

THE question in this appeal was, whether the appellant, a purchaser, would be bound in equity by certain restrictive covenants contained in a former conveyance of the property.

By indenture, dated the 27th of August, 1841, Anne Sewell, in consideration of £14,000, conveyed to William Sharp, in fee, a dwelling-house called Brooklands, with the offices and gardens and several closes of land, containing in all about twenty-eight and a half acres, subject to a covenant on the part of Sharp not at any time to erect, set up, or carry on, or permit to be erected, set up, or carried on, upon any part of the lands so conveyed, any nuisance, annoyance, or other offensive matter or thing, except the making of bricks.

By indenture, dated the 2d of November, 1842, Sharp, for a valuable consideration, conveyed to Langton, in fee, two pieces of land, separately described, being portions of the lands comprised in the indenture of the 27th of August, 1841, and containing together 9,952 square yards, with the right of using certain roads recently formed in and over those lands, and the conveyance contained a covenant by Sharp to finish and complete the several roads and ways which led to and adjoined the two pieces of land, and also the several sewers, gutters, and drains which were to run under and through the several roads.

The conveyance also contained covenants by Langton, "for himself, his heirs, and assigns," with Sharp, "his heirs, executors, and administrators," to the effect that the piece of land firstly described in the conveyance should be divided into five lots of not less than 1,400 square yards each; that on each lot only a single or double villa, with offices, and of an annual value of not less than £50 for each house should be built; that the villas should be of a particular construction as to height, and that the offices should only be placed in a certain position; that on the piece of land secondly described only a single or double villa of the same value and of the same construction should be built, with a similar stipulation as to the position of offices; that the enclosing walls or fences of both pieces of land should be of certain dimensions and form; that no nuisance or noisome trade should be permitted on the premises; and, finally, that Langton, his heirs or assigns, would always defray a moiety of the expense of keeping the roads and sewers therein mentioned in repair, so far as they were co-extensive with the pieces of land conveyed.

By another deed, dated the 19th of November, 1842, Sharp conveyed

to Langton, in fee, another piece of land, containing 6,665 square yards, adjacent to the former pieces, and also forming part of the lands comprised in the deed of the 27th of August, 1841; and the conveyance contained restrictive covenants by Langton similar to, though not identical with, those contained in the deed of the 2d of November, 1842.

Both these conveyances contained covenants by Sharp for the production of certain title deeds, among which was mentioned the deed of the 27th of August, 1841.

In the interval between the date of the first conveyance to Langton, viz., the 2d of November, 1842, and the date of the re-conveyance by Langton presently referred to, Sharp sold and conveyed to different persons various other portions of the lands comprised in the conveyance of the 27th of August, 1841, and notices of the several conveyances were indorsed on that deed. It did not appear whether they contained any covenant by the purchasers, nor was there any evidence that the purchasers were informed of the restrictive covenants entered into by Langton.

By indenture, dated the 20th of February, 1846, and made between Langton of the first part, Thomas Harvey (who was a dower trustee for Langton) of the second part, Sharp of the third part, and John Lyon and James Ryder of the fourth part, after reciting that Sharp had agreed to re-purchase from Langton for £5,000 the three pieces of land comprised in the two conveyances to Langton, and that Lyon and Ryder had agreed to advance and pay the purchase-money to Langton, Langton and his trustee, in consideration thereof, and by the direction of Sharp, conveyed the three pieces of land to Lyon and Ryder, in fee, to be held by them upon the trusts of an indenture dated the 19th of February, 1846, and made between Sharp of the one part, and Lyon and Ryder of the other part, being a mortgage to secure various sums of money, including the £5,000 paid to Langton. The trusts of this mortgage deed were the ordinary trusts for sale of the mortgage premises and repayment of the moneys advanced, with powers of leasing and management, and it contained a declaration that the money advanced belonged to Lyon and Ryder on a joint account.

On the 29th of September, 1853, Lyon and Ryder filed a foreclosure claim in the court of the County Palatine against the assignees in bankruptcy of Sharp, and certain puisne incumbrancers, and by an order made in that suit, and dated the 23d of October, 1853, the defendants were absolutely foreclosed. By a deed, dated the 22d of April, 1863, Ryder (who survived Lyon) conveyed the premises comprised in the mortgage deed (except such parts as had been sold by him to Lyon) to the use of himself and Joseph Andrew Keates and Joseph Lyon, their heirs and assigns. Lyon and Ryder, the original mortgagees, were, it appeared,

the trustees of the will of Joseph Lyon, and as such trustees advanced the money secured by the mortgage; and the last-mentioned deed was a transfer to two new trustees, together with the continuing trustee of the same will. The present suit was instituted in the Chancery Court of the County of Lancaster by Keates and Joseph Lyon as surviving trustees, for the administration of the estate of the testator, Joseph Lyon; and an order in the suit, dated the 14th of May, 1868, was made, by which a sale of the above three pieces of land was directed. Accordingly the property was put up for sale by auction in lots, under conditions of sale which referred to the restrictive covenant contained in the deed of the 27th of August, 1841, but not to those contained in the deed of the 2d of November, 1842. The appellant purchased some of the lots, and took the objections that the land was still subject to the latter covenants, and that a good title therefore could not be made. The District Registrar of the court certified that a good title to the lots in question could be made, and the Vice-Chancellor of the Duchy of Lancaster, by the order under appeal, confirmed that certificate.

*Mr. Little, Q.C., and Mr. Robinson* for the appellant.

*Mr. Charles Hall and Mr. North* for the respondent.

Jan. 30. SIR C. J. SELWYN, L.J. The judgment which I am about to deliver is the judgment of the court.

[His Lordship then stated the facts as above, and continued:]

In support of the objection it has been contended that the benefit of the restrictive covenants contained in the conveyance to Langton was a benefit reserved by Sharp in respect of the unsold portion of the property comprised in the deed of the 27th of August, 1841, and that it was so attached to the land that it passed by his subsequent conveyances of other portions of the same property to other purchasers, and, consequently, that although (as was admitted) as between Sharp and Langton those covenants were effectually put an end to by the deed of the 20th of February, 1846, no arrangement between Sharp and Langton could deprive the purchasers between the dates of the conveyances to and reconveyance from Langton of the benefit which they had obtained, or of their right to enforce the covenants, and, consequently, that a title to the lots in question, unfettered by the covenants, could not be made without the concurrence of the intermediate purchasers.

The general principles upon which the court deals with cases relating to the burden and incidence of covenants and stipulations restrictive of the free use of land, may be gathered from the observations of Lord Cottenham in the case of *Tulk v. Moxhay*,<sup>1</sup> where he says: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it—that the latter shall either

<sup>1</sup> 2 Ph. 774, 777.

use or abstain from using the land purchased in a particular way—is what I never knew disputed. . . . It is said that the covenant being one which does not run with the land this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased. Of course the price will be affected by the covenant.” And again he says: “That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement, and no covenant, this court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.”

The questions which have arisen with respect to the devolution of the benefit of covenants of this kind have been decided upon similar principles, and equally without reference to any technical distinctions depending upon the covenants running or not running with the land. Thus in *Whatman v. Gibson*,<sup>1</sup> where the owner of a particular piece of land on which a row of houses was intended to be built, executed a deed reciting that it had been laid out, and was intended to be dealt with in a particular manner, and declared that it should be a general and indispensable condition of the sale of all or any part of that land, that the several proprietors for the time being should observe and abide by the several stipulations and restrictions therein contained, and that he himself would at all times observe the like restrictions and stipulations; and those restrictions and stipulations were also enforced by mutual covenants, although the question afterwards arose between subsequent purchasers of different portions of this piece of land, it was held that the one was bound by, and the other was entitled to enforce, the covenants, for as the Vice-Chancellor of England observed: “It is quite clear that all the parties who executed this deed were bound by it, and the only question is whether, there being an agreement, all persons who come in as devisees or assignees under those who took with notice of the deed are not bound by it? I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighboring houses used in such a way as to preserve the general uniformity and respectability of the row.”

And in *Coles v. Sims*,<sup>2</sup> which was also a case of mutual covenants relating to a particular piece of land laid out in plots for the erection of a

<sup>1</sup> 9 Sim. 196.

<sup>2</sup> Ibid. 207.

<sup>3</sup> Kay, 56.



row of houses to be built in a particular and uniform manner, the present Lord Chancellor, then Vice-Chancellor, after quoting the passage to which we have just referred in the judgment in *Whatman v. Gibson*, says :<sup>1</sup> "Therefore taking the deed between Jones and Shewell alone, these two parties having clearly agreed with each other that the property should be laid out in a particular way, all those who come in under them are bound in equity by their covenants if they had notice of them." Again, in the case of *Western v. MacDermott*,<sup>2</sup> certain pieces of land in the city of Bath, including the sites of certain houses called Brock Street, were included in a deed of conveyance dated the 20th of December, 1766, by which, in consideration of a perpetual rent-charge reserved to himself, Sir Renet Garrard, the owner of the property, conveyed it to John Wood in fee, and Wood thereby covenanted to pay the rent-charge, and within ten years to build houses upon the piece of land thereby conveyed according to the plan thereto annexed ; and Sir Renet Garrard entered into certain restrictive covenants relating to certain portions of land defined in the deed, and it was provided that every conveyance of any house to be so built should contain covenants similar to those contained in that deed ; and the conveyances by Wood, under which the plaintiff and defendant derived their title, and to all of which Sir Renet Garrard was a party, did, in fact, contain such covenants, and also covenants by the purchasers with Sir Renet Garrard and Wood, and each of them, and each of their heirs and assigns, against building upon the gardens of the houses beyond a certain height ; and the Lord Chancellor, Lord Chelmsford, considered himself to be relieved from the necessity of considering the question, whether the covenant against building beyond a certain height did or did not run with the land, because it was admitted on the part of the defendant that he having purchased his house with notice of the restrictive obligation attached to it, a court of equity would interfere to prevent his violation of it. "This, indeed," he adds, "could not be disputed after the cases of *Tulk v. Moxhay*<sup>3</sup> and *Coles v. Sims*."<sup>4</sup> These cases were (with the exception of *Mann v. Stephens*<sup>5</sup> and *Child v. Douglas*,<sup>6</sup> to which we shall presently refer) the only cases cited in support of the appellant's contention, and in all of them the judgment of the court is based upon clear evidence of intention and contract, supported by mutual covenants, and relating to a particular and defined portion of land agreed to be laid out and dealt with according to a prescribed plan.

<sup>1</sup> Kay, 69.<sup>2</sup> 2 Ph. 774.<sup>3</sup> 15 Sim. 377.

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<sup>4</sup> Law Rep. : Eq. 499; 2 Ch. 72.<sup>5</sup> Kay, 56.<sup>6</sup> Kay, 560.

The case of *Mann v. Stephens*<sup>1</sup> differs from those we have been discussing in the particular that there was no general building scheme or plan affecting the property in respect of which the question to be decided arose, but in that case the owner in fee of three houses, and of an adjoining piece of land, sold one of the houses, and at the same time covenanted with the purchaser that the piece of land should be forever thereafter used in a particular way, and that no building, except a private house or ornamental cottage, should be erected thereon, and afterwards sold the piece of land to another person, and caused the purchaser to enter into a similar covenant with him as to the user of the land. The house ultimately became vested in the plaintiff, and the piece of land in the defendant, who had actual notice of the covenant entered into by his predecessor in title, but who, notwithstanding, began to build a beershop and brewery on part of the land. The plaintiff applied for an injunction to restrain this breach of the covenant, and though it was argued on behalf of the defendant that there was no privity between the plaintiff and defendant, and that the burden of the covenant did not run with the land, the Vice-Chancellor of England granted the injunction on the ground that the defendant had purchased with notice of the covenant; and on an appeal from an order to commit the defendant for breach of the injunction, the Lord Chancellor held that the injunction was properly granted, though he varied it by omitting some words taken from the covenant as being too indefinite. In *Mann v. Stephens* the covenant respecting the user of the land was contained in the deed by which the house was conveyed, and was, therefore, plainly intended to benefit the owner of the house for the time being, and the decision was based on the ground that the restriction upon the user of the piece of land in question was known to the defendant at the time of his contract for the purchase.

In the case now before us it is not shown that the vendor Sharp had made any representations, or was bound by any contract or covenant excepting those covenants against nuisances contained in the deed of 1841, and those relating to the roads; and it is clear that at and immediately after the date of the conveyance to Langton in November, 1842, he was perfectly at liberty to deal with the rest of his estate as he might think fit, subject only to the covenants to which we have just alluded, and that he was also at liberty to enter into any arrangement with Langton by which the restrictive covenants affecting the land conveyed to him might be altered or put an end to, and the question which we have to decide is, whether he must be taken to have deprived himself of this power merely by reason of his having sold and conveyed to

<sup>1</sup> 15 Sim. 377.

purchasers certain portions of his remaining property. It is true that in such cases the court does not require any particular form of deed or covenant, but, as Lord Cottenham has observed, would enforce a contract if proved by a mere agreement; but, so far as the question may turn upon the intention of Sharp, the vendor, it is not altogether immaterial to observe, that although in both the conveyances to Langton in November, 1842, Langton is made to covenant for himself, his heirs, and assigns, the covenant in both cases is entered into with Sharp, his heirs, executors, and administrators only.

The case of the appellants is not, in our judgment, strengthened by the circumstance that notices of several of these intermediate conveyances by Sharp are indorsed upon the deed of the 27th of August, 1841; for as these conveyances extend only to small portions of the property, and as the title deeds were retained by the vendor, it was only an ordinary and proper precaution on the part of the purchasers (who appear in several instances to have taken covenants to produce) to stipulate that notice of the fact of part of the property having been sold or conveyed should be indorsed on one of the principal title deeds so retained. There is no trace of any such contract or arrangement as that which existed in all the cases to which we have been referred; nor has any attempt been made to explain or define the limits within which the benefit of the restrictive covenants is supposed to have been confined, nor whether it must be taken to be confined to lands held under the same title or of the same tenure, or whether it would extend to lands subsequently acquired by the vendor, and be so attached to them as to pass under a conveyance of any part of such subsequently acquired lands, nor whether, if the covenants had been affirmative, any, and which, of the intermediate purchasers could have enforced the specific performance of such covenants. The only attempt at such a definition was made by the appellants' counsel when relying upon a particular passage of the judgment in *Child v. Douglas*. They argued<sup>1</sup> that the court invariably regards stipulations of this kind with reference to the benefit of the property which is reserved by the vendor, and consequently that they are attached to such reserved property, and therefore pass by every conveyance of any part of that property. But it is obvious that such a definition does not meet all cases; for cases might be put in which a vendor might lawfully and reasonably insist upon such covenants even when the conveyance comprised the whole of the property to which he was entitled at the date of the covenant, as in the case of the purchase and sale of a strip of land adjoining a large park by a person who had at the time no interest in the park, but who hoped

<sup>1</sup> Kay, 568.

to inherit or purchase it. Assuming the vendor of the strip of land afterwards to purchase or inherit the park, and to sue the purchaser for breach of the covenant, the purchaser of the strip of land would, in a court of equity, be unable to justify a violation of the covenant by reason of the injury sustained by the vendor having arisen only in consequence of his subsequent acquisition of the park.

We think that an owner of land in the position in which Sharp stood in the year 1842 cannot be presumed to have intended to fetter himself in the exercise of the power which he indisputably possessed of dealing with the whole of his estate as he thought fit ; and as, notwithstanding the sale of some portions of land, his power of dealing with what he retained remained unaffected, it is, under the circumstances of this case, very difficult to see how any distinction is to be drawn between his power of dealing with the land so retained and with that which he resumed by the repurchase from Langton ; and if it were to be held that a mere conveyance of a small portion of the remaining land amounts to evidence of such an intention on the part of the vendor, the rule cannot be confined to conveyances in fee, but must be extended to alienation for lives and years ; and the present case affords a remarkable instance of the inconvenience which would result from such a rule, for as there appear to have been some twenty conveyances of small pieces of land between the 2d of November, 1842, and 1846, the concurrence of all these purchasers, and of all persons claiming under them, would be necessary to any such arrangement as that which was effected in 1846 ; and as it would be extremely difficult, if not impossible, to obtain the concurrence of all those persons, the practical result would be to render a portion of the property inalienable excepting under very onerous and depreciating conditions.

The appellant has mainly relied upon the case of *Child v. Douglas* ;<sup>1</sup> and it has been said that that case goes further than any of the other decided cases, and has established such a rule as that to which we have alluded ; but it must be observed that in *Child v. Douglas* the land had been laid out for building purposes ; and in the contract entered into between the vendors and the defendant Douglas was contained a stipulation that Douglas should not erect any buildings within six feet of certain projected roads. The plaintiff Child was a subsequent purchaser of another and neighboring portion of the land so laid out, and on the occasion of his purchase he had been required to enter into, and had entered into, a covenant not to erect any building within six feet of one of the same roads called " Houghton Place " ; and it appeared that upon the negotiation of the plaintiffs' purchase his agent was in-

<sup>1</sup> Kay, 560.

formed, in reply to inquiries as to the conditions on which the land was to be sold, that the purchasers would not be permitted to build nearer than six feet to Houghton Place, and a plan of the land was shown to him on which a building line was drawn, which indicated that the buildings were to be six feet distant from the causeway of that street. The Vice-Chancellor granted an injunction upon an interlocutory application to restrain the building of a wall fifteen feet high, but his order was discharged by the Lords Justices on appeal; and in delivering judgment Lord Justice Knight Bruce said his opinion was adverse to the case of the plaintiff upon three of the four questions involved in the cause; and one of these questions was, whether if there was such a covenant or contract not to build (as mentioned in the case), which was binding on the defendant, the plaintiff was a person who was entitled to sue upon it or enforce it. The motion was directed to stand over till the hearing, and the defendant was put under an undertaking not in the meantime to carry the wall higher than fifteen feet six inches, and to abide by any order the court might make as to his removing what he had or should have built. The cause afterwards came on to be heard before the Vice-Chancellor, and it is reported,<sup>1</sup> when the bill was dismissed; and in delivering judgment His Honor said that he entertained no doubt that there was no intention to vary the original contract, or that there was, in fact, a breach of the contract. But he says that a main question was as to the right of the plaintiff to sue, and this is the question upon which his doubts arose, and he said: "There would be no doubt but that this court would interfere in a proper case without noticing the difficulty whether in point of legal form the party could sue at law or not. In *Mann v. Stephens*" the whole case was brought before the Vice-Chancellor, but it was not put upon the question of the covenant running with the land or not, but on the question whether or not there was a substantial agreement between the parties." And the Vice-Chancellor concluded his judgment by saying: "I have not been able to come to a conclusion perfectly satisfactory to my own mind what are the rights of parties *inter se* each of whom has covenanted with the landlord, but who have neither covenanted with each other nor taken any covenant from the landlord to themselves; and I have felt additional doubt from the different view taken by the court above, and shown so distinctly by the Lords Justices, allowing the defendant to complete the wall, when almost the only question before me is, whether I shall order that wall to be pulled down or dismiss the bill. It does not appear to me that I ought to interfere so far in a case where I still hesitate, and where so much hesitation has been shown in the court

<sup>1</sup> 2 Jur. (N.S.) 950, 952.

<sup>2</sup> 15 Sim. 377.

above ; and I must suffer what has taken place to turn the balance (for that is all that is required) in the defendant's favor, having great doubt both as to the law and as to the application of it."

Having regard to the circumstances to which we have already alluded as existing in the case of *Child v. Douglas*,<sup>1</sup> and which are not to be found in the present case, to the reversal of the order made upon the motion, and to the final dismissal of the bill by the Vice-Chancellor notwithstanding the undertaking given by the defendant, and to the judgments delivered on those occasions, we think that that case cannot be considered as having established any such new or general rule as that which has been contended for by the appellant, and we think such a rule is unsupported either by principle or authority, and would greatly interfere with the free alienation of landed estates.

We think, therefore, that the appellant's objection to the title fails, and the appeal motion must be refused with costs.

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### WINFIELD v. HENNING.

IN THE COURT OF CHANCERY OF NEW JERSEY, OCTOBER TERM,  
1870.

[*Reported in 21 New Jersey Equity Reports 188.*]

ON motion to dissolve injunction upon bill and answer.

*Mr. Dixon* in support of the motion.

*Mr. Ransom, contra.*

THE CHANCELLOR. The complainant owns a house and lot on the south side of South Fifth Street, formerly called also Gilbert Street, in Jersey City. The defendant owns a house and lot adjoining it on the west, and on the corner of South Fifth Street and Coles Street. These lots are part of a tract of one hundred feet square, at the southeast corner of Coles Street and South Fifth Street, which was conveyed by the devisees of John B. Coles to Keeney and Wheeler, on the first of May, 1854. In the deed the premises were designated by numbers as four lots fronting on South Fifth or Gilbert Street, and the deed contained this provision: "It being expressly understood and agreed that the houses which may be erected on Gilbert Street shall be set back ten feet from the southerly line of said street."

In May, 1857, Keeney conveyed his interest in this tract to

<sup>1</sup> Kay, 560.

Wheeler, who afterwards erected on it five two-story houses of twenty feet front on South Fifth Street, ten feet from the south line of the street. After they were built in May, 1858, he conveyed the house and lot of the complainant to a grantee, through whom the complainant derives title, and one year after this he conveyed the house and lot of the defendant to a grantee, through whom the defendant claims title. The stipulation as to the placing houses ten feet from the street is not contained in any deed after that to Keeney and Wheeler. The grantors in that deed owned a large number of lots in the vicinity, some of which were on the opposite side of the street, and retained them after the deed to Keeney and Wheeler.

The defendant, in May, 1870, commenced erecting an addition to the dwelling-house on his lot, which would occupy the ten feet between it and the street, by which the westerly view or prospect from the front of the complainant's house is cut off. The injunction restrains the defendant from proceeding with or completing that building.

The two questions in the case are, whether the defendant is bound by the stipulation or covenant in the deed from the Coles family, and if he is, whether the complainant has any right to compel its performance.<sup>1</sup>

But in this case both parties derive title from the covenantors, and not from the covenantee, and the question is, whether they are bound to each other by the covenants which Wheeler entered into with the Coles family for the benefit of the property which they retained. An action at law could not be maintained by the complainant against the defendant on such covenant. But in equity their position is different. Both parties are bound to the grantors in the Coles deed to keep this front free from buildings; each is subject to the easement over his lot in favor of those subsequently deriving title from Coles, and each is equitably and justly entitled to the advantage which the observance of this stipulation by his neighbor may be to him. If all were relieved from the incumbrance, none perhaps could complain. But to be restrained from extending his own building to the street, and to have his neighbor on each side project in front of him, would be a much greater grievance to any of these lot owners than was contained in the stipulation in the deed through which he derived title; and he has no power to compel the grantors to enforce the covenant. It seems equitable that this court should, at his instance, compel the observance of this covenant. This view is supported by the dictum

<sup>1</sup> The portion of the opinion discussing the defendant's liability has been omitted.

of Lord Romilly in a case heard before him at the Rolls in 1866<sup>1</sup> and by a decision of the Supreme Court of Rhode Island.<sup>2</sup>

This easement was in existence at the time of the conveyance of the complainant's lot by Wheeler, who still retained the lot of the defendant, which was the dominant tenement; and this space being left open in compliance with a covenant or stipulation, binding on both lots, it might be held to be an apparent and continuous easement, to which the part retained was thus made subject.

The motion to dissolve must be denied.

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EMILY SHARP v. GEORGE ROPES, JR.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER,  
1872.

[*Reported in 110 Massachusetts Reports 381.*]

BILL IN EQUITY, filed July 10, 1872, alleging that Stephen Heath in 1865, being the owner of a parcel of land on a way, now called Gordon Street, in West Roxbury, laid it out in lots; that he conveyed lot 8 and part of lot 7 to George G. Drew, by deeds containing the following provision: "That for the term of fifteen years from the first day of January, 1866, no building shall be erected or placed on said land, the main part of which shall come within twenty feet of said street or way; and the main part of any such building shall not be less than two stories high exclusive of basement and attic; and that no trade or manufacture injurious or offensive to dwelling-houses, or their occupants in that neighborhood, shall be carried on, and no livery stable or swine shall be kept on said land during said time. A violation of either of said restrictions shall not make a forfeiture of the estate, but in case of any such violation, said Heath, his heirs or devisees, may enter upon said land, and abate or remove, forcibly if necessary, anything erected, placed or kept therein, in violation of said restrictions, and at the expense of the guilty party"; that the land has since been conveyed to the plaintiff by deeds containing the same provision; that after the conveyance to Drew, Heath conveyed lot 6 and the rest of lot 7 to the defendant, by deeds containing the same provision; and that the defendant knew that the restrictions were for the benefit of all the lots; but that he was nevertheless proceeding to erect a building on lot 6 within twenty feet of Gordon

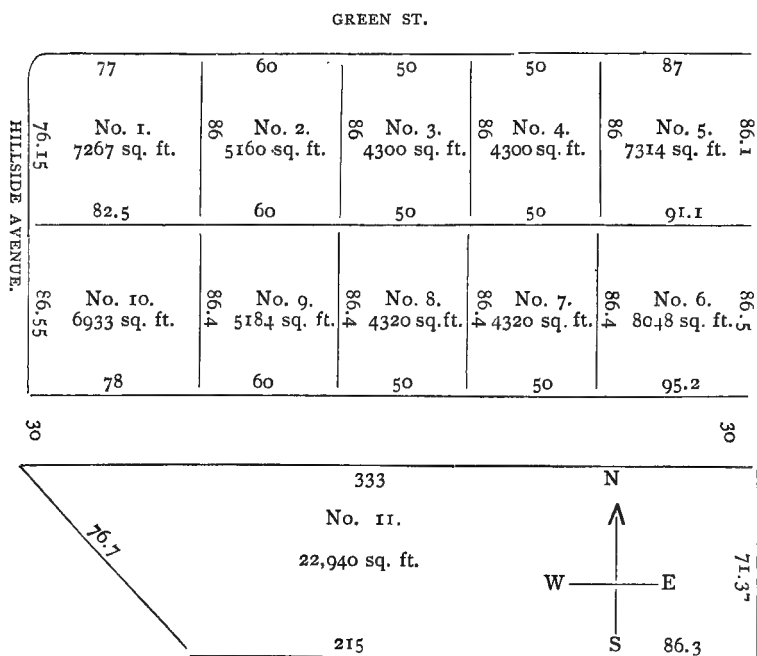
<sup>1</sup> *Western v. Macdermot*, 1 Eq. Cases (L. R.) 507.

<sup>2</sup> *Greene v. Creighton*, 7 R. I. R. 1.



Street. The prayer was that he might be restrained from so doing. The case was reserved by Gray, J., for the determination of the full court, on the pleadings and an agreed statement of facts, substantially as follows :

In 1865, Stephen Heath, a house builder, being the owner of a parcel of land in West Roxbury, laid it out in lots for building purposes, according to a plan, dated March 25, 1865, and recorded in the registry of deeds for the county, and the material part of which is copied in the margin. The way, thirty feet wide, laid down on the plan, is now a public highway, called Gordon Street.



By deed dated December 23, 1865, and recorded March 1, 1866, Heath conveyed to George G. Drew lot 8, and by deed dated June 27, 1866, and recorded July 12, 1866, he conveyed to him a strip of lot 7, adjacent to lot 8. Both these deeds contained the provision set out in the bill. Drew immediately built a house upon the land conveyed to him, and the land has since been conveyed to the plaintiff by deeds containing the same provision. Before the deeds to Drew, Heath erected on lot 10 a dwelling-house, no part of which was within twenty feet of the way, and of this house he remained the owner until his death ; but he lived a mile distant.

By deed dated June 27, 1866, and recorded September 7, 1866, Heath conveyed to the defendant the rest of lot 7 and the northern part of lot 6; and by deed dated February 27, 1867, and recorded March 11, 1867, he conveyed to the defendant the southern part of lot 6. Both these deeds contained the same provision as the deeds to Drew.

In all the deeds to Drew and the defendant, the granted premises were described by reference to the plan on record.

By deed dated March 27, 1865, Heath had conveyed lot 11 by a deed containing no restrictions whatever. He conveyed lots 3 and 4 by deeds dated respectively November 1, 1865, and January 1, 1867, and lots 1 and 2 by deed dated April 1, 1868, all these deeds containing the same provision as the deeds to Drew and the defendant, except that the buildings, instead of being required not to come within twenty feet of Gordon Street, were required not to come within fifteen feet of Green Street; and he conveyed lot 5 by a deed dated May 27, 1867, containing no provision as to the distance from Green Street within which a building might not be erected. In 1868 Heath died, leaving a will, by which he devised lots 9 and 10 to his widow, Susan B. Heath, who was his executrix, and who, with her family, has lived in the house on lot 10 for two years.

The defendant was proceeding to erect a large building on the southern part of lot 6, within four feet of Gordon Street. The plaintiff asked Susan B. Heath to prevent the erection of the building, but she refused, and verbally consented to its erection.

If it is competent evidence, it was agreed to be a fact that when the defendant took his deed of February 27, 1867, he had no knowledge that there was any restriction in any deed from Heath to any one else; and that Heath stated to him "that he would waive the restriction if he insisted upon it, that he did not consider it amounted to much, that the property would have to be used for shops in a short time, and that the defendant would not be troubled if he built a shop next to Gordon Street." The case was submitted on briefs.

*R. Olney* for the plaintiff.

*T. P. Proctor, W. W. Warren, and H. R. Brigham* for the defendant.

AMES, J. The case finds that Stephen Heath, being the owner of the entire tract of land, caused it to be laid out in eleven separate building lots. A plan showing the streets that were to be opened; and the different lots, with their respective dimensions, areas and numbers, was duly recorded in the registry of deeds; but this plan furnishes no intimation of an intention on the part of the grantor to impose any restriction whatever upon purchasers, in regard to the

manner in which they were to occupy or build upon the lots which they should purchase. Of the five lots upon the northerly side of Gordon Street, lot 10 was built upon by the grantor himself, he having erected a dwelling-house thereon, which has been occupied by his family since his decease. Lot 8 and a portion of lot 7 were sold and conveyed by him to George G. Drew, and have since been conveyed to the plaintiff. The remainder of lot 7 and the whole of lot 6 were conveyed to the defendant. Thus, of the five lots lying on the northerly side of that street, three were conveyed by said Heath to two separate purchasers, subject to the conditions and restrictions recited in the plaintiff's bill. There is no suggestion that the other two lots were subjected to any restriction of the kind.

It is not claimed that in regard to any of the lots there was any written covenant by the grantor, and it does not appear that there was any express stipulation or direct assurance on his part, that any person who should purchase a lot on the north side of that street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling-houses and the street. The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building, by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact, that in his transactions with two separate and independent purchasers, the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. It is true that, of these conditions, the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling-house in that immediate neighborhood, and the provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house.

It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as *inducements* to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other

grantee.<sup>1</sup> But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees may enforce it. Neither of the deeds under which these parties respectively claim purports to give to the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling-house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained.

The cases cited and relied upon by the plaintiff's counsel do not appear to us to meet this difficulty. In *Tallmadge v. East River Bank*,<sup>2</sup> a landowner in New York City had laid out a street sixty feet in width, and had sold the building lots on each side, making use in the sales of a plan which showed that an open space was to be reserved in front of each lot. The purchasers bought under this plan, and with the express assurance that it should be adhered to, and their right to enjoy the promised advantages was sustained by the court. In *Hills v. Miller*,<sup>3</sup> the owner had sold a tract of land, giving at the same time a bond that a smaller triangular lot belonging to him, in front of the lot sold, should not be occupied with buildings. The court held that the deed and the bond constituted one contract, and created an easement which could be enforced against any purchaser of the triangular lot with notice. In *Barrow v. Richard*<sup>4</sup> an estate had been sub-divided into a large number of building lots, which the owner had conveyed by deeds to various purchasers, with express covenants against all trades, etc., offensive to "the neighboring inhabitants." The English cases also cited, *Child v. Douglas*,<sup>5</sup> *Coles v. Sims*,<sup>6</sup> and *Western v. MacDermott*,<sup>7</sup> are all of them cases in which a general building plan, or uniform system and mode of occupation, had been distinctly established and made a part of the title conveyed, in express terms, either by the deed itself, or by some covenant or obligation connected with it by reference. But we find nothing in the terms of the conveyance, or in any reference to a plan or covenant, or in the circumstances of the transaction, or the situation of

<sup>1</sup> *Whitney v. Union Railway Co.*, 11 Gray 359; *Parker v. Nightingale*, 6 Allen 341; *Linzee v. Mixer*, 101 Mass. 512; *Tulk v. Moxhay*, 2 Phil. Ch. 774.

<sup>2</sup> 26 N. Y. 105.

<sup>3</sup> 3 Paige 254.

<sup>4</sup> 8 Paige 351.

<sup>5</sup> *Kay* 560.

<sup>6</sup> 5 De G., M. & G. 1.

<sup>7</sup> L. R. 2 Ch. 72.

the property, that will justify us in saying that any such general plan or system was intended by the grantor to be established for the benefit of grantees, or to make a part of their respective titles. The case in our judgment is closely analogous to *Badger v. Boardman*,<sup>1</sup> *Jewell v. Lee*,<sup>2</sup> *Hubbell v. Warren*,<sup>3</sup> and is disposed of according to the law decided in these cases, by an order that the bill be dismissed with costs.

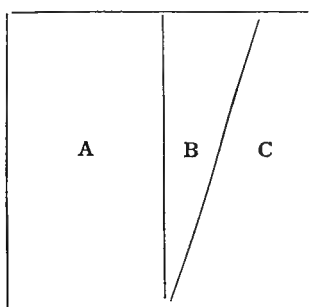
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HULDAH M. PECK *v.* JAMES E. CONWAY AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 9, 1876.

[*Reported in 119 Massachusetts Reports 546.*]

BILL IN EQUITY by the owner of lot A, shown on the plan printed in the margin, to restrain the defendants, the owners of lots B and C, from building on lot B.



The case was reserved by Colt, J., upon the pleadings and the report of a Master, for the consideration of the full court, and was as follows:

Richard Ensign, on February 14, 1848, being the owner of lots A and B, and occupying lot A as a homestead, conveyed lot B, in fee simple, with general covenants of warranty, to Joseph B. Huggins, who was then the owner of lot C. The deed described the land by metes and bounds, and following the description was this clause, "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed."

The defendants purchased lots B and C in 1874. Of the deeds in

<sup>1</sup> 16 Gray 559.

<sup>2</sup> 14 Allen 145.

<sup>3</sup> 8 Allen 173, 178.

the chain of title from Huggins, which were all duly recorded before the defendants purchased, some mentioned or referred to the reservation in Ensign's deed, but the deed to the defendants, which contained full covenants of warranty, made no mention of it or reference to former deeds. The defendants made no examination of the records before their purchase, and had no actual knowledge of the reservation.

The plaintiff purchased lot A of Richard Ensign by deed dated April 13 and recorded April 14, 1848. This deed made no mention of privileges or appurtenances, or of the reservation in the deed to Huggins. The defendants purchased their land, paying therefor its full market value, free of incumbrances, for the purpose of building thereon. The plaintiff notified them of the restriction before they commenced building, and forbade them so to do, and, upon their proceeding to build upon the land, brought this bill.

The Master found that the greater part of the proposed building would stand upon lot B; that it would not obstruct the view from the front rooms in the plaintiff's house, and only partially obstruct the view from the rooms in the rear part of the house, and that its erection would be no appreciable damage or injury to the plaintiff's premises.

*A. J. Waterman* for the plaintiff.

*J. Dewey, Jr.*, for the defendants.

MORTON, J. Both parties derive title from Richard Ensign. The deed of said Ensign, under which, through various mesne conveyances, the defendants derive their title, conveys to Joseph B. Huggins a triangular piece of land adjoining the lot now owned by the plaintiff, "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed." Ensign, being owner of the fee, had the right to sell his land subject to such reservations or restrictions as to its future use and enjoyment as he saw fit to impose, provided they were not contrary to public policy. The restriction in this deed that no building should be erected upon the land conveyed was one which he had a right to make, and there is no room for doubt that, if a building was erected in violation of this restriction Ensign, as long as he lived and remained the owner of the adjoining land, would be entitled to relief in equity to enforce the restriction.<sup>1</sup>

The only question in the case is whether the plaintiff, who is the grantee of said Ensign, is entitled to the same remedy.

The reservation creates an easement, or servitude in the nature of an easement, upon the land conveyed. If this easement was created

<sup>1</sup> *Parker v. Nightingale*, 6 Allen 341; *Whitney v. Union Railway*, 11 Gray 359; *Badger v. Boardman*, 16 Gray 559.

for the benefit of the adjoining lot, of which the grantor in the deed remained the owner, and not for the personal convenience of the grantor, and was intended to be annexed to such lot, it would be appurtenant thereto and would pass to a grantee thereof.

The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.

In this case the triangular piece of land affected by the easement was a part of a large lot owned by Ensign. He retained the remainder of the large lot for his homestead. There is no suggestion that he had other land in the vicinity which could be benefited by the restriction. It is difficult to see how he would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign, but was an easement appurtenant to the estate which he conveyed to the plaintiff.<sup>1</sup>

It follows that the plaintiff is entitled to the relief which he seeks.

The fact that the defendants, when they took their deed, had not actual knowledge of this reservation is immaterial. They derive their title under the deed which contains it, and have constructive notice of the provisions of the deed.<sup>2</sup>

Nor can the fact found by the Master, that the erection of the building contemplated by the defendants "would be no appreciable damage or injury to the plaintiff's premises," affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived because in the judgment of others it is of little or no damage.

Decree for the plaintiff.

<sup>1</sup> *Dennis v. Wilson*, 107 Mass. 591; *Stearns v. Mullen*, 4 Gray 151.

<sup>2</sup> *Whitney v. Union Railway*, *ubi supra*.

## RENALS v. COWLISHAW.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, APRIL 10,  
1878.

[*Reported in Law Reports, 9 Chancery Division 125.*]

By an indenture dated the 29th of September, 1845, Messrs. Hoby, Winterbotham, and Russell, as the devisees in trust for sale of a mansion-house and residential property known as the Mill Hill estate, and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one Francis Shaw, in fee, and Shaw thereby, for himself, his heirs, executors, and administrators, covenanted with Hoby, Winterbotham, and Russell, their heirs, executors, administrators, and assigns, not to build upon the lands thereby conveyed within a certain distance from a particular road leading "to the Mill Hill house and property belonging to the said trustees"; that the garden walls or palisades to be set up along the side of the said road should stand back a certain distance from the centre of the road; that any house to be built on the land adjoining the road should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling-houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the other adjoining pieces of land, or make any statement or reference thereto.

The same trustees also sold about this time other pieces of lands adjoining the Mill Hill estate; and the conveyance to the purchaser in each case contained restrictive covenants similar to those above mentioned. It was alleged by the plaintiffs in their statement of claim that the intention of all the restrictive covenants was to protect and maintain the value of the Mill Hill estate, and to secure the continuance of the surrounding neighborhood as purely residential in character.

The trustees, in December, 1854, sold and conveyed the Mill Hill estate to T. P. Bainbrigge in fee, and, Bainbrigge having died, his devisees in trust, in September, 1870, sold and conveyed the same estate to the plaintiffs as tenants in common in fee.

In neither of these two conveyances were there covenants similar to those in the conveyance to Shaw, but there was in the conveyance to the plaintiffs a covenant by them with their vendors not to build a public-house or carry on offensive trades upon a particular portion of the property conveyed to them. Neither of the two conveyances recited or mentioned in any way the conveyance or sale to Shaw, or



the existence of any restrictive covenant entered into by Shaw or by Gadsby, nor did either of them recite or mention the sales or conveyances of the other pieces of land sold as above mentioned.

There had also been a devolution title with regard to the lands sold to Shaw, for after his death Mary Shaw, the person entitled under his will, in August, 1867, sold and conveyed part of the lands comprised in the indenture of September, 1845, to John Gadsby in fee, who, in his conveyance, entered into covenants with Mary Shaw, her heirs, executors, and administrators, substantially identical *mutatis mutandis* with the restrictive covenants contained in the indenture of the 29th of September, 1845. And subsequently the lands so conveyed to Gadsby were sold and conveyed (with certain buildings erected thereon) by Gadsby, or persons deriving title through him, to the defendants as tenants in common in fee.

The plaintiffs alleged that the defendants were carrying on upon their lands, and in contravention of the restrictive covenants first above mentioned, the trade of wheelwrights, smiths, and bent timber manufacturers, and had erected a high chimney which emitted thick black smoke, and that those acts were destructive of the residential character of the neighborhood, and had deteriorated the value and amenity of the Mill Hill estate. By their action they claimed an injunction to restrain the defendants from carrying on any trade or business upon their lands, and from permitting the buildings erected thereon to be used otherwise than as private houses, and from contravening in any manner the restrictive covenants contained in the indenture of September, 1845.

The principal question argued, and that on which the decision turned, was as to the right of the plaintiffs to sue upon these covenants.

It appeared that no contract had been entered into or representations made, either upon the occasion of the purchase by Bainbrigge from the trustees, or upon the purchase from Bainbrigge by the plaintiffs, that the purchaser should have the benefit of the covenants entered into by Shaw with the trustees.

*Dickinson*, Q.C., and *Renshaw* for the plaintiffs.

*W. Pearson*, Q.C., and *Bury* for the defendants.

HALL, V.C. I think this case is governed by *Keates v. Lyon*, by *Child v. Douglas*,<sup>1</sup> as ultimately decided by Vice-Chancellor Wood,<sup>2</sup> who, after granting an interlocutory injunction in the first instance, refused to grant the plaintiff an injunction at the hearing, and by the case of *Master v. Hansard*.

The law as to the burden of and the persons entitled to the benefit

<sup>1</sup> *Kay*, 560; 5 D. M. & G. 739.

<sup>2</sup> 2 Jur. (N. S.) 950.

of covenants in conveyances in fee was certainly not in a satisfactory state ; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs, and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant? From the cases of *Mann v. Stephens*,<sup>1</sup> *Western v. Macdermott*,<sup>2</sup> and *Coles v. Sims*,<sup>3</sup> it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant ; and that this right, that is, the benefit of the covenant, inures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant : whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.

The plaintiffs in this case, in their statement of claim, rest their case upon their being " assigns " of the Mill Hill estate, and they say that as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill

<sup>1</sup> 15 Sim. 377.<sup>2</sup> Law Rep. 2 Ch. 72.<sup>3</sup> Kay, 56 ; 5 D. M. & G. 1.

estate, which they retained ; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred show that this is not the law of this court ; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to inure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice Bramwell, in *Master v. Hansard*,<sup>1</sup> said : “ I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained.” In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to Bainbrigge that there were such restrictive covenants in conveyances already executed, and expressly or otherwise that Bainbrigge was to have the benefit of them, he and the plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to Bainbrigge no reference to the existence of such covenants by recital of the conveyances containing them or otherwise, the plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed with costs.<sup>2</sup>

<sup>1</sup> 4 Ch. D. 724.

<sup>2</sup> Affirmed on appeal ; L. R. 11 Ch. Div. 866.—ED.

## EDWARD S. TOBEY AND OTHERS v. CHARLES MOORE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FEBRUARY  
24, 1881.

[*Reported in 130 Massachusetts Reports 448.*]

BILL IN EQUITY, filed December 11, 1879, to restrain the defendant from putting up a building on his land, situated on the east corner of Main Street and Trowbridge Street in Cambridge. The case was heard, on the pleadings and proofs, by Morton, J., who reported the following case for the consideration of the full court:

All the parties to the suit derive their title by mesne conveyances from Charles C. Little and James Brown, to whom, in 1850, Richard H. Dana conveyed four lots of land, including the lands now owned by the plaintiffs and the defendant, bounded on Main Street about three hundred and fifty feet, and extending from Ellery Street on the east to Trowbridge Street on the west, which lots were one hundred and fifty feet in depth, and also fifteen other lots in the neighborhood, by a deed describing each lot by metes and bounds, and as numbered on a plan, and containing these clauses, following the *habendum*:

“Provided, nevertheless, and the grant hereby made is subject to the following restrictions and conditions, viz., that the said grantees, their heirs or assigns, shall never erect any building or part thereof which shall be used for the trade or calling of a butcher, currier, tanner, varnish-maker, ink-maker, tallow-chandler, soap-boiler, brewer, distiller, sugar-baker, dyer, tinman, working brazier, founder, smith, or brickmaker, or for any nauseous or offensive trade whatsoever; nor occupy such lots for these or any other purposes which shall tend to disturb the quiet or comfort of the neighborhood; and that no building or part of any, and no fence over six feet high, shall be erected within eight feet of said streets; and that no steam-engine shall be used on the premises, and no livery stable be kept thereon. But the erection or use of any such building, or the occupation of the land hereby conveyed, contrary to these provisos or any of them, shall not subject the said grantees or their heirs or assigns to a forfeiture of their estate in said land; but such erection or occupation shall be conclusively deemed a nuisance, for which the grantor, his heirs, representatives or assigns, may have remedy by due process of law; or may, at their option, enter or send agents on said land and remove and abate such nuisance at the expense of the grantees, their heirs or

assigns, without being held responsible for any manner of trespass therefor."

All the deeds through which the parties respectively claim title from Little and Brown are expressed to be subject to these conditions and restrictions. And the deeds made by Dana to other persons of many other lots of land in the neighborhood, and shown upon the same plan, contain similar clauses.

The defendant is now erecting a building, intended for shops for the sale of groceries and provisions, within less than eight feet of the line of Trowbridge Street, and within less than eight feet of the line of Main Street as now located and used. In 1868 the city council of Cambridge, for the purpose of widening Main Street, took a strip from the southerly side of the defendant's land, twelve and  $\frac{8}{100}$  feet wide at the corner of Trowbridge Street and one and  $\frac{5}{100}$  feet wide at the southeasterly corner of the lot.

There was also evidence reported tending to show that the restrictions were imposed in pursuance of a general scheme of improvement, which it is now unnecessary to state.

The judge reserved for the consideration of the full court the questions whether the bill could be maintained to restrain the defendant from putting up any building on his land nearer than eight feet from the line of Main Street as widened, and nearer than eight feet from the line of Trowbridge Street; and from putting up any building on the land to be used and occupied for the purposes named. If it could be maintained for all or any of these purposes, a decree was to be entered accordingly; otherwise, the bill to be dismissed.

*D. G. Haskins, Jr.*, for the plaintiff.

*G. W. Park* for the defendant.

GRAY, C.J. The rule against perpetuities, which governs limitations over to third persons to take effect in the future, has never been held applicable to conditions, a right of entry for the breach of which is reserved to the grantor or devisor and his heirs, and may be released by him or them at any time.<sup>1</sup>

But this case does not require us to consider whether there are any conditions, strictly so called, to which the rule should be applied. The provision in the deed before us is not a common-law condition; for the deed expressly provides that any breach of it shall not work a forfeiture of the estate. It does not affect the title, but only the mode of use; and, though unlimited in point of time, it is a valid restriction,

<sup>1</sup> Sugd. Vend. (14th ed.) 596; *Gray v. Blanchard*, 8 Pick. 284; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Brattle Square Church v. Grant*, 3 Gray 142, 148, 161; *French v. Old South Society*, 106 Mass. 479; *Cowell v. Springs Co.*, 100 U. S. 55.

which equity will enforce at the suit of any party entitled to the benefit of it.<sup>1</sup>

Independently of the other facts in the case, the deed to Little and Brown—under which both parties to this suit claim title, and of the contents of which they had notice—by applying the restrictions to many distinct lots of land on different streets, supplies the evidence (which was wanting in *Dana v. Wentworth*)<sup>2</sup> of a general scheme for the improvement and benefit of all the lands included in a large tract, which a grantee of any part of the land may enforce against his neighbor.<sup>3</sup>

The restriction against building “within eight feet of said streets” named in the deed has reference to the line of each street as existing at the date of the deed, and is intended to establish a uniform rule as of that date, which cannot be affected by the subsequent widening or narrowing of either street by public authority, or by the fact whether a building is erected before or after such alteration of the line.

The sale of groceries and provisions is not one of the trades or callings enumerated in the deed, and cannot be considered as a “nauseous or offensive trade,” or a purpose “which shall tend to disturb the quiet or comfort of the neighborhood,” within the meaning of the restrictions. In *Dorr v. Harrahan*,<sup>4</sup> cited for the plaintiff, the defendant attempted to set up a grocer’s shop when expressly restricted from erecting anything but a dwelling-house.

Decree accordingly.

<sup>1</sup> *Whitney v. Union Railway*, 11 Gray 359; *Sanborn v. Rice*, 129 Mass. 387; *Lewis on Perp.*, 599, 612.

<sup>2</sup> 11 Mass. 291.

<sup>3</sup> *Parker v. Nightingale*, 6 Allen 341; *Linzee v. Mixer*, 101 Mass. 512; *Sharp v. Ropes*, 110 Mass. 381; *Jeffries v. Jeffries*, 117 Mass. 184; *Renals v. Cowlishaw*, 9 Ch. D. 125 and 11 Ch. D. 866.

<sup>4</sup> 101 Mass. 531.

NOTTINGHAM PATENT BRICK AND TILE COMPANY v.  
BUTLER.

IN THE COURT OF APPEAL, MARCH 3, 5, 1886.

*[Reported in Law Reports, 16 Queen's Bench Division 778.]*

APPEAL of the defendant from the judgment of Wills, J., at the trial of the action in favor of the plaintiffs.<sup>1</sup>

The action was brought to recover the sum of £610, which the plaintiffs had paid to the defendant as a deposit upon the purchase by the plaintiffs from the defendant of a plot of land containing about six and a half acres. The plot of land was put up by the plaintiffs for sale by auction on the 26th of September, 1882, subject to certain conditions of sale, but was not then sold. Among the conditions were the following:

"4. The property is sold subject to all tenancies, tenant rights, chief and other rents, tithe, rights of way, water, light, and other easements, and also to an arrangement entered into with the Nottingham Waterworks Co. for removing from time to time and laying down along the private road, called Plains road, new main water-pipes, and also to the payment of a ratable proportion of the expense of keeping the said private road and gate at the end thereof next Mapperley Plains in good condition, and also subject to any matter or thing affecting the same, whether disclosed at the time of sale or not."

"10. The title shall commence with an indenture of conveyance dated the 20th of May, 1868, and made between Conway Barnett of the first part, Harriett Maltby, spinster, of the second part, and Wm. Windley of the third part."

"12. The property is believed to be, and is to be taken to be, correctly described, and any incorrect statement, error, or omission found in the particulars of these special conditions is not to annul the sale nor entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim to be allowed any compensation in respect thereof."

Neither the particulars nor the conditions of sale contained any intimation that the land was subject to any covenants or conditions restricting the mode of its user by the owner. Shortly after the abortive auction the plaintiffs, by their solicitor, Mr. Hind, entered into negotiations, first with the auctioneer and then with the defendant himself, for the purchase of the plot of land, in the course of which

<sup>1</sup> 15 Q. B. D. 261.

the defendant told Mr. Hind that the land was subject to some restrictive covenants which would prevent its being used as a brick-field. The defendant's solicitor, Mr. Gilbert, who was present, was asked by Mr. Hind whether this statement of the defendant was correct, and he replied that he was not aware of any restrictions. Thereupon the defendant said that he had seen the restrictions in one of the old title deeds, and, upon Mr. Hind again appealing to Mr. Gilbert, the latter repeated that he was not aware of any restrictions. Mr. Gilbert, however, did not say that (as the fact was) he had not read the earlier title deeds and knew nothing about their contents. Thereupon one of the directors of the plaintiff company, who was present, signed, on behalf of the company, a contract to purchase the plot of land in question for £6,100, and a deposit of £610 was paid to the defendant. The contract was made subject to the above-mentioned conditions of sale.

In December, 1882, the plaintiffs discovered for the first time that the land had formed part of an estate of about forty-three acres, which was on the 24th of March, 1865, put up by the then owners in fee for sale by auction in thirteen lots, the plot which the present plaintiffs had agreed to purchase from the defendant having been lot 11 at that sale. That sale was made subject to (*inter alia*) the following conditions:

"15. All buildings to be erected on any part of the said lands shall be stone-colored, with slated roofs; and no building to be occupied as a public house or workshop, or blacksmith's shop, or as a butcher's shop or slaughter house, or chandler's house or shop, or as a shop for the sale of any article whatsoever, or for the purpose of using, working, or making any article of manufacture therein, shall be erected, or built, or so used upon any part of the land now offered for sale; nor shall any part thereof be used as a brickyard, or for the making of bricks, except lot 13; and in case the property shall be sold in lots, no house shall be erected on any part of the said land, except on lot 13, at a less cost than £400."

"16. The purchaser of the property, or of each lot, in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of such purchaser, which covenants shall be inserted in his deed of conveyance; and he shall also, in conjunction with the other purchasers (if any) enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense."



At this sale only lots 1, 2, and 12 were sold. In February, 1866, there was a second auction, at which lots 6, 7, and 8 were sold. In October, 1867, there was a third auction, at which lots 9 and 10 were sold. Lots 3, 4, and 5 were sold respectively in 1865, 1866, and 1867 by private contract to different purchasers. Lot 11 was also sold by private contract, and was conveyed to Barnett, the purchaser, by a deed dated the 4th of September, 1866, which deed contained a restrictive covenant by the purchaser with the vendors in accordance with the above conditions of sale. Lot 13, which was then a brickfield, was sold in June, 1866, by private contract, and the conveyance of it to the purchaser contained, with the exception of a permission to build a blacksmith's shop, a covenant embodying such of the restrictions as were applicable to that lot. On the evidence the court was satisfied that all the lots were sold subject to the original conditions of sale, and that each of the purchasers entered into restrictive covenants with the vendors in accordance with those conditions, the covenants being modified in the case of lot 13 as above stated.

The defendant purchased lot 11 in 1877 from William Windley. The conveyance to Windley contained no reference to the restrictive covenants. The defendant alleged (though this defense was not much insisted on before Wills, J., at the trial) that he bought the property without any notice of the restrictive covenants, and that he discovered their existence afterwards on looking at the conveyance to Barnett.

The plaintiffs, on discovering the restrictive covenants, brought this action, claiming the return of their deposit. The defendant delivered a counter-claim for the specific performance of the agreement to purchase.

Wills, J., gave judgment for the plaintiffs on the claim and the counter-claim. The defendant appealed.

*A. Charles*, Q.C., and *W. Graham* for the defendant.

*Cookson*, Q.C., *Darling*, Q.C., and *R. M. Bray*, for the plaintiffs, were not heard.

LORD ESHER, M.R.<sup>1</sup> I am of opinion that the decision of Wills, J., must be affirmed.

One fact in the case was not clearly brought before Wills, J., but, assuming the facts to be as he considered that they were, I think his judgment was right in every particular. The first point he had to consider was, whether there were with regard to this property restrictive covenants which could be enforced by any one of the purchasers of other parts of the estate of which this property had formed part

<sup>1</sup> Only a portion of the opinion of Lord Esher is given, and the concurring opinions of Lords Justices Lindley and Lopes have been omitted.

against any other. It has been argued that there are no restrictive covenants capable of being enforced in that way, because there was no covenant, either in writing or otherwise in express terms, that each covenantor—each original purchaser—would consider himself bound to the other purchasers, and there was no covenant by the original vendor. But I think that Wills', J., view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a court of equity will, in favor of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter.

Now in the present case the property was originally put up for sale in lots, and it seems to me that the evidence is conclusive that the vendor, at the time when he first put it up to be sold by auction in lots, intended to sell the whole property, and that his intention to sell the whole was clearly published, so that every one who was present at that auction must have known that he was intending to sell the whole, and, as the purchasers were to enter into restrictive covenants, it follows that the purchasers must have known that those covenants were really intended for the benefit of each of them as against all the rest. But it is said that the whole of the property was not sold at once; some parts of it were sold at the first auction, and other parts were not sold till afterwards. That is true, and it is also true that the subsequent sales were at considerable distances of time after the first. That would be a circumstance to be taken into account in considering what was the view of the later purchasers if that was material. But it is impossible, in my opinion, to say that the mere fact that the lots were not all sold on one day can make any difference. Lapse of time is not of itself a bar to the liability of the purchasers *inter se*; it is a matter to be taken into consideration, but it is not a bar. In the present case I think the evidence is conclusive that the sale of every one of the lots was made under the original conditions, and under the authority which was given on the first occasion, when the vendor put up the whole of the lots for sale. The lots were not

all sold on the first occasion only because there were not bidders for them all, but no new instructions were given to the auctioneer for the subsequent sales, no new bargain was made with him, no charges were made by him for altering any of the conditions.

There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the latter sale, you cannot look at the conditions of the former sale; you must look only at the conditions relating to the latter sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers at against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others.

Then it is said that there is no one who could enforce these covenants. But, if all these sales were parts of the one original sale, and the covenants were entered into by each purchaser for the benefit of the other purchasers, each of them could insist on the performance of the covenants by the others.

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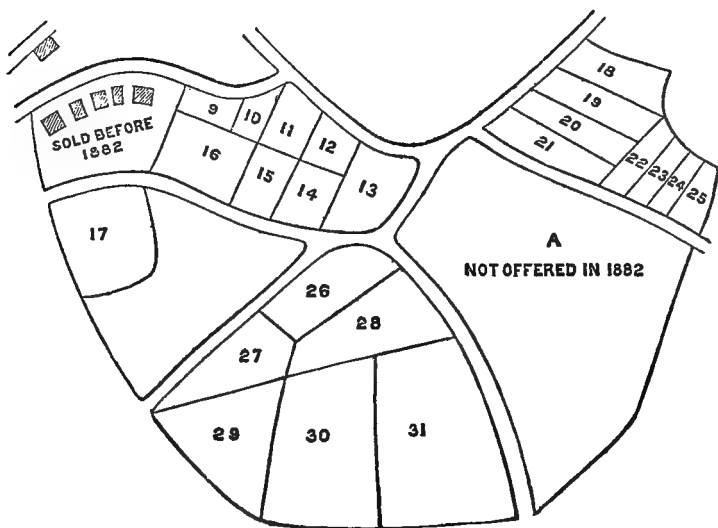
### COLLINS v. CASTLE.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, JUNE  
7, 8, 1887.

[*Reported in Law Reports, 36 Chancery Division 243.*]

THE Marquis Camden had in 1856 and 1857 laid out estates near Tunbridge Wells, then called the Camden estate and Bayham estate, and had sold part of them for building. He died in 1875. In 1882 the only remaining part of the estate, near Tunbridge Wells, was that marked by figures and by the letter A in the annexed plan. It seemed to be then called the Camden Park estate. The trustees of the will of the Marquis Camden in 1882 put up for sale by auction the part of the estate marked with figures 9 to 31 in the annexed plan, together with eight pieces of land at Pembury, about two miles off, forming lots 1 to 8. Amongst the conditions were that the purchasers of lots 9, 10, and

11 were to enter into a deed of covenant with the trustees, their heirs, successors in estate, and assigns, and other the person or persons for the time being entitled to the rents and profits of the unsold part of the Camden estate, similar to that entered into by previous purchasers of the Camden Park estate with the Marquis Camden; and in addition covenant to erect only one dwelling-house on each plot, and to expend in the erection of such dwelling-house the sum of £1,200 at the least. The purchasers of lots 12 to 16 were to enter into a covenant not to build more than one house on an acre, and to spend on each house £1,200 at least. The purchasers of lot 21 and of lots 26 to 31 were to erect on each lot one dwelling-house only, and to expend thereon £1,000 at the least.



As to lots 17, 18, 19, 20, 22, 23, 24, and 25 there were no building restrictions.

At this sale the plaintiff, B. H. Collins, bought lots 18 to 25 for £5,280, and they were conveyed to him subject to the covenant as to lot 21. The only other lot sold at that sale was lot 17.

In July, 1883, the land unsold at the previous sale, together with the piece of land marked A, divided into lots, being the whole of the estate then unsold, was put up for sale with similar conditions as to the houses to be built on lots 9 to 16, but as to some other lots without restriction as to building. The plan annexed showed what had been sold. All the lots were then sold except 9 to 16, some of those without restriction being bought by the plaintiff, B. H. Collins, and some by the plaintiff, J. S. S. Douglas.

In 1884 the trustees agreed to sell to F. J. Castle the lots 9 to 16, subject to the former conditions, and on June 4, 1885, they conveyed those lots to him. By a deed of the same date F. J. Castle covenanted with the trustees, their appointees, heirs, and assigns, and others the person or persons for the time being entitled to the receipt of the rents and profits of such of the lands now or heretofore part of the Camden Park estate as had not been sold since the death of the Marquis Camden (amongst other things), to erect only one dwelling-house on lots 9 to 11, at a cost of £1,200 at least for each house; and as to lots 12 to 16 not to erect anything but dwelling-houses with not less than an acre of land attached, or of less value than £1,200.

B. H. Collins and J. S. S. Douglas brought this action, alleging that the defendant F. J. Castle intended to build on the land so bought by him houses of a less value than £1,200; and claiming an injunction to restrain the defendant from dealing with his land in breach of the restrictive conditions affecting the same and the covenants entered into by him.

*Warmington, Q.C.*, and *Chadwyck Healey* for the plaintiffs.

*Barber, Q.C.*, and *Heath* for the defendant.

KEKEWICH, J. (after stating that the plaintiffs could not maintain this action as on the covenant entered into by the defendant, as they were neither appointees, heirs or assigns of the trustees, having purchased before the covenant was made, nor persons entitled to the rents and profits, proceeded):

In fact that is not the question which I have to decide. That question I apprehend to be: Are the plaintiffs entitled as a matter of inference from all the facts and circumstances of the case, or in other words, can the court see in those facts and circumstances an intention that the plaintiffs were to be entitled to the benefit of conditions restricting the use of their neighbors' property? That is the real question, and it is a question which, but for the *Nottingham Patent Brick and Tile Company v. Butler*,<sup>1</sup> would have made it necessary for me to look into many authorities and consider whether the doctrine to be evolved from them fitted the present case or not. I am, however, relieved from this task by that case. Not only is it the most recent case, not only is there a considered and elaborate judgment of Mr. Justice Wills, but it has been approved of by the Court of Appeal,<sup>2</sup> and approved of as stating the doctrine of the court on this particular subject, as in fact a summary of the law on the subject. It did not profess to lay down a new principle. On the contrary, it professed to be only the statement of the doctrine of the courts of equity applied according to the principles of the judi-

<sup>1</sup> 16 Q. B. D. 778.

<sup>2</sup> *Ibid.*

cature acts in the Queen's Bench Division. Mr. Justice Wills professed to follow the prior decisions in the Court of Chancery, and he did so, laying down what he states to be the principle. Perhaps, if I may venture to criticise the learned judge's language, it is scarcely a principle in a logical sense : it is really a statement of the law. But whether it is a principle, or whether it is a statement of the law, it is equally valuable and equally binds me. He states the principle or the law to be that deducible from the cases, namely, that <sup>1</sup> "where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit."

Now, it is to be observed that the Master of the Rolls in giving judgment in that very case on appeal says :<sup>2</sup> "I think that Mr. Justice Wills' view of the law on this subject is perfectly correct. In my view he is right in saying that"; then follows a statement of what the Master of the Rolls lays down to be the law, which is not a repetition of or a quotation from Mr. Justice Wills' judgment, but a statement of what the Master of the Rolls himself considers, as I read it, to be the law on the subject ; but it is not intended to differ, and it does not substantially differ, from Mr. Justice Wills' own statement. Lord Justice Lindley, also having first dealt with the other parts of the case, adds in a separate part of his judgment :<sup>3</sup> "I wish to add that I think the way in which Mr. Justice Wills has treated *Keates v. Lyon*\* and that class of cases is correct, and that it is an inference of fact in each case whether the purchasers are bound *inter se* by such covenants." I therefore have not merely Mr. Justice Wills' statement of the principle guiding the court, but I have the opinion of the Court of Appeal expressly given by Lord Esher and Lord Justice Lindley that that statement is correct. Therefore I have that to guide me, and I think it would be improper of me to consider whether it is the statement which I myself should have deduced from these cases or not. In saying that, of course I do not

<sup>1</sup> 15 Q. B. D. 268.

<sup>2</sup> 16 Q. B. D. 784.

<sup>3</sup> 16 Q. B. D. 791.

<sup>4</sup> Law Rep. 4 Ch. 218.

mean for a moment to suggest that I should not have deduced the same principle if I had stated it in my own language.

With reference to some of the arguments, I wish to add that I can see that in applying the Nottingham Case<sup>4</sup> and the doctrine there laid down to the present case, I am to some extent extending the doctrine, in this sense, that I am applying the doctrine there laid down to a different set of facts—a set of facts, perhaps, not contemplated by either of the learned judges who dealt with that case. But extension of the doctrine of any case is in certain circumstances not only legitimate and right, but inevitable. For a judge to extend a doctrine by applying it to a different subject altogether is hazardous, and may be exceedingly wrong; but to extend it to a different set of facts from that which has been found before is merely the application of principles to details, which it is the duty of the court every day to do. Also with reference to other remarks that have been made I wish to say that I do not intend or desire, any more than the learned judges in that case intended or desired, to decide questions which have not arisen. I can see that the Nottingham Case and this case may suggest and may leave open a variety of questions of considerable interest which will probably occupy some future editor of learned works on vendors and purchasers, and probably we shall have to wait some few years before the doctrine is thoroughly elaborated. Supposing that the vendors in this case had thought fit to accede to Mr. Castle's request to be relieved from these conditions, either before or after the purchase, either before the contract was signed or afterwards, when he desired to dispose of the property and found that there was a difficulty in doing so, what would have been the position of the plaintiffs? Could they still have sued Mr. Castle? Could they have sued the vendors? Is there any right of a purchaser under such conditions as exist here to insist on conditions being entered into and being fulfilled when there has been no express contract by the purchaser that they shall be fulfilled? Those are questions in different forms which I only throw out. They will, no doubt, give rise to litigation hereafter. They do not arise here at all.

Passing then to this particular case, I hold that, taking Mr. Justice Wills' language, it is difficult—and more than difficult—it is impossible, to resist the inference that the conditions with which we are dealing here were intended for the common benefit of the purchasers, and I also hold, applying his language to the particular case, that the plaintiffs bought on the faith that the conditions which they now seek to enforce would be observed over the property of the common vendor. Those two points struck me at an early period of the case as being the two

<sup>4</sup> 16 Q. B. D. 778.

which one would have to consider, and I find that they also are put forward by Mr. Justice Wills.

Now this difficulty certainly has occurred to me, and has had to be dealt with by counsel in argument. Does this principle, as laid down, apply only to a case where the common vendor is putting up for sale the whole of his property and intending to sell the whole, if he can, at once, or as soon as circumstances permit? Or does it apply also to cases where he either retains or declares his intention of retaining a portion for himself? The Master of the Rolls in affirming Mr. Justice Wills' judgment points to the conclusion that if the doctrine is to be extended to other cases than where the whole of the property is put up for sale and sold, that is not what he at any rate means to decide. But then I must bear in mind that the Master of the Rolls' judgment was given in a case where he found as a matter of fact that there was a sale of the whole of the property. That was a part of the case which he concluded before considering the doctrine applicable to the facts and circumstances. I find nothing in the Master of the Rolls' judgment to show that he would have held differently or would have differed from Mr. Justice Wills if some other elements of detail were added or were wanting. No doubt he does point to the whole property being put up for sale. He says: <sup>1</sup> "The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others." I must read that judgment with reference to the case before the court, where the whole of the property had been put up for sale, and was intended to be sold. The Master of the Rolls is obviously reserving to himself the liberty of dealing with a case like the present when it arises. I do not find that the other judges in the Court of Appeal referred to that in any way, though Lord Justice Lindley, as I have already said, approved the judgment of Mr. Justice Wills. That learned judge certainly did not intend to say that it was necessary to the application of the principle which he laid down that all the property should be put up for sale, and that there should be no part retained, because he in more than one passage points to the whole

<sup>1</sup> 16 Q. B. D. 785.



property being sold as cogent evidence and an important item in the consideration of the case ; and if he had meant to say, or it had occurred to him that he ought to say or ought to hold that the sale of the whole property was an essential part of the doctrine, he must have said so, and he could not have said what he did say in his judgment.

I am not called upon to apply the doctrine to a case where an owner of a property has put up for sale part of that property, reserving to himself any considerable portion. I am not applying it to a case where a vendor is only selling part of the property—where it is in any sense a sale of part of a large property. I am applying it to a case where he is really desirous of selling the whole, though not desirous of selling the whole at one and the same time. It seems to me that to narrow the doctrine to a case where all the property is put up for sale at once by one auction, according to one scheme, once and for all determined, never to be departed from, would be to narrow the doctrine far too much, and to give it a restricted application which can never, I think, have been intended. Here I find that in 1856 the Marquis Camden determined to sell part of his property, which might conveniently be called the Camden Park estate. In 1857, having then sold some parts, he seems to have contemplated the sale by degrees of the whole of the property, and with the assistance of his agent he had prepared plans, mapping the whole out in lots. I think that is important, and is admissible in evidence to show the intention of the marquis, through whom the trustees claim. I do not think it is important or admissible in evidence for any other purpose, because there is no evidence to show that this was communicated to the defendant when he purchased in 1884. But in 1882 the property was put up for sale by the trustees of the will, and in the conditions of sale the property is marked out in such a way as to show that by no means only that property which was then offered for sale had been in the market, because there are several houses which had then been built, and though the property is not all marked out or divided into lots or numbered, still there is that fact that there are no less than five houses marked as built on the Camden Park estate. However, that perhaps is of little importance as regards the present defendant, because he did not buy subject to those conditions. It may be important as regards one of the plaintiffs who bought at that time. But in the plan annexed to the conditions of 1883 I find not only those five houses which had been built before 1882 again marked, but I find two properties marked as sold, one in the extreme left of the plan, the other being that which was sold to the plaintiff Collins. That plan included property which had never been included before, and the defendant who bought subject to the conditions of 1883 had express notice on the face of that plan that the whole of this property had been or was

then laid out in building lots intended for sale in one general scheme. I cannot but think that we have it here shown that the intention of the vendor was from first to last to sell, as and when circumstances permitted, the whole of the property and convert it into building land, a thing which cannot be done in the neighborhood of Tunbridge Wells or anywhere else in a hurry, and requires the exercise of judgment in dealing with land. I think that is enough for the application of the doctrine.

Some difficulties are raised apart from that, and the first is that we have not got here one entire property. It is true the property is described in different ways, and a distinction has been drawn in argument between Camden Park and Camden Park estate. But I will not dwell upon that because we have had evidence to show that this property which was offered for sale, included in the plan to which I have just referred, was known as the Camden Park estate. That is sufficient for that purpose. Then we have also the Pembury property, and it has been argued that I cannot apply the doctrine which I am asked to apply by the plaintiffs because I cannot say to what property it was to be referred. That would be so if I was dealing with a covenant. If I am dealing with a covenant, and actually deciding between covenantor and covenantee what was the extent of the covenant, I must spell the application of the covenant to any particular property out of the words of the covenant. But what I have to do here is to consider the intention of the parties. I am to consider what is the irresistible inference from all the facts. It is a question of fact, Mr. Justice Wills says more than once, an inference which you are to draw from the circumstances of the case. Mr. Warmington appropriately suggested that a man might be offering at the same time a property in Yorkshire and a property in Sussex, and, perhaps, under similar conditions; and of course if they were similar conditions the court would apply by inference the Yorkshire conditions to the Yorkshire property; that is to say, so far as they were necessary, in favor of Yorkshire purchasers, and the conditions as regards the Sussex property to the Sussex purchasers. You would not consider that because they all might be one estate, derivable under one will or one settlement, therefore the conditions applied in favor of purchasers in Yorkshire to property in Sussex. I do not feel any difficulty in saying that these conditions which are sought to be enforced are applicable in favor of purchasers of the Camden Park estate as against purchasers of the Camden Park estate. That is to my mind the reasonable inference, and one to which the court is necessarily drawn.

Then there is a more plausible argument to this effect—that the conditions are different as regards different lots; that there is more than one property; that some of the lots are altogether free from conditions;

that some were in the first instance put up for sale subject to conditions and were afterwards sold free from conditions ; not only that, but that one of the plaintiffs actually bought a part of it free from conditions, and that it does not lie in the mouth of the plaintiffs to say that the conditions subject to which the defendant bought can be enforced. To my mind that makes not the slightest difference. It is true that there are different conditions, and there are different conditions applicable to different lots and different bunches of lots, if I may so say, and it is not only reasonable, but it is what one might expect. When a considerable property, going, I think, to 100 acres here, is laid out in building lots, you would expect those who have the management of the property to say, "So much shall be laid out for building-houses worth £1,200. On the other side of the road there shall be less valuable houses ; £1,000 will do for them. Further off we want a different class altogether ; £600 will do for that—and perhaps it would be as well to leave a few more acres entirely free. Persons may wish to turn them to the use of other purposes than building ; we will not bind them to do anything with them." In the development of a building estate judgment is required in such matters, and it certainly is against one's own common experience to find an extensive property of 100 acres laid out on the principle that only houses of a particular class shall be built all over it. Here, I think, a church is built upon one of the plots, and there is certainly a vicarage built on another. Such matters necessarily come into consideration in the development of a building property. I do not see why, because one man has a property on which he can build a house of £600, he should not be entitled to insist upon a condition that another man should build a house of £1,200. I can well conceive a man buying a property of this kind for a shop, and saying : "It is very important to me that within reasonable reach of my shop-door there should be large residential houses. I should never have thought of buying a piece of land on which to build a shop unless I could have been quite certain that within reasonable reach there would be residences of persons who would deal with me. That is the value of the land to me—not that I should have the land, but that there should be persons who will dwell near me and deal with me." On the other hand, the persons who have the £1,200 properties may very reasonably require that there shall be smaller properties, or, on the other hand, that there shall not be properties which will depreciate the value or the amenities of those which they purchase. The defendants' argument on this point seems to me to be made under a misapprehension, rendered necessary perhaps by the exigencies of his position, of the circumstances under which a building estate is developed.

That being so, it is suggested that there were some motives of the

plaintiffs other than those which are put forward in the pleadings, evidence, and argument. Mr. Collins, I think, is said not to wish to build at all upon his land, and I think Mrs. Douglas it is also suggested, though there is no evidence of it, did not wish to build upon her land, and therefore that they cannot be simply enforcing the covenant. I have nothing whatever to do with the motives. What I have to see is these two things. Are the plaintiffs entitled to enforce these restrictions according to law? And I think I have also to see this: Is it important to them that they should enforce them? When a man is suing on a covenant, leaving out of the question of course those *minima* about which the law is said not to care, it is immaterial whether there is damage or not. A man is entitled to enforce that covenant, which is a species of property. In a case like this, however, it is important to prove damage, but when a man has proved the damage then, to my mind, if he has got a right to sue the right to relief follows.

Apart from any question of evidence, it seems to me obvious and incontrovertible that a man who has purchased a property knowing that within a short distance another property is put up for sale on the condition that on that other property there shall be built houses of not less value than £1,200 each can allege damage if houses are built on that property of less than £1,200 each; and it is immaterial whether he intends to build on his own land or not. In either case damage may exist. It may be a different sort of damage, it may be a different amount, but that there will be damage I cannot for a moment doubt. I should hold that quite apart from the evidence. But evidence was put in which the defendant failed to controvert, and damage as the result of the defendant's intended operations was conclusively proved. Therefore, I hold that the plaintiffs here have established these two things. First, that they are entitled, not to sue the defendant on the covenant contained in his purchase deed, but to enforce that covenant so far as it is in accordance with the conditions subject to which he bought, and subject to which the plaintiffs knew that he must buy, if the vendors did their duty; and, secondly, that the damages which they will sustain if the defendant is not restrained are sufficient to enable them to maintain an action in this court. That being so, I think they are entitled to the injunction they ask.

GEORGE JOHN SPICER, APPELLANT, v. GEORGE MARTIN,  
RESPONDENT.

IN THE HOUSE OF LORDS, DECEMBER 18, 1888.

*[Reported in Law Reports, 14 Appeal Cases 12.]*

APPEAL from a decision of the Court of Appeal.

The facts are stated in the report of the decision of the Court of Appeal,<sup>1</sup> and are referred to in some detail in the judgments of Lords FitzGerald and Macnaghten in this House. For the present purpose the following outline will suffice :

By a conveyance dated the 25th of March, 1867, reciting that it was in pursuance of prior building agreements between the Commissioners for the Exhibition of 1851 and John Spicer, the Commissioners conveyed to John Spicer the fee simple of the house No. 2 Cromwell Gardens, subject to a covenant that he, his heirs and assigns, would not carry on or permit to be carried on upon the premises any trade or business, but would keep and use them as a private dwelling-house only, and would not wittingly or willingly do or suffer to be done on the premises any act or thing which might grow to the annoyance, damage, or disturbance of any person who might be or become the owner, tenant, or occupier of any part of the hereditaments and premises then or late belonging to the Commissioners. The conveyance contained a block plan of the seven houses in Cromwell Gardens. By six similar conveyances of the same date the Commissioners conveyed to John Spicer the houses Nos. 1, 3, 4, 5, 6 and 7 Cromwell Gardens, the whole seven forming one block of buildings, and each conveyance contained a similar restrictive covenant.

In 1874 the respondent took from John Spicer a short lease of No. 2 Cromwell Gardens containing a block plan of the seven houses in Cromwell Gardens and a covenant similar to that in the eighty years lease hereinafter referred to, and was informed by John Spicer's solicitors that there was a covenant to this effect in the conveyance of No. 2 to John Spicer and also in the leases of his other houses in Cromwell Gardens.

In 1880 John Spicer in consideration of a high premium granted to the respondent a lease of No. 2 for eighty years subject to a covenant that the lessee and his assigns would not use the premises or permit them to be used for any trade or business or for any purpose whatever other than as a private dwelling-house, nor do or permit or suffer any act, matter, or thing to be done therein which might be or grow to the

<sup>1</sup> 34 Ch. D. 1.

annoyance, damage, or disturbance of the lessor, his heirs or assigns, or of his or their tenants or other the owners or occupiers of lands or houses adjoining, or of any person or persons who might be or become the owner, tenant, or occupier of any part of the hereditaments or premises at Kensington then or late belonging to the Commissioners. The lease contained a copy of the block plan on the lease of 1874.

During the negotiations for this lease the respondent was informed by John Spicer's solicitors (as the fact was) that the leases of his other houses in Cromwell Gardens contained a similar restrictive covenant, and the abstract of John Spicer's title also disclosed to the respondent the conveyance of No. 2 from the Commissioners to John Spicer.

In 1885 one Brett, the promoter of an hotel company, arranged for the purchase of Nos. 3, 4, 5, 6 and 7 Cromwell Gardens—as to some of them direct from G. J. Spicer (the devisee of John Spicer), and as to the others from persons on whom John Spicer's interest had devolved—for the purpose of converting the houses into an hotel. Brett also, with G. J. Spicer's consent, negotiated with the Commissioners for a license to convert these houses into an hotel, which the Commissioners appeared willing to grant

The respondent having brought an action for an injunction against G. J. Spicer, Brett, and the hotel company, the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), varying an order of Bacon, V.C., granted a perpetual injunction restraining the defendants from carrying on or authorizing to be carried on upon any part of the property known as Nos. 3, 4, 5, 6 and 7 Cromwell Gardens the trade or business of an hotel or any other trade or business, and from using the property or any part thereof or authorizing it to be used otherwise than as private dwelling-houses or a private dwelling-house.<sup>1</sup>

Against this decision G. J. Spicer appealed.

1888, July 2, 9. *Rigby*, Q.C., and *Edward Ford* for the appellant. *Sir H. Davey*, Q.C., and *F. C. J. Millar*, Q.C. (*A. R. Kirby* with them), for the respondent.

LORD FITZGERALD. My Lords, in dealing with the questions in this case your Lordships may look at the title of Mr. Spicer as disclosed on the conveyance before us and appearing on the abstract of title submitted to the solicitors who represented the respondent Martin in the negotiations with Mr. Spicer, and also at the occurrences of 1874 on the negotiations for the lease for fourteen years. That lease is directly connected with the lease for eighty years, which was made during the continuance of the lease for fourteen years. Both leases are between the same parties and negotiated between the same solicitors. The so-

<sup>1</sup> 34 Ch. D. 1.

licitors for Mr. Martin had apparently the same information and the same statements before them on both negotiations.

The fourteen years lease of No. 2 to George Martin, the respondent, is preceded by an agreement which provides that the lease should, *inter alia*, contain "such other covenants as are usual and comprised in the lessor's lease." By "lessor's lease" is meant the conveyance from the Commissioners to Spicer. It was in the course of the negotiations for that lease that the present appellant, then acting as solicitor for his late father, John Spicer, in sending the draft of the lease for fourteen years to George Martin for approval, writes on the 26th of February, 1874: "I may, perhaps, add that the draft is the form used for the other houses in Cromwell Gardens." That draft lease contains a covenant on the part of the lessee that the demised premises should not be used "for any purpose whatsoever other than as a private dwelling-house," with a marginal observation by the present appellant in these words: "There is a covenant to this effect in the conveyance of these premises to Mr. Spicer. G. J. S." That lease was executed in the terms of the draft.

In 1880 Mr. Martin, availing himself of a provision in the lease of 1874 (that is, the fourteen years lease), gave notice of his intention to surrender in 1881, but there never was a surrender, in fact, of that lease. Negotiations were entered on for the purchase of a lease for eighty years, which, when completed by the execution of the new lease, created a surrender by operation of law of the earlier lease. Your Lordships have not before you the earlier portion of these negotiations, but we may look at the position of the parties and the circumstances of the sale. The parties were the same, the solicitors were the same, and Martin was then still in possession under the lease of 1874.

There is a letter from Martin to John Spicer, relating apparently to the notice of surrender, in which he quotes and sends to him a letter from his solicitors in which they ask him to get Mr. Spicer's acknowledgment of the receipt of that notice—"and then we can put it with our papers." This passage seems to indicate that Ashurst & Co. retained the papers connected with the lease of 1874, and had before them the statement contained in the letter of the 26th of February, 1874.

The terms of the new contract appear to have been substantially arranged before the 21st of September, 1880, for on that day the present appellant writes to Ashurst & Co.: "I send you the draft contract for sale of No. 2 Cromwell Gardens." That draft agreement deserves the special attention which was given to it in argument and will be given to it in the judgment which my noble and learned friend (Lord Macnaghten) will deliver after me. I have already read his judgment, and I concur in the observations on it which will be made by my noble and

learned friend, and in the inferences he will deduce. It will be seen that the agreement for the lease for eighty years was subsequently carried into effect by a lease prepared by the present appellant

My Lords, it seems to me that these two transactions run into each other and are not to be separated, and that each was subject to and brought about by the same statement that the whole of this property of the seven dwelling-houses was on the part of both the landlord and his lessees subject to the same restriction, that the houses were to be used as dwelling-houses only, and for no other purpose, and that the purchaser, Martin, was to be subject to and to have the benefit and protection of that restriction. I cannot doubt that both parties so intended in honesty and good faith. The transaction of 1880 was really this : that Martin purchased the larger term of eighty years, commencing from a date then three years past, at a lesser rent, but for which he paid a premium of £11,000. It was but the extension of the same relation of lessor and lessee for a longer term and at a reduced rent, and the statements which affected the first were, as it appears to me, equally applicable to the second lease.

There is, my Lords, every ingredient in this case from which we may reasonably infer an intention that the lessees or purchasers were to be protected by and have the benefit of the restrictive covenant as between Spicer and the Commissioners and to be bound by a similar obligation entered into by each on his own behalf.

It can make no difference that Spicer's obligation to the Commissioners was split up by the adoption of a separate conveyance in fee of each of the seven building lots. The restrictive obligation was applicable to each and every of the seven houses, and Mr. Spicer has himself, whilst giving notice to his lessees and assigns of the obligation he had undertaken, stipulated that they severally should enter into a similar covenant as to his own holding.

My Lords, I cannot entertain any reasonable doubt that, as between the appellant and the respondent, the latter was, according to right and justice, entitled to the full benefit and protection of the restrictive covenant which the vendor had entered into with the Commissioners. The appellant Spicer alone contests the respondent's claim. The lessees or purchasers of two other of the seven houses were made defendants, but offered no opposition, and the other defendants, Brett and the intended hotel company, have vanished.

My Lords, in my opinion the decision of the Court of Appeal should be affirmed, and so affirmed on the ground and for the reasons which I have given, namely, that the lessee, whilst he was on the one hand subject to the obligation of the restrictive covenant contained in his lease, was also, on the other hand, entitled to the benefit of the covenant



entered into by Spicer with the Commissioners to the same effect. The decision of the Court of Appeal proceeded on a question somewhat different, being one of mixed fact and law, which may be thus expressed, viz., whether the representations alleged to have been made by or on behalf of Spicer were so made and were such as that the court ought to deduce from those representations a collateral contractual obligation on his part with Mr. Martin that the tenants of the other six dwelling-houses should be severally bound to use the houses as and for private dwelling-houses only, and not otherwise; and that he, Mr. Spicer, would not permit his property to be used save in accordance with that obligation. The houses Nos. 3, 4, 5 and 7 had been dealt with by John Spicer prior to 1874, and the leases each contained that restrictive covenant. In 1876 Hammersley acquired No. 6, but subject to the same restriction. The same observation applies to the dealing with Shafto as to No. 3 in 1876.

In the view which I have expressed as to the proper *ratio decidendi*, it is not now necessary to express an opinion on the difficult question on which the Court of Appeal acted. I desire to say, however, that if I had been called on now to express an opinion on it, the inclination of my mind would be in favor of the view on which the judgment of the Court of Appeal rested. The temptation of a large price was unfortunately sufficient to induce the appellant to become active in assisting to defeat the arrangement he had so entered into.

It is not necessary here to examine in detail the action of the appellant. He was not only active in promoting the design of Mr. Reginald Brett, but he has maintained at the bar here his right to do so.

It makes no difference that the actual project has come to an end since the institution of the suit, and possibly because of its institution. The suit became necessary because of the action of the appellant, and the respondent is entitled to an injunction in the modified form adopted by the Court of Appeal.

I move, your Lordships, therefore, that the decision of the Court of Appeal be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN. My Lords, the learned counsel for the respondent put their case in two ways.

Adopting the arguments which seem to have found most favor with the Court of Appeal, they contended that the communications addressed to Mr. Martin and his solicitors by Mr. Spicer's solicitor involved representations which amounted to a collateral contract by Mr. Spicer as to the future management of the estate on which Mr. Martin was induced to purchase a residence.

They also contended that, under the circumstances of the case, having regard to the nature of the transaction which resulted in that pur-

chase, Mr. Martin was entitled to the benefit of the restrictive covenant which the Commissioners for the Exhibition of 1851 imposed on Mr. Spicer, and through Mr. Spicer on all persons deriving title from him to any portion of the estate.

Certainly the communications which passed between the parties are not to be disregarded. They form part of the transaction. They serve to record some facts which otherwise might have been left to inference or conjecture. But still, if the true view were that "this case really turns on the correspondence," to use the language of one of the learned judges, or "really depends upon the construction of the letters which passed between the plaintiff and the defendant Spicer," as another member of the court sums up the question, I should have had a difficulty in advising your Lordships to affirm the decision under appeal.

Mr. Martin's connection with the estate began in 1874. On that occasion no correspondence of any sort or kind appears to have passed between the parties until Mr. Martin had entered into a binding agreement to take a lease of No. 2 Cromwell Gardens. The lease was to be for a term of fourteen years, determinable by the lease at the end of the first seven years. One of the conditions of the agreement was, that the lease should contain "such covenants as are usual and comprised in" the conveyance to the lessor. Shortly afterwards a draft lease on a lithographed form, with some alterations in writing, was sent to Mr. Martin. It contained a covenant in the terms of the covenant now in question. It was accompanied by a letter, which stated that the draft was "the form used for other houses in Cromwell Gardens, and, in fact, for all the houses on Mr. Spicer's estates." In the margin of the draft, opposite to a written addition extending the benefit of the covenant to the owners, tenants and occupiers of any part of the estate then or lately belonging to the Exhibition Commissioners, there was a note in these words: "There is a covenant to this effect in the conveyance of these premises to Mr. Spicer."

In due course the draft was approved, and the lease was executed in May, 1874. In the margin of the lease there was a block plan of Cromwell Gardens, showing Mr. Martin's house by distinguishing color.

In 1880 notice was given to terminate this lease at the end of the first seven years. Then there were negotiations for a new lease of the same premises for a long term of years, at a premium of £11,000. A draft agreement was sent by Mr. Spicer's solicitor to the solicitors who acted for Mr. Martin, which originally contained this clause: "The said lease shall contain such covenants, conditions, and agreements, on the part of the purchaser or lessee, as are usually contained in leases granted by the said vendor of his other houses in Cromwell Gardens." Mr. Martin's solicitors asked for "a copy of the form of lease referred to in

the draft agreement as in use on the estate." They said they could not settle the draft without it. They also suggested that the shortest plan would be for Mr. Spicer's solicitor to prepare and send to them the draft lease, which might then be annexed to the agreement. A form of lease was accordingly sent, which apparently was a copy of a lease actually granted to a tenant of one of the other houses in Cromwell Gardens. Accompanying this document, which again contained the restrictive covenant, there was a letter in these words: "As promised, I beg to forward draft of proposed lease herein." The draft was approved, and scheduled to the agreement, which was altered in the clause I have quoted, so as to make it refer to the draft lease as the form of lease to be granted in pursuance of the agreement. The lease itself was executed on the 24th of December, 1880. The plan upon it was a copy of that on the former lease.

I have now stated the whole of the communications which passed between the parties from the very beginning to the end of the transaction, so far as they are relevant to the present question.

Whatever construction may be placed upon the communications which passed in 1874, I much doubt whether they are so connected with the transaction that took place seven years afterwards as to entitle Mr. Martin to rely upon them as a representation inducing the contract of 1880. But, however that may be, I must confess that I am unable to see any difference as regards the question now before your Lordships, between the communications which took place in 1874 and those which took place in 1880. On the first occasion the information was furnished in fulfillment of an antecedent obligation contained in the agreement for a lease. On the second occasion the information was supplied in compliance with a request by Mr. Martin's solicitors who wanted it in order to enable them to settle the draft then before them. In each case the representation which was made was nothing more than a simple statement as to the terms of the restrictive covenant which, for himself and his sequels in right, Mr. Spicer had contracted to observe. In itself the statement was admittedly accurate. It was not in my judgment designed or calculated to put Mr. Martin off his guard. It was not intended or apparently understood to convey any assurance as to the continuance of the existing state of things.

In this respect the present case is altogether different from the case of *Piggott v. Stratton*,<sup>1</sup> on which the judgment of the Court of Appeal seems to be founded.

In *Piggott v. Stratton*<sup>2</sup> one Stratton had taken a building lease of two plots of ground in the Isle of Wight. There was a restrictive cov-

<sup>1</sup> John. 341; 1 D. F. & J. 33.

<sup>2</sup> Ibid.

enant in respect of plot C, with the object of preserving an uninterrupted view of the sea for the benefit of houses to be erected on plot B. Stratton granted an under-lease of plot B. During the negotiations for the under-lease he had told the under-lessee that he was prevented by the terms of his lease from building so as to obstruct the sea view. On this assurance the under-lease was taken, and villas were built which were afterwards acquired by Piggott. Stratton then went to the lessor and surrendered his lease for the purpose of getting rid of the restrictive covenant. But it was held that the obligation of the covenant still remained. What was actually said by Stratton may have been nothing more than a representation, accurate in itself, of an existing fact. But it was intended to be understood, and was in fact understood, as an assurance that he had no power to obstruct the sea view during the currency of the lease, and that so long as the under-lease lasted, the under-lessee would be safe from the apprehended obstruction. That was a case of bad faith, and the Lord Chancellor denounced Stratton's conduct in terms which would be absurdly extravagant if applied to the conduct of the Commissioners, or to the conduct of the appellant. There is no room for any charge of bad faith in the present case. Strange as it may seem, I have no doubt that both the Commissioners and the appellant honestly thought that they were not even acting unreasonably or unfairly to Mr. Martin.

Although the correspondence of itself would not, as I venture to think, give the respondent a right to the interposition of the court, the question still remains whether Mr. Martin was not, under the circumstances, entitled to the benefit of the restrictive covenant.

On this branch of the case Lord Justice Cotton apparently would have been in favor of the respondent. But the point did not form the ground of his decision.

The law on the subject has never been stated more clearly than it was by Vice Chancellor Hall in *Renals v. Cowlshaw*.<sup>1</sup> The opinion of that learned judge on any question relating to conveyancing and real property law, owing to his great experience as a conveyancer, would of itself carry the utmost weight. In this instance his opinion was emphatically confirmed in the Court of Appeal,<sup>2</sup> where Lord Justice James expressly concurred in every word of the Vice-Chancellor's judgment. It has also, I may observe, been approved and followed in the Queen's Bench Division.<sup>3</sup>

"It may, I think," observes the Vice-Chancellor, "be considered as determined that any one who has acquired land, being one of several

<sup>1</sup> 9 Ch. D. 125, 129.

<sup>2</sup> 11 Ch. D. 866.

<sup>3</sup> *Nottingham Patent Brick and Tile Company v. Butler*, 15 Q. B. D., 261, 269; S. C., on appeal, 16 Q. B. D. 778.

lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should as against the others have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant inures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase."

I should be disposed to hesitate if I were invited to extend the principles recognized in *Renals v. Cowlshaw*.<sup>1</sup> But those principles, as defined by the Vice-Chancellor, are I think perfectly sound, consistent with the authorities, and consistent with good sense. I think they apply to the present case, and I think they must govern it.

If the site of the houses now known as Cromwell Gardens had been put up for sale by auction in building lots, according to a plan corresponding with that on Mr. Martin's lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant, in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers *inter se*. What difference is there in substance between the case I have supposed and the case which has occurred? The site was laid out in accordance with a building scheme. The houses were to be built as private houses, and to be used for no other purpose; a covenant to that effect was imposed on the builder who bought the ground, and intended to parcel it out and sell it, or let it again. The houses were actually built as private houses, and offered to the public as such. Their character was unmistakable; and every person who took one of the houses was required to enter into the same restrictive covenant. All this in one way or another was brought to Mr. Martin's knowledge. Every lessee in ordinary course must have had the same information as Mr. Martin had. Every lessee must have known that

<sup>1</sup> 9 Ch. D. 125.

every other lessee was bound to use his house as a private residence only. This restriction was obviously for the benefit of all the lessees on the estate ; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires and imports reciprocity of obligation.

As regards the appellant, the case, I think, is doubly clear. It seems to me that when Mr. Spicer put his houses in Cromwell Gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing he sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?

For these reasons I think the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed with costs.

LORD WATSON. My Lords, in this case I have had the advantage of considering in print the judgment which has just been delivered by my noble and learned friend (Lord Macnaghten), and finding there all that I could desire to say myself, I shall simply express my concurrence.

Order appealed from affirmed, and appeal dismissed with costs.

## LOWELL INSTITUTION FOR SAVINGS *v.* CITY OF LOWELL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MAY 19, 1891.

[*Reported in 153 Massachusetts Reports 530.*]

BILL IN EQUITY, filed February 23, 1888, to prevent the defendant from building upon a lot of land adjoining that of the plaintiff. The case was heard by Holmes, J., who reported it for the consideration of the full court, and was as follows :

In 1839 the Proprietors of Locks and Canals on Merrimack River, from which corporation both parties derived title, owned a tract of vacant land in the vicinity of Middle Street in Lowell, and in its deeds of the same generally inserted, in pursuance of a scheme of improvement, a provision that no building more than twelve feet high should ever be erected on the granted premises of any other material than of brick or stone, with a roof of slate or of some other equally incombustible material. On June 26th of that year the city council of Lowell passed a resolution authorizing the purchase from that corporation of two lots of

land, one on the south side and the other, which was the lot in question, on the north side of Middle Street, the latter to be forever kept open, and the expenditure therefor to be charged to the appropriation for grammar and primary schools. On the same day the city council passed another resolution looking to the erection of a grammar school on the lot on the southerly side of the street. On August 7th following, the defendant city purchased the two lots, and the deed accepted by it of the lot on the north side of the street contained, after the description of the granted premises, the following: "But this conveyance is made on the express condition that no building shall ever be erected on the above-mentioned premises, and also that no wall or fence shall ever be placed on the above-mentioned premises within less than five feet of Middle Street, and that the same five feet shall forever remain open as a public sidewalk," without more. Subsequently the defendant built the contemplated school-house on the south lot. On May 18, 1844, the Proprietors of Locks and Canals conveyed to the plaintiff another lot of its land, which still remained vacant, adjoining the lot in question on the west, and bounded on the south by Middle Street, on the west by Shattuck Street, and on the north partly by an open square and partly by an open passageway sixteen feet wide. Immediately following the description of the lot was the restriction that no building over twelve feet in height should be erected thereon of material other than brick and stone, or with other than an incumbustible roof, or should be placed within less than five feet of Middle Street or eight feet of Shattuck Street, without more. Upon this lot the plaintiff proceeded to build its bank building. On December 29, 1874, the Proprietors of Locks and Canals executed a release to the defendant city of the condition above quoted contained in the deed to it of the lot in question. At the filing of the bill the defendant threatened and intended to erect a wooden building more than twelve feet high on the lot in question.

The plaintiff contended that, for the purposes of light and air, and for safety from fire, it had a right to prevent the defendant from building upon its lot.

The judge ruled that the lot in question was not subject to the restriction as to wooden buildings more than twelve feet high, and that the plaintiff had no easement or private equitable right to have the lot in question remain open.

*P. Webster (F. L. Washburn with him)* for the plaintiff.

*G. F. Richardson & L. T. Trull (F. N. Wier with them)* for the defendant.

C. ALLEN, J. The burden of proof is on the plaintiff to show, from the terms of the grant to the defendant, or from the situation and circumstances, that it was the intention of the grantor in inserting the con-

dition to create a servitude or right which should inure to the benefit of the lot of land now owned by the plaintiff, and which should be annexed to it as an appurtenance.<sup>1</sup> If such a servitude was imposed for the benefit of the lot now owned by the plaintiff, it must have been at the time of the grant to the defendant. Nothing that has happened since could impair the defendant's title in this particular without its consent. We are therefore to look to see if enough can be found in the deed itself, or in the situation and circumstances, fairly to show that any such right or easement was then created in favor of the lot which the plaintiff afterwards bought.

In the first place, it is apparent that the idea of keeping the lot open originated with the defendant. The original owners never had a scheme or plan that their lots in this neighborhood should not be built upon at all, but only that the buildings must be of brick and stone. This latter requirement is not mentioned in the deed to the defendant, and there is nothing to show that the defendant had notice of it. The ruling that the defendant's land was not subject to that restriction was right. The first suggestion of keeping the lot open is found in the vote of the city council authorizing the purchase of the two lots, one on the south side of Middle Street, and the other, being the lot now in question, on the north side, "the latter to be forever kept open"; and the expenditure to be charged to the appropriation for grammar and primary school-houses. On the same day a resolution was passed authorizing the erection of a grammar school-house on the south lot. The deeds of the two lots were taken simultaneously a few weeks afterward. The deed of the north lot contains the clause upon which the plaintiff now relies. It is as follows: "But this conveyance is made on the express condition that no building shall ever be erected on the above-mentioned premises, and also that no wall or fence shall ever be placed on the above-mentioned premises within less than five feet of Middle Street, and that the same five feet shall forever remain open as a public sidewalk."

It is to be observed that the deed contains no mention that this condition is imposed for the benefit of the adjacent lands, that no earlier deed had mentioned any scheme or plan to keep the lot open, that in point of fact there was no such scheme or plan, and that the lot now owned by the plaintiff was then vacant land, bounding on three sides on public streets, and in part, on one of these three sides, on a pass-way. Even if facts which took place afterwards could be looked at, the deed to the plaintiff executed several years later contained no mention that any such right or easement existed for its benefit. It is more

<sup>1</sup> *Beals v. Case*, 138 Mass. 138, and cases there cited.



probable that the intention at the time of the grant to the defendant was to keep the lot open, to be used in connection with the school-house, either as a playground or otherwise. This supposition will account for the insertion of the clause in the deed. But however this may be, an easement or servitude of this description ought not to be held to be imposed for the benefit of an adjacent lot of land, in the absence of any words in the grant itself implying it, unless the circumstances and situation at the time of the grant were such as to make it manifest that the condition or restriction or reservation was intended to be for the benefit of such adjacent lot and to be annexed to it as an appurtenance. There is nothing in the facts of the present case sufficient to sustain the burden resting upon the plaintiff. In this respect the case resembles *Badger v. Boardman*,<sup>1</sup> *Jewell v. Lee*,<sup>2</sup> *Sharp v. Ropes*,<sup>3</sup> and *Beals v. Case*;<sup>4</sup> and it differs from *Peck v. Conway*<sup>5</sup> and other cases, where the fact to be established sufficiently appeared.

Bill dismissed.

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### TULK v. MOXHAY.

IN CHANCERY, BEFORE LORD COTTENHAM, C., DECEMBER 22, 1848.

[*Reported in 2 Phillip 774.*]

IN the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of "Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stonework around the same," to one Elms in fee; and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators, "that Elms, his heirs and assigns, should, and would from time to time, and at all times hereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same, in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground."

<sup>1</sup> 16 Gray 599.

<sup>2</sup> 14 Allen 145.

<sup>3</sup> 110 Mass. 381

<sup>4</sup> 138 Mass. 138.

<sup>5</sup> 119 Mass. 546

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor; but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a Square Garden and Pleasure Ground in an open state and uncovered with buildings.

On a motion now made to discharge that order,

*Mr. R. Palmer* for the defendant.

The LORD CHANCELLOR (without calling upon the other side).

That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it that the latter shall either use or abstain from using the land purchased in a particular way is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the Square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he con-

sidered that doctrine as not in dispute ; but looking at the ground on which Lord Eldon disposed of the case of the Duke of Bedford v. The Trustees of the British Museum,<sup>1</sup> it is impossible to suppose that he entertained any doubt of it. In the case of Mann v. Stephens before me, I never intended to make the injunction depend upon the result of the action, nor does the order imply it. The motion was to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment, on the ground that it was not clearly proved that any breach had been committed; but there being a doubt whether part of the premises on which the defendant was proceeding to build was locally situated within what was called the Dell, on which alone he had under the covenant a right to build at all, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.

With respect to the observations of Lord Brougham in Keppell v. Bailey, he never could have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

I think the cases cited before the Vice-Chancellor and this decision of the Master of the Rolls perfectly right, and, therefore, that this motion must be refused, with costs.

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### SUSANNAH WHITNEY v. UNION RAILWAY COMPANY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1858.

[*Reported in 11 Gray 359.*]

BILL IN EQUITY, filed at April Term, 1857, alleging that the plaintiff for forty years had been seized in fee of certain lands in Cambridge ; that she had incurred great expense in procuring a survey and plans thereof and constructing and grading streets thereon, intending the same for private residences ; that on the 10th of September, 1851, she sold and conveyed by warranty deed (duly recorded) to Artemus White a lot of this land, subject to these restrictions : "That if the said Artemus White, his heirs or assigns, shall suffer any building to stand or be erected within ten feet of Lambert Avenue, or shall use or

<sup>1</sup> 2 My. and K. 552.

follow, or suffer any person to use or follow, upon any part thereof, the business of a taverner, or any mechanical or manufacturing, or any nauseous or offensive business whatever, then the said grantors, or any person or persons at any time hereafter, who at the time then being shall be a proprietor of any lot of land represented upon said plan east of lot No. 27 and north of Lambert Avenue, shall have the right, after sixty days' notice thereof, to enter upon the premises with his, her, or their servants, and forcibly, if necessary, to remove therefrom any building or buildings erected or used contrary to the above restrictions, and to abate all nuisances, without being liable to any damages therefor, except such as may be wantonly and unnecessarily done."

The bill further alleged that White erected a stable on this lot and kept horses for hire and at livery, against the remonstrance of the plaintiff and to her nuisance and injury; that the defendants had since by mesne conveyances acquired White's title and enlarged and added to the stable, and were building further additions, and kept and intended to keep a much larger number of horses, contrary to the reservations and restrictions in the deed, and to the injury, nuisance and annoyance of the plaintiff, and to the injury of a lot with a dwelling-house thereon, still owned and occupied by the plaintiff, on the opposite side of the same street and within the tract mentioned in the restrictions; and that the defendants had laid down rails and were proceeding to construct a turntable in Lambert Avenue.

The bill prayed for an injunction to restrain the defendants from erecting additional stables, or laying rails or constructing a turntable in the street, or keeping a stable for horses upon the premises, and for an abatement of these nuisances.

The defendants in their answer admitted so much of the allegations of the bill as related to the laying down of rails and the construction of a turntable, but alleged that immediately after the filing of the bill they entirely removed and abated the same; and they demurred to the rest of the bill upon grounds which are sufficiently stated in their argument.

*B. F. Butler* and *N. St. J. Green* for the defendants.

*E. R. Hoar* for the plaintiff.

The decision was made in January, 1860.

BIGELOW, J. The claim of the plaintiff to equitable relief rests mainly on the validity of the restrictions contained in her deed to Artemus White of September 10, 1851, under which the defendants hold the estate described in the bill. By the facts stated in the bill and admitted by the demurrer it appears that the plaintiff was originally the owner in fee of a large tract of land, which she caused to be surveyed and laid out in lots, with suitable ways or streets affording convenient access thereto, intending to sell them to be used and occupied by

private dwellings. One of these lots she sold and conveyed to White by the deed above mentioned, containing the clause as to the use and occupation of the premises, which is fully stated in the bill. This lot by mesne conveyances has become vested in the defendants. The plaintiff still continues the owner of a part of the tract originally laid out by her, and occupies a dwelling-house thereon, nearly opposite to the lot now owned by the defendants. She was therefore the original grantor by whom the restrictions were created, and, as the owner and occupier of a part of the estate out of which the land owned by the defendants was granted, and for the benefit and advantage of which the restrictions were imposed, she has a present right and interest in their enforcement. The purpose of inserting them in the deed is manifest. It was to prevent such a use of the premises by the grantee and those claiming under him as might diminish the value of the residue of the land belonging to the grantor or impair its eligibility as sites for private residences. That such a purpose is a legitimate one and may be carried out consistently with the rules of law by reasonable and proper covenants, conditions or restrictions, cannot be doubted. Every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade. Nor can there be any doubt that in whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition on covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity.

The more difficult question, and the one on which the decision of this case must turn, is, to what extent and in what cases are such stipulations binding on those who take the estate under the grantee, directly or by a derivative title? Upon this point the better opinion would seem to be that such agreements are valid and capable of being enforced in equity against all those who take the estate with notice of them, although they may not be strictly speaking real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed. This opinion rests on the principle that, as in equity that which is agreed to be done shall be considered as performed, a purchaser of land, with notice of a right or interest in it, subsisting in another, is liable to the same extent and in the same

manner as the person from whom he made the purchase, and is bound to do that which his vendor had agreed to perform. Therefore an agreement or covenant, though merely personal in its nature, and not purporting to bind assignees, will nevertheless be enforced against them, unless they have a higher and better equity as *bona fide* purchasers without notice. It is on this ground that a purchaser of an estate, taking it with notice of a prior agreement by the vendor to sell it to another, can be compelled in equity to convey it according to such agreement. In like manner, by taking an estate from a grantor with notice of valid agreements made by him with the former owner of the property concerning the mode of occupation and use of the estate granted, the purchaser is bound in equity to fulfill such agreements with the original owner, because it would be unconscientious and inequitable for him to set aside and disregard the legal and valid acts and agreements of his vendor in regard to the estate, of which he had notice when he became its purchaser. In this view the precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform.<sup>1</sup>

The validity of agreements similar to those in the plaintiff's deed to White has been also recognized and established and their performance enforced in equity, as against subsequent purchasers with notice, upon the ground that such stipulations create an easement or privilege in the land conveyed for the use and benefit of the grantor, and those who might afterwards claim under him as owners of adjacent land, of which the land granted originally formed a part. In such cases, although the covenant or agreement in the deed, regarded as a contract merely, is binding only on the original parties, yet, in order to carry out the plain intent of the parties, it will be construed as creating a right or interest, in the nature of an incorporeal hereditament or easement, appurtenant to the remaining land belonging to the grantor at the time of the grant, and arising out of and attached to the land, part of the original parcel, conveyed to the grantee. When, therefore, it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor

<sup>1</sup> Sugd. Vend. (11th ed.) 734-743; *Bedford v. British Museum*, 2 Myl. & K. 552; *Bristow v. Wood*, 1 Collyer 480; *Whatman v. Gibson*, 9 Sim. 196; *Schreiber v. Creed*, 10 Sim. 9; *Barrow v. Richard*, 8 Paige 356, 360.

and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land. Cases have arisen where the owner of a large tract of land, for the purpose of providing an area in front of it, to be kept forever open, or securing its permanent use and enjoyment for dwellings and excluding all offensive and noxious trades from the premises, has inserted covenants or conditions in his grants restricting the use of the land conveyed so as to effect these objects. It has been held in such cases on the grounds just stated that each grantee of a part of the land subject to such restrictions is bound to observe the stipulations in favor of other grantees of a part of the same land, and is entitled to claim a like observance in his own favor as against them. Nor does it make any difference that a party cannot maintain a suit at law in his own name to enforce the stipulation as a covenant or contract. A court of equity will give full effect to the stipulation on the complaint of a party for whose benefit and protection, as owner of the land, the stipulation was intended.<sup>1</sup>

This class of cases is clearly distinguishable from *Keppel v. Bailey*.<sup>2</sup> There was in that case no covenant or agreement between grantor and grantee concerning the particular mode of using the estate granted as a privilege or benefit to other land belonging to the grantor. The sole question was whether assignees of a lease were bound to perform certain covenants made by their assignors with owners of property held by a distinct and independent title as to the use of such property by the assignors for certain purposes. The covenant was originally between strangers having no privity of estate with each other, and there was nothing on which to found any right or privilege in the nature of a grant or reservation of an easement. The decision, however, in *Keppel v. Bailey*, has been severely criticised in *Sugden on Vendors*, 737-741, and the soundness of several of the dicta of the Lord Chancellor and of the decision of the case called in question by the learned author of that valuable treatise.

In the light of these principles and authorities it is not material to the decision of this case to determine the precise nature of the clause in the deed to White, by which restrictions were imposed on the use and enjoyment of the estate now owned by the defendants. It is sufficient that the intention of the parties to the original deed to place restrictions on the use and enjoyment of the estate granted is clear.

*Hills v. Miller*, 3 Paige 256; *Watertown v. Cowen*, 4 Paige 510; *Barrow v. Richard*, 8 Paige 360.

<sup>2</sup> 2 Myl & K. 517.

The grantee, by accepting the deed and taking title under it, was bound to comply with its stipulations so far as from their nature they were to be performed by the owner of the land, or created a right or privilege therein in the nature of an easement in favor of his grantor and those claiming under him. This deed was duly registered, and the defendants, claiming title derivatively under the grant, have constructive notice of its stipulations, and are bound in equity to observe them.

The objection that the terms of the restrictions are contrary to public policy and in unreasonable restraint of trade is not well founded. They do not restrict the alienation of land. The owner of the fee can convey it at his pleasure. They do not tend to perpetuity. The person who is entitled to the rights or privileges created or secured by the restrictions can at any time release them. They do not impair the enjoyment of the property. This remains in the respective parties according to their legal rights under the contract and grant; in the same manner as in case of a right of way, where one person owns the land, which he may use and occupy, subject only to the enjoyment of the easement by him who has the right of way over it. Nor do such restrictions operate to impose any unlawful restraint of trade. While they are confined to separate parcels of land of limited extent, they are at most only in partial restraint of trade, and do not transcend the legitimate exercise of the right which every owner has to control and dispose of his own estate.

Upon the grounds therefore that the plaintiff is the grantor in the original deed by which the land now owned by the defendants was conveyed, and is the owner and occupier of a part of the original tract for the benefit of which the restrictions in the deed to White were inserted; that these restrictions were useful and beneficial to the enjoyment of the land of the plaintiff, and are in the nature of an easement or privilege in the land granted, reserved to the grantor, and are not unreasonable or against public policy; and that the defendants took their estate with notice of these restrictions, and are equitably bound to regard them in the use and enjoyment of their property; we are of opinion that the plaintiff can maintain this bill to enforce their observance, if she has not waived or relinquished the right by her own laches.

But it is very clear that a suit in equity to compel a compliance with such stipulations concerning the use of property must be seasonably commenced before the persons in possession of the estate have expended money or incurred liabilities in erecting buildings or other structures on the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damage on parties acting in good faith. In such cases a prompt



assertion of right is essential to a just claim for relief in equity. In the present case the plaintiff can have no equitable relief to prevent the use or procure the abatement of the stable erected by White. Having stood by and permitted its erection, she cannot now invoke the aid of the court to enforce a remedy in equity for its removal. Whether she has been guilty of further laches, so as to prevent her maintaining the bill against the defendants for acts done by them in enlarging the stable, can be determined only upon hearing the facts bearing on the question.

Nor can we decide in the present posture of the case whether the erection of a stable is a "nauseous or offensive business," in the proper sense of those words as used in the deed to White. This is mainly a question of fact, to be determined on a view of the evidence relevant to the inquiry, and depending in some measure on the extent and mode of use of the premises by the defendants for the purposes of a stable.

The objection that the bill is multifarious, if originally tenable, is now obviated by the defendants' answer that they have removed the railroad track and turntable from the street or avenue and entirely abated the same. This allegation may therefore be now deemed as stricken from the bill.

It does not appear by the allegations in the bill that any person other than the plaintiff has any right or interest in the enforcement of the agreements contained in the deed to White. Nor does it appear, except by an uncertain and remote inference, that there was any other grantor in that deed but the plaintiff.

Demurrer overruled.

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### WILSON v. HART.

IN THE COURT OF APPEAL, FEBRUARY 28, MAY 28, 1866.

[*Reported in Law Reports, 1 Chancery Appeals 463.*]

THIS was an appeal from an order on further consideration made by Vice-Chancellor Wood <sup>1</sup> under the following circumstances :

By an indenture dated the 9th of December, 1859, the plaintiffs, Isaac Wilson, Joseph Whitewell Pease and Alfred Kitching, conveyed a piece of land, part of a building estate called the Pinder Bank Estate, in the town of Darlington, to Robert Robinson in fee. By the same indenture, R. Robinson for himself, his heirs, executors and administra-

<sup>1</sup> Reported 2 H. and M. 551.

tors, covenanted with the plaintiffs, their heirs and assigns, to repair the roads and to erect buildings in the manner therein mentioned; and further, that no building or buildings erected or to be erected on the said purchased premises, or any part thereof, should be used for the sale of ale, beer, wine or spirits, or any other intoxicating liquor, nor for the purpose of carrying on any trade or business of a noxious character, or which should be deemed either a public or a private nuisance.

R. Robinson built a house on the piece of land purchased by him, which he subsequently sold to Charles Marshall, who conveyed it to the defendant, Jane Hart, in fee.

In September, 1864, Jane Hart instructed Mr. W. T. Robinson, an auctioneer at Darlington, to let the house; and he accordingly let it to the defendant, John Thompson, as tenant from year to year.

Thompson entered into possession on the 24th of November, 1864, and carried on the business of a grocer and provision dealer there, and as part of his business sold ale and beer, but not to be consumed on the premises.

In January, 1865, the plaintiffs required Thompson to desist from selling ale and beer, and on his refusal filed this bill on the 9th of February, 1865, against Jane Hart and Thompson, praying that they might be restrained from using the house for the sale of ale or beer, or any other intoxicating liquor.

It appeared by the evidence, that on several of the building estates in and near Darlington the tenants were restricted from selling beer; but this was not universally the case, and even on the Pinder Bank Estate there were two houses licensed to sell beer across the counter.

The defendant, Jane Hart, admitted that she had notice of the covenant. The defendant Thompson stated in his answer that when he took the house he was a stranger in Darlington, and denied all knowledge that there was any such restriction imposed upon the use of the house which he took, or upon any other houses on the Pinder Bank Estate. He also stated—and the account was confirmed by Thomas Littlefair, one of his witnesses—that the defendant and Littlefair went to the office of Mr. W. T. Robinson to inquire about the house, and that Robinson then asked the defendant for what he wanted the shop, and that the defendant answered that he wished to carry on the business of a provision dealer; and that Robinson then said that his orders were not to let it as a butcher's shop, but that he might carry on any other business there that he liked.

W. T. Robinson made an affidavit, in which he admitted that he had told Thompson that he was not to use the premises as a butcher's shop, but denied that he had said that he could carry on any other business in the house.

The cause was heard before the Vice-Chancellor on motion for decree, and His Honor made an order granting a perpetual injunction in terms of the prayer, but gave no costs against the defendant Thompson.

From this decree Thompson appealed.

*Mr. G. M. Giffard*, Q.C., and *Mr. Fry* for the plaintiffs.

*Mr. De Gex*, Q.C., for *Jane Hart*, took no part in the argument.

*Mr. Rolt*, Q.C., and *Mr. Kay* for the defendant Thompson.

May 28. SIR G. J. TURNER, L.J., after stating the facts, continued :

Three questions arise upon this appeal. First, whether the covenant contained in the deed of the 9th of December, 1859, ran with the lands so as to affect the defendant Thompson, independently of any question whether he had notice of it or not. Secondly, whether assuming the covenant not to have run with the land, the defendant Thompson ought to be held to be affected with notice of it ; and, thirdly, whether, assuming the defendant to be affected with notice of the covenant, it ought under the circumstances of the case to be enforced against him.

In the view which I have taken of this case it is not necessary for us to decide the first of these questions. The Vice-Chancellor, however, has been of opinion that the covenant did not run with the land, and it may be right for me to say that I see no reason for dissenting from that opinion. The covenant does not purport to bind assigns, and it seems to me to be a covenant directed not against the use of the land, but against the personal use and enjoyment of the building to be erected upon the land. The grantee, as I understand the covenant, was to be at liberty to erect any building which he might think proper upon the land, provided that the building, when erected, was not used for any of the purposes specified in the covenant. It was, as I think, a covenant applying merely to the personal use and enjoyment of the land by the grantee, and not to the permanent user of the land itself.

Then as to the second question, the notice of the covenant. The evidence certainly does not satisfy me that the existence of covenants of this description in respect of lands in the district was of such notoriety in the town of Darlington as that the defendant ought, upon that ground, to be affected with notice of the covenant contained in the conveyance of this plot of land. If the defendant is to be affected with such notice it must, I think, be upon the law of the case, and not upon the facts. It was argued for the defendant that the circumstances which would affect a purchaser or mortgagee with notice ought not to be held so to affect a mere tenant from year to year, that such a tenant ought not to be held bound to inquire into his landlord's title, and that even if in any case such a tenant was bound to make such inquiry, the defendant was not bound to do so under the circumstances of this case, as

he was, as it was said, induced by the representations of the landlord's agent to believe that no further inquiry was needed.

But these arguments cannot, I think, be maintained. Looking at them first with reference to their general application, on the one hand I am not by any means inclined to extend the doctrine of constructive notice; but, on the other hand, I am as little inclined to flitter away the principles of the court by refusing to apply them to cases to which they properly extend.

It cannot, I think, be denied that generally speaking a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases ought not to be held to apply in the case of a tenant from year to year. The difference in the cases seems to me to be only in the quantum of injury which falls upon the party to whom the rule is applied. Then looking at these arguments with reference to the circumstances of this case, I do not think that the mere fact of the landlord's agent having represented that his orders were not to let the house for a butcher's shop, was sufficient to absolve the defendant from making further inquiry as to the purposes for which it might be used. As to the other representation alleged to have been made by the landlord's agent, it is, I think, more proper to consider it with reference to the third point. Upon the point now before us I may add that assuming notice of the covenant, the case of *Tulk v. Moxhay*<sup>1</sup> seems to me to apply.

Then, as to the third point. It is alleged, on the part of the defendant, that the landlord's agent represented that the house might be used for any other purpose than as a butcher's shop, and certainly, if this representation was made, I am not disposed to think that this court ought to enforce the covenant against the defendant, whatever right there may be upon it at law. The evidence, however, does not satisfy me that any such representation was made.

[His Lordship then considered the evidence which had been adduced upon this question, and expressed his opinion that the defendant's case failed on this point also. He then continued as follows:]

In dealing with the case I have assumed that the conveyances to Marshall and Hart did not disclose this covenant; but it may be right to say that I have not seen those conveyances. I have not thought it

<sup>1</sup> 2 Ph. 774.

necessary to do so, as it is obvious that the investigation of title which, in my opinion, the appellant was bound to make, must have disclosed the covenant. I may mention that some doubt at one time occurred to me whether the case might not be distinguished upon the ground that this was a personal covenant merely, and that persons dealing with estates, although they might be bound to inquire into matters affecting the estate, might not be bound to inquire into mere personal obligations affecting the owner in respect of the estate ; but upon consideration I have thought that this distinction is more plausible than sound, and that it certainly cannot apply to the present case, as there was here no inquiry into the title, and the inquiry, if made, must have resulted in notice of the covenant. I think this appeal must be dismissed ; but certainly without costs.

SIR J. L. KNIGHT BRUCE, L.J. I agree in the conclusion of my learned brother. But as to the first of the three questions, I wish pointedly to say that I abstain from giving an opinion. My conclusion is the same whatever answer ought to be given to that question.

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BREWER, APPELLANT, v. MARSHALL AND CHEESEMAN, RESPONDENTS.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY,  
NOVEMBER TERM, 1868.

[*Reported in 19 New Jersey Equity Reports 537.*]

THE injunction in this case restrains the defendant, Marshall, from selling or removing from the farm conveyed to him by the defendant, Cheeseman, known as the Swope farm, any marl, and from digging any marl on it except for the use of the farm. The defendants have filed their answer, and move to dissolve the injunction.

The defendant, Cheeseman, was, in 1841, seized of a farm in the county of Gloucester, known as the Swope farm, on which there were valuable beds of marl. On the 23d of February, in that year, he conveyed to James W. Lamb two tracts of that farm, one a tract of forty-eight acres, lying east of the Cross Keys road, which divided the farm, and another of twelve and a half acres, lying west of the road, on Great Timber Creek, and which, in the deed, is described as "twelve acres and a half of marl land." The deed grants a right of way over a strip twenty feet in width from the road to the creek along the marl lot, and contains, in the description of the premises after the description of the way, these words: "Also the said George Cheeseman, his heirs or

assigns, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property."

On the 14th of December, in the same year, Lamb conveyed back to Cheeseman the forty-eight acre lot. On the 3d of January, 1842, Cheeseman conveyed to Lamb another part of the Swope farm, in two lots. One was a lot of seven acres adjoining the creek, and north of and adjoining the twelve-and-a-half-acre lot; the other was a strip of one acre, leading from the seven-acre lot eastwardly to the road, and including the land over which the right of way had before been granted. On the same day Cheeseman executed to Lamb a bond in the penalty of \$5,000, secured by a mortgage on part of the Swope farm not conveyed. The conditions of the bond and mortgage (which were both in the same words) contained this recital: that Cheeseman, in consideration of \$1,650, had, by deed of the same date, conveyed to Lamb a lot of seven acres, part of the Swope farm; that the principal value of said lot consisted in the valuable beds of marl upon it; that there were divers like beds of marl upon the residue of the Swope farm; that said sum was paid not only as the consideration for said lot, but upon the express agreement between the parties that neither Cheeseman, his heirs or assigns, nor any other person holding said farm, should, within thirty years from the date, dig, sell, remove, or suffer to be dug, sold, or removed from off the said farm, any part or parcel of the marl thereon except for the use of the farm, "so that the said marl, or any part thereof, should not be sold or otherwise brought into competition with the marl of the said James W. Lamb"; and upon the further agreement that for any violation of said covenant by the said Cheeseman, his heirs, executors, administrators, or assigns, or other persons holding said farm under him or them, said Cheeseman, his heirs, executors, or administrators, should pay to said Lamb, his heirs, executors, administrators, or assigns, the sum of \$500. The condition was that if they did not so dig or sell, and if they paid up such penalties, the obligation and mortgage should be void.

On the 6th of September, 1842, Lamb conveyed back to Cheeseman the seven-acre lot, except a triangular part containing about one-tenth of an acre, retained to give access from the one-acre strip (used as a way) to the twelve-and-a-half-acre lot, this being the means of communication from that lot to the Cross Keys road. Lamb conveyed the twelve-and-a-half-acre lot, the one acre used for a way, and the tenth of an acre reserved from the seven-acre lot, to the complainant Brewer by two deeds, one dated March 3d, 1847, the other dated January 3d, 1848; the last deed conveyed the one acre used as a road and the tenth of an acre reserved from the seven-acre lot. And on the same day Lamb assigned to Brewer the bond and mortgage given to him by Cheese-

man. Cheeseman, by four deeds made at different times, conveyed to the defendant, Marshall, the rest of the Swope farm not conveyed to Brewer.

Both the defendants have at different times dug, removed, and sold from the seven-acre tract and other parts of the Swope farm marl by the ton and measured quantity since 1842; and the defendant, Marshall, was continuing to do so until the injunction.

These facts appear by the bill and are admitted by the answer.

The opinion of the Chancellor is reported in 3 C. E. Green 338.

*Mr. Browning* for appellant.

*Mr. J. Wilson* for respondents.

The opinion of the court was delivered by the CHIEF JUSTICE.

The facts out of which this controversy has arisen so fully appear in the statement which prefaces this opinion that I do not deem it necessary to repeat them *in extenso*. It will answer every present purpose to say that one George Cheeseman was originally the owner in fee of the several tracts of land now respectively owned by the appellant, Mr. Brewer, and by the respondent, Mr. Marshall; that on the 23d day of February, 1841, he conveyed to the grantor of the appellant the lands now held by the latter, and also, by the same instrument, another tract of twenty-eight acres, and that in this deed there was a covenant in the following words, viz.: "Also, the said George Cheeseman, his heirs or assigns, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property." The tract described in this covenant as that to which the restriction was to apply is now owned by the respondent, Mr. Marshall, who, notwithstanding the covenant just quoted, has exercised, and still claims, the right to sell marl therefrom. Before proceeding to test the strength of this position, it should be premised that this respondent is not in a situation to deny that, at the time he acquired his rights, he had notice of this covenant. The law conclusively charges him with such information, because the deed which contains this restrictive agreement constitutes one of the muniments of his own title. The covenant is contained in the conveyance of the forty-eight acre tract to the grantor of the appellant, and that tract was re-conveyed by such grantor to Cheeseman, the original owner, who then conveyed it to the respondent, thus incorporating in the chain of the title of the latter the covenant in question. In this position of things the respondent is chargeable, by incontestable legal presumption, with full knowledge of the existence of the stipulation in question, for the rule upon that subject is settled by a long series of decisions, as will appear from the cases collected in the voluminous notes to the case of *Le Neve v. Le Neve*.<sup>1</sup> It is to be assumed, therefore, as an incon-

<sup>1</sup> 2 Lead. Cas. in Eq. 182.

trovertible fact that when the respondent took his conveyance he was aware that his grantor had covenanted, both for himself and his assigns, that no marl should be sold from off the premises so conveyed. This presumption obviously makes the attitude of the respondent an unfair one. He knew that Mr. Cheeseman's vendee, who is now represented by the appellant, had paid his money in purchase of this stipulation and in reliance on its honest performance, and consequently that it was the duty of Mr. Cheeseman, in the fair discharge of his obligation, not to sell this land free as to its uses. But the respondent stands upon his strict legal rights, and insists that the covenant in question is not either of a character to run with the title, nor to create an easement in the land, and that, consequently, he takes such land as the assignee of the covenantor, unbound by such obligation.

I think the Chancellor, in the opinion which he has sent up in this case, has clearly shown that these premises, on which the defense has been rested, are well founded, for I quite agree that the covenant under consideration neither runs with the land nor is it, in effect, the grant of an easement. But the difficulty with me has been whether, granting these premises, the conclusion follows that the complainant is not entitled to relief in this court. The point is this: There is a class of cases in which equity will charge the conscience of an alienee of land with an agreement relating to such land, where clearly the agreement neither creates an easement nor runs with the title. This rule has been too frequently acted upon and is too deeply seated in our legal system to be passed by unnoticed or to be rejected as unsound. I regard it as a part of the law. Thus, if title deeds be deposited as security for money, and a creditor, knowing these facts, takes a subsequent mortgage on the same property, he will be postponed to the equitable mortgage of the prior creditor, and a trust will be raised in him to the amount of such equitable incumbrance.<sup>1</sup> So if lands are held in trust, or the owner of lands is under a contract to sell or lease them, and a subsequent purchaser has notice of such facts, he will, in equity, stand in the place of his grantor and be chargeable with the same duties and contracts. "In such cases," says Judge Story, "he will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to theirs. It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes, by such conduct, *particeps criminis* with the fraudulent grantor."<sup>2</sup> It will be observed that it is a feature common to all these instances that the party in fault acquires a legal title in an unrestricted form, but in disregard of the known equitable rights of others, and that these same

<sup>1</sup> Birch v. Ellames, 2 Anst. 427.

<sup>2</sup> 1 Story's Eq. Jur. § 395.



elements exist in the case now before this court. But there is also another clearly defined line of cases illustrative of the same rule. I mean that class of decisions which hold that an agreement between the owners of several parcels of lands that the buildings to be erected thereon shall not be applied to certain specified uses is obligatory. Such stipulations have been repeatedly held to be obligatory, not only upon such owners, but upon the alienees taking with notice. *Whatman v. Gibson*<sup>1</sup> was of this description. In that case the owner of a piece of ground, which was laid out in building lots, having sold some of them, he and the purchasers executed a deed whereby it was agreed that it should be a condition of the sale of all the lots that the several proprietors should observe all the stipulations of the deed, among which was one prohibiting the use of any building as a tavern. This restriction was declared to be binding, in equity, on a purchaser with notice, although he had not executed the deed, but claimed derivatively through a purchaser who had. This decision, Sir Edward Sugden observes, is fully warranted by the older cases.<sup>2</sup> And the same principle will be found exemplified in the following series of adjudications, which extend down almost to the present moment.<sup>3</sup>

It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point. Thus in *Wilson v. Hart*,<sup>4</sup> which was a suit to compel the observance of a covenant not to use any building erected on a building plot as a beer-shop, the defendant, who was the assignee of the covenantor, was enjoined, although Sir G. J. Turner, L.J., in delivering the judgment, declared that, in his opinion, the covenant did not run with the land; that it did not purport to bind assigns, and that it seemed to be a covenant directed not against the use of the land, but against the personal use and enjoyment of the building to be erected upon the land.

Nor is this doctrine without illustration in our own courts. It was enforced in the case of *Van Doren v. Robinson*.<sup>5</sup> This was a suit founded on a covenant in a conveyance, whereby the grantee agreed to re-convey to the grantor whenever he, the grantee, should quit the

<sup>1</sup> 9 Sim. 196.

<sup>2</sup> Ven. and Pur., 2 Vol., p. 185.

<sup>3</sup> *Tulk v. Moxhay*, 2 Phill. 774; *Coles v. Sims*, 5 De Gex, M. and G. 1; *Mann v. Stephens*, 15 Sim. 376; *Western v. MacDermot*, Law Rep. 1 Eq. 499; S. C., Law Rep. 2 Ch. App. 72; *Bristow v. Wood*, 1 Coll. 480; *Brouwer v. Jones*, 23 Barb. 153; *Coleman v. Coleman*, 7 Harris 100.

<sup>4</sup> Law Rep. 1 Ch. App. 463.

<sup>5</sup> 1 C. E. Green 256.

actual possession of the premises. The grantee conveyed to a stranger, who took the title with constructive notice of the covenant. Chancellor Green maintained that this was a mere personal covenant; that it neither ran with the lands nor bound the alienee at law, but that it would be enforced against such alienee in equity when he was chargeable with notice of the original contract. And in *Holsman v. Boiling Spring Bleach Co.*<sup>1</sup> the same accurate jurist maintained the right of equity to exert its authority, in proper cases, to prevent injustice without any dependency on the merely legal rights of the parties. And I think it is also manifest from the case of *Rogers v. Danforth*\* that Chancellor Williamson was of the same mind on this subject, for he remarked, with reference to a covenant touching lands, that he does not think that it follows that because a suit at law cannot be maintained a court of chancery may not protect the rights of the parties under it.

From this review of the authorities, I am entirely satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title. So far I think the law is not in doubt, and the only question in this case which I have regarded as possessed of any material difficulty is whether the covenant now in controversy is embraced within the proper limits of this branch of equitable jurisdiction. The inquiry is, have courts of equity ever gone the length of enforcing contracts similar to the one now before us? My conclusion is that this question should be answered in the negative, and for the reasons following, viz.: First, because the enforcement of this covenant between the parties to this suit would establish a principle which must inevitably overturn, by the application of equitable principles, the entire doctrine which prevails in courts of law, that covenants, as a general thing, will not run as a burden upon land. That this would be the result I think would become at once apparent to any person who will carefully compare the present covenant with those which have been decided to be incapable of enforcement as not running with the title. It has been remarked, and I think upon solid grounds, that with regard to mere legal remedies there appears to be no authority for saying that the burden of a covenant will run with land in any case except that of landlord and tenant.<sup>3</sup> This is the admitted rule at law; but if this complainant is to be relieved, then in equity we have the opposite rule, that all covenants touching land, which are known to the purchaser at the time of the transfer to him, become attached to the land, and will descend with the title, under similar conditions, to the remotest alienee. The extent of such a doctrine

<sup>1</sup> 1 McCarter 347.

<sup>2</sup> 1 Stockt. 294.

<sup>3</sup> Notes to *Spencer's Case*, 1 *Smith's L. C.* 138.

is this : that the owner of land may impress upon it any of his notions, and equity will see that the land shall retain such impress in the hands of every subsequent holder. Let us test the principle by example. A is the owner of land, and he covenants with B that neither he, A, nor his assigns will ever raise any grain on such land, or will ever permit a dwelling-house to be put thereon. It is clear that, at law, such covenants as these will not become parcel of the land so as to fetter it in its devolutions. The remedy for their breach, if intrinsically legal, is by suit against the original covenantor. But if an agreement that marl shall not be sold from a certain tract of land will pass as a burden upon such land in equity, it will be difficult to hold that in the examples just put the same result is not to obtain. Thus incidents can be annexed to land as multiform and as innumerable as human caprice. The inconvenience of giving such a latitude to the power of the owner of lands is forcibly put by Lord Brougham in the case of *Keppell v. Bailey*.<sup>1</sup> "Every close, every messuage," such is his language, "might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations on the premises, besides many other restraints, as infinite in variety as the imagination can conceive." These are the evils which I think will unavoidably result from adopting any principle which will sustain the bill in this case. If we enforce the covenant now under consideration, I do not know on what theory we could refuse to execute any covenant which has for its purpose any conceivable restriction placed upon the free enjoyment of lands. I cannot think it proper to go this length. No case has as yet been so extreme as this ; and I can perceive no good reason, but much inconvenience, in enlarging the sphere of this rule in equity. In my judgment the decisions in this branch should be followed, but not transcended. If this, then, were the only objection to the case of the complainant, I should be opposed to granting him the relief for which he asks.

But, in the second place, it seems to me that this covenant, on which this suit rests, is illegal in itself and absolutely void. The substance of this covenant is that neither the former owner of these premises, nor his assigns, shall sell by the quantity any marl taken from these lands. This is not a restriction on the use of the land, for the marl can be dug

<sup>1</sup> 2 Mylne and K. 517.

up and used upon the land ; but the restriction is on the sale of the marl after it shall have been dug up. Marl, of course, is an article of merchandise, and the covenant restrains traffic in that article. It prohibits the sale of it at any time, in any market, either by the owner of the lands or by his assigns. Now it seems to me that this is a plain contract "against trade and traffic, and bargaining and contracting between man and man." That it is the rule that all general restraints of trade are illegal has never been doubted since the famous opinion of Lord Macclesfield in *Mitchel v. Reynolds*.<sup>1</sup> And the development of this rule, and its application under a variety of conditions, can be traced in the series of decisions which have been carefully collected and intelligently commented on in the notes to the case just cited in 1 Smith's L. C. 182. The reason upon which this rule is founded is thus expressed by Mr. Justice Best in *Homer v. Ashford* :<sup>2</sup> "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom would be void." And so far has this principle been carried that even in cases in which the restraint sought to be imposed is only partial it has been repeatedly held that such agreement will be void unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other.<sup>3</sup> Tested by these principles, the covenant in question appears to be destitute of all the essentials of a legal agreement. The restraint it imposes is general, both as to time, place, and persons. It transcends by far the limits of utility to the covenantee. I cannot say that this covenant is legal any more than I can say that a covenant on the part of a farmer not to sell, nor permit any of the future owners of his farm to sell, any grain to be grown on his farm would be legal. I think all such engagements are nugatory as opposed to the valuable rule of law just referred to, and which is designed, and is so well adapted, to promote commerce by preventing the imposition of all unnecessary trammels, either on labor or on property. In this view, I am prepared to say that the complainant's case has no legal foundation.

In conclusion, I may say that I have not overlooked the claim of the appellant to restrict the use of the lands of the respondent by force of the covenant contained in the bond and mortgage of the date of the 23d January, 1842. This covenant would be quite as objectionable as the one already considered, with regard to imposing incidents on real property so as to pass with the same from hand to hand.

<sup>1</sup> 1 P. Wms. 181.    <sup>2</sup> 3 Bing. 326.    <sup>3</sup> *Horner v. Graves*, 7 Bing. 743.

It is liable, therefore, to the first objection above stated by me, and which I think decisive of this controversy. Nor, in my opinion, can it be said to be beyond the scope of the second objection. It is to the effect that the marl from the lands of the covenantor shall not be sold so as to be brought into competition with the marl of the covenantee. It is obvious that under so broad a covenant as this the covenantee could drive the covenantor from every accessible market in the country. I do not find any case which sanctions so broad a restriction. But it is not necessary to pursue this inquiry, for as this case is now presented the complainant is not in a position to ask the aid of this court with regard to this covenant embodied in the bond and mortgage. It will be observed that this agreement prohibits the selling of marl taken from the lands adjoining the seven-acre tract, so as to bring such marl in competition with that to be derived from such tract. The appellant is now the owner of but a small part of this seven-acre tract, and from which portion he has never taken any marl. If it be true, then, that the respondent has taken or intends to take marl from his property which adjoins the seven-acre tract, such acts cannot be even technical breaches of the covenant now in question, for as the appellant has not worked that portion of the seven-acre tract which still remains to him, it is obvious that the prohibited competition has not occurred. In this respect the appellant has not suffered, nor is he threatened with substantial loss, and, consequently, on this head has no standing in a court of equity.

On these grounds I think the decree of the Chancellor should be affirmed, with costs.

The decree was affirmed by the following vote :

*For affirmance*—Beasley, C.J., Bedle, Dalrimple, Depue, Vail, Vredenburgh, Wales, Woodhull—8.

*For reversal*—Clement, Kennedy, Ogden, Olden—4.

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### CARTER v. WILLIAMS.

IN CHANCERY, BEFORE SIR W. M. JAMES, V.C., MARCH 9, 1870.

[*Reported in Law Reports, 9 Equity Cases 678.*]

THIS was a bill by Thomas Carter against Thomas Benjamin Williams and Paul Price, praying that the defendants, their servants and agents, might be restrained from using or allowing to be used, for the term of twelve years and a half from the 12th of February, 1866, a house erected by the defendant Williams, "in any way for the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or beer-house."

The plaintiff, who was the owner of a close of land abutting on Chester Street, in the city of Chester, erected on it a dwelling-house, which was afterwards licensed as an inn or public-house; and by a lease dated the 6th of April, 1864, he demised the same to Messrs. Sellers, a firm of brewers, for fourteen years from the 1st of May, 1864, upon an understanding that during the term no other house to be built on the close of land should be used as an inn or public-house.

In 1866 the plaintiff sold to the defendant Williams another portion of the same close; and by an indenture dated the 2d of January, 1866, the same was conveyed to Williams in fee. The conveyance contained no restriction as to trade; but by a written agreement, not under seal, of even date between the plaintiff and Williams, the latter undertook and agreed that during the term of twelve years and a half from that day no building erected on the land should "in any way be used for the sale of ale, beer, spirits, wine, porter, or as an inn, public-house or beer-house"; and that if the same was so used Williams would "forfeit and pay" to Carter £5 for every week while the same was so used.

In February, 1866, the plaintiff sold a third portion of the same close of land to Samuel Brown. Brown's conveyance, which was in fee, and dated the 12th of February, 1866, also contained no restriction; and he also entered into an agreement with the plaintiff of even date for a term of twelve years and a half from the date, in the same terms as Williams had done, except that the amount to be forfeited and paid in case of breach was to be £4 a week.

In 1868 Williams purchased the fee of the last-mentioned piece of land from Brown; and the important question in the cause upon the evidence was, whether or not Williams had knowledge of Brown's restriction. Upon this point His Honor reviewed the evidence, and came to the conclusion that Williams had knowledge of it.

Shortly afterwards Williams built a house on this last-mentioned piece of land, which, in July or August, 1868, was opened and used as a beer-shop or public-house.

In the course of the same year Williams let the house to the other defendant, Price, as tenant from year to year, who took it, as he said—and, as His Honor held on the evidence, truly said—without notice or knowledge of any kind of the restriction; and it is with regard to the position of Price only that any report of the case is necessary.

*Mr. Freeling* and *Mr. Speed* for the plaintiff.

*Mr. Bristowe*, Q.C., and *Mr. Blackmore* for the defendants.

SIR W. M. JAMES, V.C. In this case the plaintiff has filed his bill for the specific performance, in effect, of an agreement entered into by a person named Brown that a certain property should not be used "for the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or

beer-house." The agreement was made with Brown ; it does not appear in the conveyance to him, but was a distinct agreement. There was a sale afterwards by Brown to Williams, and I cannot entertain the slightest doubt that Williams had full notice of that agreement, and of the mode in which it was made, for he had taken a similar conveyance and entered into a similar agreement himself, with regard to another portion of the same property, and he had written a letter to Brown intimating as a ground for reduction in price, that the property was subject to this restriction. He knew that if the property were not subject to such a restriction, the vendors would have written to say so ; so that it comes to the same thing as if he had written and asked, " Is this property subject to a restriction against its being used as a public-house ?" and had received for answer, " Yes, it is."

Then it has been said there was not such an agreement here as this court will enforce. There was a rent of £4 a week, which it is stated in the agreement that Brown would "forfeit and pay" to Carter. It was, in fact, a penal rent. But this court is never prevented by a penalty from enforcing specific performance of an agreement.

Then it was further said there has been acquiescence of such a kind as to prevent the plaintiff from obtaining relief. The defendant says : " You saw me building a house, which you could see was intended to be a public house, and you ought to have stopped the building." But the defendant's own affidavit shows that whilst he was building the house he received letters from Brown's solicitors and from the plaintiff's present solicitors on behalf of Brown, requiring him (the defendant) not to make the house he was then building into a public-house ; and it does not appear that there was any substantial increase of expenditure on the ground of its being a building which was about to be used as a public-house as distinct from an eating-house, a coffee-shop, or anything of that kind. He received, therefore, distinct notice of the restriction, which was followed by two letters, in July, 1868, and February, 1869, and, finally, by this bill on the 17th of March, 1869, at which date I think it was by no means too late for the plaintiff to make the complaint he has done. As against Williams, therefore, the plaintiff has clearly made out his case.

With reference to Price the case stands differently : Price takes the premises from year to year. There is no evidence of anything to bring home to him actual knowledge or notice of this restrictive agreement ; and I am certainly not disposed to enlarge the doctrine of constructive notice, which I think has been already carried far enough, beyond what is necessary for the protection of mankind in the ordinary transactions of life.

In this case the grantor has chosen to have the agreement, not in the

deed, but upon a separate piece of paper ; so that the tenant from year to year might have seen the title-deed of his lessor without becoming aware that there was any restriction of this kind. The difficulty has arisen from the grantor's mode of carrying out the sale. The tenant from year to year might have seen everything which appeared to be necessary for him to see, and yet not have acquired any knowledge of this restriction. If he had inquired, it is reasonably certain that Williams would have told him there was no restriction, because Williams swears he did not himself know of its existence ; and if he had asked for the conveyance, the deed would not have disclosed it.

I think, therefore, the plaintiff can have no relief against Price, and the bill must be dismissed as against him.

As to Williams, there must be an injunction to restrain him in the terms of the first paragraph of the bill ; but the injunction will be suspended until Price's tenancy has been determined, or is determinable at the earliest possible notice.

The defendant Williams must pay the plaintiff's costs, including the costs of the motion ; and the plaintiff must pay Price's separate costs, and add them to his own.

I do not think it a case of sufficient importance to direct an inquiry as to damages pending the suspension of the injunction.

Solicitors for the plaintiff : *Messrs. Roberts & Simpson*, agents for *Messrs. Barber & Hughes*, Bangor.

Solicitor for the defendants : *Mr. G. F. Cooke*, agent for *Mr. G. Tibbits*, Chester.

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MANHATTAN MANUFACTURING AND FERTILIZING  
COMPANY v. THE NEW JERSEY STOCK YARD  
AND MARKET COMPANY AND OTHERS.

IN THE COURT OF CHANCERY OF NEW JERSEY, MAY TERM, 1872.

[*Reported in 23 New Jersey Equity Reports 161.*]

THE argument was upon a rule to show cause why an injunction should not issue to restrain the defendants from suffering or permitting any other person than the complainant to take or save any of the blood of the animals slaughtered at the abattoir of the stock yard company, at Communipaw, in the county of Hudson.

*Mr. McCarter* for complainant.

*Mr. I. W. Scudder* and *Mr. Winfield* for defendants.

THE CHANCELLOR. The complainant is a corporation of the State of New York, doing business at Communipaw. The defendant, the stock



yard company, a corporation of this State, owns a large and extensive abattoir, or slaughter-house, at Communipaw. It has not, for some years, slaughtered animals there, but let to butchers the privilege of slaughtering their animals in the abattoir. Previous to August, 1870, the blood and other remains of animals thus slaughtered there by the butchers, not being removed or properly cared for, had created a stench which became a nuisance to the adjoining country, and the company was restrained by an injunction from permitting the business to be carried on there, unless on condition of having the blood and offal perfectly cared for. The butchers paid for the privilege of slaughtering there, and left the blood and offal on the premises, to be cared for by the stock yard company. These difficulties became a serious embarrassment in the enterprise. The complainant undertook to manage this, and to remove and manufacture the blood and other abandoned refuse left on the premises by the butchers, so as to prevent any public or private nuisance that might else arise from them.

To effect the objects of this arrangement, the stock yard company, on the 5th of August, 1870, made a lease to the complainant of certain premises adjoining the abattoir, for the specified business of manufacturing and preparing fertilizers and manures, and the materials for that purpose. The term was for twenty years from April 20, 1867, with privilege of renewal, and the rent to be paid was fifteen per cent. of the net profits of the business. The lease contained this provision: "The parties of the second part shall also have the refusal and exclusive right of saving and taking all the blood of animals slaughtered in the abattoir and sheep-house of the parties of the first part, and of saving and taking the animal matter and ammonia from the rendering tanks of the parties of the first part, and of using the same in their business." And also this agreement on the part of the complainant: "Said parties of the second part hereby bind themselves to save all that is possible of the blood from the animals slaughtered, and the animal matter and ammonia from the tanks, to prevent any effluvia or stench from escaping, and to prevent any and all nuisance from being created in any manner whatsoever, either in saving the blood, animal matter, or ammonia, or in converting the same into articles of commerce."

The lease was executed by the president of the stock yard company, in the name of the company, by affixing its common seal and his signature. The execution was duly proved, and the lease recorded in Hudson county clerk's office, August 20, 1870.

The complainant, on faith of the lease, erected on the demised premises expensive buildings and machinery for the purpose of the manufacture. These were completed by January 9, 1871. In the meantime arrangements had been made by the complainant with the stock

company and its employees for coagulating the blood on the premises, and for preventing nuisances arising from slaughtering in the abattoir. Part of this coagulated blood had, with complainant's acquiescence, been delivered to John J. Craven, one of the defendants, for making experiments or manufacturing it.

In April, 1871, the stock yard company leased its abattoir to Henry R. Payson and David H. Sherman, two of the defendants, who have since carried on the business under the name of D. H. Sherman & Co. The defendant, Isaac Freese, who was in the employ of the stock yard company as superintendent, and continued in the employ of D. H. Sherman & Co. in the like capacity, entered into partnership with the defendant, Craven, who was also in the employ of the stock yard company at the making of its lease to the complainant, and with the defendant, Sherman, under the name of "The Bergen Manufacturing Company," for the purpose of manufacturing albumen and fertilizers.

After January 9, 1871, the complainant demanded all the blood of the animals slaughtered at the abattoir, but Craven made an arrangement with certain butchers who slaughtered there for saving and taking the blood of the animals slaughtered by them, and this was permitted by Sherman & Co., and Freese, their superintendent; and a large part of the blood is thus taken and delivered to Sherman, Freese, and Craven, and is lost to the complainant.

By the record of the lease to the complainant, Sherman, Craven, and Freese had constructive notice of its contents, and also it is clear that they, as well as Payson, had actual notice. They do not deny this, but take the ground that the blood, like all other parts of the animal slaughtered, belongs to the butcher, and that they or the stock yard company can no more control or deliver it than they could control the flesh or hides. That the butchers, having discovered that the blood has a merchantable value, have a right to dispose of it for their own benefit; and that when they had determined to sell it, and not to abandon it, Craven was under no obligation not to buy it, and his firm might receive it through him without breach of faith.

This defense, at first sight, is seemingly good; but it wholly rests upon the correctness of the premises, to wit, that the stock yard company had not the right or power to control the disposition of the blood. It is not claimed that it had, before the complainant's lease, granted to any one the privilege of slaughtering there. If it had, for a term unexpired, it would have lost control. Before that, they had permitted butchers to slaughter there without any provision about disposing of the blood or offal. It may, by custom, have been the effect of such contract that the butcher might leave the blood and offal to be removed by the company. If left, the company was liable for any nuisance occasioned

by it. It cannot be doubted that the company could have required, as a condition, that the butchers should remove the blood and offal. It had the right to prevent any one from using the abattoir who would not comply. Before the lease to the complainant, this condition would have been deemed a burden on the butchers, and might have injured the business of the company. It was in difficulty by reason of the nuisance caused by leaving these matters, and the injunction growing out of it. It was relieved by this lease. The consideration was the exclusive right to take the blood and offal which was secured by covenant to the complainant. After that, the company had the same right to demand of every one using the abattoir that he should leave these matters for the complainant, as it had to require him to remove them. This could have been annexed as a condition to every permission to use the abattoir, as well as the condition to pay for the use. And this, by its covenant, the company was bound to do. D. H. Sherman & Co., as the lessees, are bound by the same covenant. And Freese, Craven, and Sherman, having notice of this obligation before they commenced their business, are bound to refrain from interfering with these rights of the complainant, and from taking the blood and other matters which it is entitled to take.<sup>1</sup>

The facts that Freese and Craven transferred to the complainant their claim to a patent for making albumen from blood, and took part in the arrangements for the lease by the company in whose employ they were, and that Craven interfered by these negotiations with the butchers after he was repulsed in his attempt to get into the employ of the complainant, do not give greater validity to the complainant's right; they may show bad faith and vindictiveness, and that they are not entitled to any favorable consideration beyond their legal rights.

The injunction applied for is not a mandatory injunction; it is not to require the delivery of the blood, but to restrain Craven from taking it, and the other defendants from suffering or permitting any other person than the complainant to take it.

For this injury there is a remedy at law, but it is not an adequate remedy. The value of the blood is no measure of the injury, and it is hardly possible to compute the damages which the injury may occasion. And redress at law could only be obtained by a continued series of suits through the twenty or forty years of the complainant's term. It is a case peculiarly proper for the preventive remedy by injunction.<sup>2</sup>

The defendants, in their answers, deny that the seal of the stock yard company was affixed to the lease by authority of the directors. The bill alleges that the stock yard company made and executed the lease

<sup>1</sup> *Tulk v. Moxhay*, 2 Phil. 774; *De Mattos v. Gibson*, 4 DeG. & Jones 276.

<sup>2</sup> *Shreve v. Black*, 3 Green's Ch. 177.

under its corporate seal, and sets out a lease with the seal affixed, and signed by the president. The answer of the company is not verified by any one who has knowledge of the facts. The present secretary swears that he believes the facts to be true. Any deed of a corporation, under its corporate seal and signed by the proper officer, is presumed to have been executed by authority of the corporation, until the contrary is clearly shown.<sup>1</sup> There is no proof here to overcome this presumption.

The injunction must issue as prayed for.

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THE TRUSTEES OF COLUMBIA COLLEGE IN THE CITY OF  
NEW YORK, APPELLANTS, v. ANNA M. LYNCH  
ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER 18, 1877.

[*Reported in 70 New York Reports 440.*]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.<sup>2</sup>

This action was brought to restrain the carrying on of business in certain premises situate on the northeast corner of Fiftieth Street and Sixth Avenue in the city of New York, of which the defendant Lynch was owner, and the other defendants tenants, upon the ground that the premises were subject to a covenant reserving the property exclusively for dwelling-houses.

The westerly portion of the block in question, prior to 1860, belonged to Joseph D. Beers, from whom defendant Lynch acquired title, and the portion adjoining on the east belonged to the plaintiffs.

On the 25th day of July, 1859, an agreement was executed by the parties, whereby the said Beers, in consideration of similar reciprocal covenants therein contained on the part of the plaintiffs, did for himself, his heirs, and assigns, in respect to the lands which he then owned, covenant and agree to and with the plaintiffs, their successors, and assigns, that his lands above mentioned, and every part thereof, should be subject to the following covenants, among others, namely: That the said Beers, his heirs or assigns, his or their tenants, and others occupying his lands, above described, or any part thereof, should not permit, grant, erect, establish or carry on in any manner on any part of said

<sup>1</sup> Leggett v. N. J. Man. & Bank'g Co., Saxt. 541.

<sup>2</sup> Reported below, 7 J. & S. 372.

lands any stable, school-house, engine-house or manufactory, or business whatsoever ; or erect or build, or commence to erect or build, any building or edifice, with intent to use the same, or any part thereof, for any of the purposes aforesaid.

And it was mutually covenanted and agreed between the parties, that the grants, covenants, and agreements therein contained should not only be binding upon the parties, their heirs, and successors, but that the same should be binding upon all persons who might thereby become interested in the lands, or any part or parts thereof, as owners, tenants or occupants, or otherwise claiming under or through the said Beers, or as lessees of the plaintiffs, or as assignees, under tenants, occupants or otherwise under such lessees, and might be enforced by or against any of such persons as occasion might require.

The agreement was duly recorded, and the defendant Lynch took her lot expressly subject to the conditions and restrictions of the agreement of Beers and the plaintiffs.

Before the action was commenced, the defendant Lynch erected a four-story dwelling-house upon that part of the premises conveyed to her, between Sixth Avenue and a line distant twenty-two feet eastwardly therefrom, and running to the centre of the block, between Fiftieth and Fifty-first Streets, of the full width thereof, fronting on and entered by a high stoop from Fiftieth Street, and in width on Sixth Avenue sixty-four feet. On the basement story, in front, by the side of the stoop, and on the side opening on Sixth Avenue, were two French windows, and one on Fiftieth Street, which were used as entrance doors to the basement.

Yates, one of the defendants, occupied a portion of the basement of said building as a dwelling for himself and family, having in one room thereof a real estate office, and using it for that business, with a business sign ; and the defendants, William A. Blaisdell and Harrison A. Blaisdell, occupied a room in said office for receiving orders for painting, to be done by them, with a business sign.

The court found these facts, and also that the opposite side of Sixth Avenue, between Fiftieth and Fifty-first Streets, is entirely occupied by the Broadway Railroad stables ; that there is a grocery-store on the southeast corner and a liquor-store on the southwest corner of Sixth Avenue and Fiftieth Street ; and that Sixth Avenue, in that vicinity, is occupied as a business street.

As conclusions of law, the court found :

“ 1. That there was no privity of estate between the plaintiffs and Beers.

“ 2. That the covenant sought to be enforced in this action does not run with the land.

"3. That the defendants' land is not bound by the covenant sought to be enforced in this action.

"4. That the restrictions imposed by the agreement between the plaintiffs and Beers did not mutually and reciprocally bind the plaintiffs and their assigns and Beers and his assigns.

"5. That the covenant against carrying on any business is one liable to conflict with the public welfare, and retards the advancement of the community."

And directed judgment dismissing the complaint.

Judgment was entered accordingly.

*S. P. Nash* for the appellants.

*Samuel Hand* for the respondents.

ALLEN, J. It was competent for the plaintiffs and Mr. Beers, from the latter of whom the defendants derive title, while they were the owners of adjoining tracts or parcels of land in the city of New York, by mutual covenants to regulate the use and enjoyment of their respective properties, with a view to the permanent benefit and the advancement in value of each. The mutual and reciprocal covenants of the contracting parties constituted a good consideration for the covenants and agreements of both. All that is required, when the undertaking of one of two contracting parties gives the consideration for the undertaking of the other, is that there should be mutuality; covenants or undertakings by each, that each should come under some obligation, or release some right to the other; but a perfect reciprocity in the undertakings, or equality in the obligations assumed or rights released, is not involved in or essential to the sufficiency of the considerations. Equality is not of the essence of mutuality. It suffices that some promise or covenant has been made, or some right given up; and the adequacy of the same, as a consideration to support the undertaking of the other party, in the absence of fraud, is for the parties to determine. A covenant is well supported in law and in equity by any consideration, however slight. In this case, it is not material to inquire whether the covenant of the plaintiffs is, as viewed from our standpoint, the perfect equivalent of that of Mr. Beers. It was accepted by the latter as a sufficient consideration for the covenant made by him, and there is no evidence before us to impeach the agreement as one not fairly and honestly made.

The agreement itself is not void, as in restraint of trade or as imposing undue restrictions upon the use of property. Covenants, conditions, and reservations, imposing like restrictions upon urban property, for the benefit of adjacent lands, having respect to light, air, ornamentation, or the exclusion of occupations which would render the entire property unsuitable for the purposes to which it could be most advan-

tageously devoted, have been sustained, and have never been regarded as impolitic. They have been enforced at law and in equity without question. The restrictions are deemed wise by the owners, who alone are interested, and they rest upon and withdraw from general and unrestricted use but a small portion of territory within the corporate limits of any city or municipality, and neither public nor private interest can suffer. It is not alleged in the answer, nor was it proved upon the hearing, that there has been any change in the character of the locality, the surroundings of the premises, or the occupation of contiguous property, or the business of the vicinage, which has rendered it inexpedient to observe the covenant, or made a disregard of it indispensable to the practical and profitable use and occupation of the premises, so that it might be inequitable to compel a specific performance of the agreement. If such a defense could avail, it has not been interposed, so that the facts found by the learned trial judge, in respect of the character of the buildings, and the business carried on at this time in the Sixth Avenue, are immaterial and cannot affect the result.

The purpose and intent of the parties to the agreement is apparent from its terms preceded by the recital. The agreement recites the ownership by the respective parties of adjacent premises particularly described, and these constitute the subject-matter of the mutual covenants. There was no privity of estate, or community of interest between the parties, but each could, by grant, create an easement in his own lands for the benefit of the lands owned by the other, and the purpose of the agreement was to create mutual easements, negative in their character, for the benefit of the lands of each. It was the design to impose mutual and corresponding restrictions upon the premises belonging to each, and thus to secure a uniformity in the structure and position of buildings upon the entire premises, and to reserve the lots for, and confine their use to, first-class dwellings, to the exclusion of trades and all business, and all structures which would derogate from their value for private residences. The purpose clearly disclosed was, by the restrictions mutually imposed by the owners respectively upon the use of their several properties, to make the lots more available and desirable as sites for residences, and the agreement professes to, and does in terms, impose, for the common benefit, the restrictions in perpetuity, and to bind the heirs and assigns of the respective covenants. This should be construed as a grant by each to the other in fee of a negative easement in the lands owned by the covenants. An easement in favor of, and for the benefit of lands owned by third persons, can be created by grant, and a covenant by the owner, upon a good consideration, to use, or to refrain from using, his premises in a particular manner, for the benefit of premises owned by the covenantor, is,

in effect, the grant of an easement, and the right to the enjoyment of it will pass as appurtenant to the premises in respect of which it was created. Reciprocal easements of this character may be created upon the division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition annexed to a grant, or by a covenant, and even a parol agreement of the grantees.<sup>1</sup> The right sought to be enforced here is an easement, or, as it is sometimes called, an amenity, and consists in restraining the owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another.<sup>2</sup> Easements of all kinds may be created and exist in favor of any third person, irrespective of any privity of estate or community of interest between the parties; and in this respect there is no distinction between negative easements and those rights that are more generally known as easements as a way, etc.

A covenant by the owner with A B, his heirs and assigns, that it should be lawful for them at all times afterwards to have and to use a way by and through a close, etc., was held to be an actual grant of a way and not a covenant only for the enjoyment of such right.<sup>3</sup> A negative easement, by which the owner of lands is restricted in their use, can only be created by covenant in favor of other lands not owned by the grantor and covenantor. The covenant made by Beers was valid and binding upon him, and had he retained the ownership of the premises it would have been specially enforced by a court of equity. Upon a disturbance of the easement by him, it was capable of being enforced by the appropriate remedies at law or in equity at the suit of the owner of the dominant tenement, at the time of the violation of the covenant. The plaintiffs appear to retain the ownership of the premises to which the easement is appurtenant, and therefore this action is properly brought by them. Equity has jurisdiction to compel the observance of covenants made for the mutual benefit and protection of all the owners of lands, by those owning different parcels of the lands, and to secure to those entitled the enjoyment of easements or servitudes annexed by grant, covenant, or otherwise to private estates.<sup>4</sup>

It is strenuously urged, in behalf of the defendants and respondents,

<sup>1</sup> *Curtiss v. Ayrault*, 47 N. Y. 73; *Tallmadge v. East River Bank*, 26 Id. 105; *Gibert v. Peteler*, 38 Barb. 488, affirmed; 38 N. Y. 165.

<sup>2</sup> Wash. on Easements 5.

<sup>3</sup> *Holms v. Seller*, 3 Lev. 305; *Gibert v. Peteler*, *supra*; Wash. on Easements 22, 28, and cases cited in note 1.

<sup>4</sup> 2d Story Eq. Jur. 926a, 927; *Barrow v. Richard*, 8 Paige 351.



that there was no privity of estate between the mutual covenantors and covenantees, in respect of the premises owned by them respectively, and which were the subjects of the covenants and agreements, and that the covenants did not therefore run with the lands, binding the grantees, and subjecting them to a personal liability thereon. This may be conceded for all the purposes of this action. It is of no importance whether an action at law could be maintained against the grantees of Beers, as upon a covenant running with the land and binding them. Whether it was a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, is not material as affecting the jurisdiction of a court of equity, or the right of the owners of the dominant tenement to relief upon a disturbance of the easements.

The covenantor, Beers, bound himself, and in equity charged the premises with the observance of the covenant, and thus impressed this easement upon the lands then owned by him in favor of the lands then and now owned by the plaintiffs. A right, in respect of the defendants' lands, and affecting the use in behalf of the plaintiffs and their lands, existed, which, while Beers continued the owner, equity would have been enforced, and this right was a right in perpetuity, going with, and attaching to, the lands in the hands of all subsequent grantees taking title, with notice of its existence. An owner may subject his lands to any servitude, and transmit them to others charged with the same; and one taking title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities, and such right or claim, and stands, in the place of his grantor, bound to do or forbear to do whatever he would have been bound to do or forbear to do. Lord Cottenham uses this language: "If an equity is attached to property by the owner, no one purchasing, with notice of that equity, can stand in a different situation from the party from whom he purchased."<sup>1</sup> In the case cited, a covenant between grantor and grantee, in respect to the use of the granted premises, was enforced against subsequent grantees thereof, with notice. The rule is of universal application, as stated by Lord Cottenham.<sup>2</sup> Here each successive grantee, from Beers, the covenantor, down to and including the defendant Lynch, the present owner, not only had notice of the covenant, and all equities growing out of the same, but took their title in terms subject to it, and impliedly agreeing to observe it. It would be unreasonable and unconscientious to hold the grantees absolved from the covenant in equity for the technical reason assigned, that it did not run with the land, so as to give an

<sup>1</sup> *Tulk v. Moxhay*, 2 Phil. 774.

<sup>2</sup> *Tallmadge v. E. R. Bank*, *supra*; Story's Eq. Jur., §§ 395, 397.

action at law. A distinguished judge answered a like objection in a similar case by saying, in substance, that, if an action at law could not be maintained, that was an additional reason for entertaining jurisdiction in equity and preventing injustice. The action can be maintained for the establishment and enforcement of a negative easement created by the deed of the original proprietor, affecting the use of the premises now owned and occupied by the defendants, of which they had notice, and subject to which they took title. There is no equity or reason for making a servitude of the character of that claimed by the plaintiffs in the lands of the defendant, an exception to the general rule which charges lands in the hands of a purchaser with notice with all existing equities, easements, and servitudes. The rule and its application does not depend upon the character or classification of the equities claimed, but upon the position and equitable obligation of the purchaser. The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities, and charges however created, of which he has notice.<sup>1</sup> The grantees from Beers became entitled to the benefits of the corresponding covenants on the part of the plaintiffs, and of the easement in their lands, and in the purchase had recompense for any diminution in the value of their own lands by reason of the restrictions upon their use. Should it appear that the plaintiffs had parted with their title, it might be questionable whether they could maintain the action. The right exists for the benefit of the owners of the lands for the time being, and it may be waived or released by them, and it would seem they would be the proper parties to bring the action. At most, the plaintiffs would be but the dry trustees of the covenant for the benefit of their grantees, and in equity and in all cases under the present system of practice the real party in interest should bring the action. But the plaintiffs' right of action, if a cause of action exists, does not appear to have been questioned, so that no question as to parties is in the case. The cases in which it has been held that an action at law will not lie, upon a covenant restricting the use of the lands against the grantees of the covenantor, when there was no privity of estate between the covenantor and covenantee, do not aid us in determining whether there may not be relief in equity for a violation of the

<sup>1</sup> *Parker v. Nightingale*, 6 Allen 341; *Catt v. Tourle*, L. R. 4 Ch. App. 654; *Carter v. Williams*, 18 W. R. 593, before V. C. James; *Wolfe v. Frost*, 4 Sandf. Chy. R. 72; *Tulk v. Moxhay*, *supra*; *Whiting v. Union R. Co.*, 11 Gray 359; *Gibert v. Peteler*, *supra*; *Barrow v. Richard*, *supra*; *Greene v. Creighton*, 7 R. I. 1; *Bronner v. Jones*, 23 Barb. 153.

equitable right resting upon and growing out of the covenant treated as, in substance, a grant and the consideration upon which it was made.

The author of the American note to *Spencer's Case*<sup>1</sup> recognizes the distinction between the binding obligation at law of covenants not running with the lands and the equitable rights recognized and enforced in equity in such cases. He says, speaking of such a covenant: "But although the covenant, when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the right and be subject to the obligations which the title or liability to such an easement creates."

In *Hills v. Miller*,<sup>2</sup> and *Trustees of Watertown v. Cowen*,<sup>3</sup> and *Barrow v. Richard*,<sup>4</sup> there could have been no recovery at law, or actions on the covenants; but upon the deeds and instruments, in writing, under seal, it was held that easements had been granted out of the property sought to be charged, which had come by assignment to the hands of the defendants, which were intended by the parties to be appurtenant to lands owned by the plaintiffs; and the observance of the easements was enforced.

*Barrow v. Richard*, although differing in circumstances from the present case, was decided upon the ground that is controlling here, that the parties intended to create mutual easements for the benefit of the owners of the whole tract, and that the want of a remedy at law would sustain, rather than defeat, the jurisdiction of equity, and that the covenant should consequently be enforced by injunction against those who held the land to which it related. The lands of the defendants are equitably chargeable with the easement created by Beers, and the objection that the easement is not obligatory upon the defendants as a contract cannot avail as a defense to a suit in equity to restrain the defendants by injunction from its violation and a destruction of the easement.

There is no waiver of the covenant and consequent surrender of the easement, alleged in the answer, proved upon the trial, or found by the judge. The building was the class of buildings permitted by the easement and suitable for occupation as a private residence. It was not specially adapted to any other use, and the plaintiffs were not bound to foresee, before its completion, that it could or would be applied to any purpose prohibited by the covenant. So far as appears their objec

<sup>1</sup> 1 *Smith's Leading Cases* (6th Am. ed.) 167.

<sup>3</sup> 4 *Ib.* 510.

<sup>2</sup> 3 *Paige* 254.

<sup>4</sup> 8 *Ib.* 351

tion was seasonable. The plaintiffs did not stand by and keep silence when it was their duty to speak, and the defendants have a building which they may use for purposes contemplated by the parties. It was assumed by the judge at the trial, and does not appear to have been questioned that the business carried on by the defendants Yates and Blaisdells were violations of the covenants and forbidden by it. If they were not, that was a proper question to be litigated upon the trial, and may be tried upon the new trial which must be had. There is nothing in the record from which we can determine, that if permitted, such businesses will not defeat the object and purpose of the agreement of the parties, and deprive the plaintiffs of the substantial benefit of the covenant. If the occupation and use of the premises by the defendants in the manner reported by the judge is in contravention of the spirit, as well as the letter of the covenant, the question of damages is wholly immaterial. Upon that question men might differ, and it might be thought that the damages, if any, were so trifling as to be inappreciable, but the parties had the right to determine for themselves in what way and for what purposes their lands should be occupied irrespective of pecuniary gain or loss, or the effect on the market value of the lots. Doubtless another trial will, upon other facts, present other questions, and there may be objections, to a recovery not disclosed by the record, but upon the record before us the judgment must be reversed, and a new trial granted.

All concur, except RAPALLO and MILLER, JJ., absent.

Judgment reversed.

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## HAYWOOD v. THE BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY.

IN THE COURT OF APPEAL, DECEMBER 3, 1881.

[*Reported in Law Reports, 8 Queen's Bench Division 403.*]

APPEAL from the judgment of Stephen, J., on further consideration.

This was an action against a building society, the mortgagees of certain land, upon a covenant to build and keep in repair houses erected upon the land. The facts were these:

By an indenture dated the 17th of May, 1866, made between Charles Jackson and Edward Jackson, Charles Jackson granted a plot of land to Edward to the use that Edward should pay Charles an annual chief rent of £11, and Edward for himself, his heirs, executors, administrators, and assigns, covenanted with Charles, his executors and assigns, that he, Edward, his heirs and assigns, would pay Charles, his heirs and assigns, this rent half yearly, and would erect and keep in

good repair and, when necessary, rebuild, messuages on the land of the value of double the rent. On the 2d of March, 1867, Charles Jackson conveyed to Haywood to the use of Haywood, his heirs and assigns, the said chief rent and all powers and remedies in respect thereof, together with the benefit of the said covenant. Edward Jackson assigned his interest to MacAndrew. MacAndrew by deed of the 8th of September, 1871, mortgaged the premises in question to certain persons described as the trustees of the Brunswick Building Society in fee subject to the rent-charge and covenants above-mentioned. The building society was afterwards incorporated under the Act of 1874, and under the mortgage deed took possession of the land and the buildings on it. It was conceded on the one hand that buildings of the stipulated value had been erected upon the land, and on the other that they had not been kept in repair, and the question was whether, under the circumstances stated, the building society was liable upon the covenant to keep them in repair. No question arose as to their liability to pay the chief rent, as the arrears were paid into court in the action.

The case was tried before Stephen, J., without a jury, at the Manchester Winter Assizes, 1881, who reserved it for further consideration, and after stating the facts as above gave judgment as follows :

The points argued in this case were two. It was affirmed by the plaintiff and denied by the defendants, that the covenant in the deed of 1866 ran with the land, and that Haywood, as assignee of Charles Jackson, could therefore sue upon it the Brunswick Building Society, the mortgagees of the assignee of Edward Jackson. It was also affirmed by the plaintiff and denied by the defendants, that the defendants being in possession of the property with equitable notice of the covenant must perform it.

As to the first part of these arguments, I am disposed to think the case of *Milnes v. Branch*<sup>1</sup> is an authority directly in point in favor of the defendants. It is true that Lord St. Leonards appears to disapprove of this decision,<sup>2</sup> but I must regard it as a binding authority till it is overruled.

With regard to the second point, I think that the plaintiff's contention must prevail. The only distinction, on which the defendants relied to take the case out of the ordinary rule as to persons in possession of land being bound to perform covenants relating to it of which they have notice, was that, though an equity to use property or to abstain from using it in a particular way may be so attached to land, a liability to repair or do similar acts cannot. I see no reason for this distinction, and it is directly opposed to the case of *Cooke v. Chilcott*.<sup>3</sup>

<sup>1</sup> 5 M. & S. 411.

<sup>2</sup> 2 Vendors and Purchasers, 14th ed., p. 591, *note*.

<sup>3</sup> 3 Ch. D. 694.

The result is that there must be judgment for the plaintiff with costs. There will be no damages, the parties having agreed that if it is formally decided that the defendants are to put the buildings in repair, they must be repaired to the satisfaction of a gentleman agreed upon.

The defendants appealed.

*Ambrose, Q.C., and Henry (Crompton with them)* for the defendants.  
*Addison, Q.C., and R. H. Collins* for the plaintiff.

BRETT, L.J. This appeal must be allowed. I am clearly of opinion, both on principle and on the authority of *Milnes v. Branch*,<sup>1</sup> that this action could not be maintained at common law. *Milnes v. Branch* must be understood, as it always has been understood, and as Lord St. Leonards<sup>2</sup> understood it, and it will be seen, on reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee.

This being so, the question is reduced to an equitable one. Now the equitable doctrine was brought to a focus in *Tulk v. Moxhay*,<sup>3</sup> which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any court has gone farther than this, and yet if the court would have been prepared to go farther, such a case would have arisen. The strongest argument to the contrary is, that the reason for no court having gone farther is that a mandatory injunction was not in former times grantable, whereas it is now; but I cannot help thinking, in spite of this, that if we enlarged the rule as it is contended, we should be making a new equity, which we cannot do.

I think also that *Cox v. Bishop*<sup>4</sup> shows that a court of equity has refused to extend the rule of *Tulk v. Moxhay* in the direction contended for, and that if we decided for the plaintiff we should have to overrule that case. But it is said that if we decide for the defendants we shall have to overrule *Cooke v. Chilcott*.<sup>5</sup> If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think there is much to show that the ground of the decision

<sup>1</sup> 5 M. & S. 411.

<sup>2</sup> 2 Ph. 774.

<sup>3</sup> 3 Ch. D. 694.

<sup>4</sup> Sug. V. & P., 14th ed., p. 490.

<sup>5</sup> 8 De G. M. & G. 815; 26 L. J. (Ch.) 389.

was that Malins, V.C., was of the opinion—wrongly as it now turns out—that the covenant ran with the land, and the decision of the Court of Appeal appears to have proceeded on an admission.

COTTON, L.J. I am of the same opinion on both points. I think that a mere covenant that land shall be improved does not run with the land within the rule in *Spencer's Case*<sup>1</sup> so as to give the plaintiff a right to sue at law. I also think that the plaintiff has no remedy in equity. Let us consider the examples in which a court of equity has enforced covenants affecting land. We find that they have been invariably enforced if they have been restrictive, and that with the exception of the covenants in *Cooke v Chilcott*,<sup>2</sup> only restrictive covenants have been enforced. In *Tulk v. Moxhay*,<sup>3</sup> the earliest of the cases, Lord Cottenham says, "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using it in a particular way, is what I never knew disputed." In that case the covenant was to use in a particular manner, from which was implied a covenant not to use in any other manner, and the plaintiff obtained an injunction restraining the defendant from using in any other manner, although the covenant was in terms affirmative. At p. 778, Lord Cottenham says, "If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." This lays down the real principle that an equity attaches to the owner of the land. It is possible that the doctrine might be extended to cases where there is an equitable charge which might be enforced against the land, but it is not necessary to decide that now; it is enough to say that with that sole exception the doctrine could not be farther extended. The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length. We are not bound here by *Cooke v. Chilcott*,<sup>2</sup> and I do not think that the rule of *Tulk v. Moxhay*<sup>3</sup> can be extended as Malins, V.C., there extended it. In *Morland v. Cook*<sup>4</sup> there are perhaps some expressions of Romilly, M.R., which favor the opposite contention, but the fact of there being a deed of partition in that case makes it distinguishable. That is the only case besides *Cooke v. Chilcott*<sup>2</sup> at all in favor of the plaintiff. *Cox v. Bishop*<sup>5</sup> is distinctly the other way. There the covenants affected the owner, but not the land, and although the defendant was full equitable owner the court refused an injunction. *Daniel v. Stepney*,<sup>6</sup> where there was merely a grant of a rent to be distrained for on land adjoining the land demised, does not seem to me to

<sup>1</sup> 1 Sm. L. C., 8th ed., at p. 89.

<sup>2</sup> 3 Ch. D. 694.

<sup>3</sup> 2 Ph. 774.

<sup>4</sup> Law Rep. 6 Eq. 252.

<sup>5</sup> 26 L. J. (Ch.) 389.

<sup>6</sup> Law Rep. 9 Ex. 185.

be in point, and such observations of Bramwell, B., in *Aspden v. Seddon*<sup>1</sup> as might possibly assist the plaintiff are extra judicial. There is therefore no ground for extending the equitable doctrine as we are asked to do.

LINDLEY, L.J. I am of the same opinion. The practical question is, whether the defendants, being mortgagees in possession, are bound to repair under the circumstances of the case. It is said that the obligation to repair is imposed upon them because they took a conveyance of the land with notice of the covenant, and Stephen, J., has thought himself bound by *Tulk v. Moxhay*<sup>2</sup> and *Cooke v. Chilcott*.<sup>3</sup>

Now I may first say that I do not think that the defendants could be hit by any process of circuitry of action. As mortgagees they took the land subject to the rent charge, no doubt, so far as the liability to distress and re-entry were concerned. I do not think that either covenant runs with the land. Neither *Milnes v. Branch*,<sup>4</sup> nor *Randall v. Rigby*,<sup>5</sup> however, apply very closely. In *Milnes v. Branch*<sup>4</sup> the plaintiff was not assignee in fee of the rent, having only a leasehold interest in that rent. In *Randall v. Rigby*<sup>5</sup> the question was whether debt or covenant was the proper form of action. 'There are dicta in the judgments, however, which favor the contention of the defendants in this case, and it is impossible not to see that the burden of the covenant does not run with the land. This is not a case of landlord and tenant; we must never lose sight of that distinction.

With regard to the question of notice, *Tulk v. Moxhay*<sup>2</sup> shows that a restrictive covenant will be enforced, and so do *Cox v. Bishop*<sup>6</sup> and *Wilson v. Hart*.<sup>7</sup> But I think that the result of these cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice. Especially does this appear from *Wilson v. Hart*,<sup>8</sup> where a covenant not to use a house as a beershop was enforced against a purchaser's tenant from year to year. It is absurd to suppose that such a tenant could have been compelled to perform a covenant to repair.

The principle of *Cooke v. Chilcott*<sup>3</sup> may or may not be applicable to this case, but the circumstances were wholly different. I should be sorry to overrule that case, and prefer to leave it to be reconsidered on some future occasion. It is enough to say that in the present case we have been asked to extend *Tulk v. Moxhay*<sup>2</sup> as it has never been extended before, and we decline to do so.

Appeal allowed.

<sup>1</sup> 1 Ex. D. 496.

<sup>3</sup> 3 Ch. D. 694.

<sup>5</sup> 4 M. & W. 130.

<sup>7</sup> Law Rep. 1 Ch. 463.

<sup>2</sup> 2 Ph. 774.

<sup>4</sup> 5 M. & S. 411.

<sup>6</sup> 8 De G. M. & G. 815; 26 L. J. (Ch.) 389.

<sup>8</sup> Law Rep. 1 Ch. 464.



AUGUSTUS M. HODGE, EXECUTOR, ETC., ET AL., APPELLANTS v.  
RICHARD SLOAN, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER TERM, 1887.

[*Reported in 107 New York Reports 244.*]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 6, 1884, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from selling sand taken from land conveyed by the plaintiff to John D. Sloan, and by him to the defendant, in violation of a covenant contained in the deed to John D. Sloan, and of which the defendant, when he bought, had notice. The complaint was dismissed. After an appeal to this court from the judgment of General Term, the plaintiff died and his executor was substituted as appellant.

There is no controversy in regard to the findings of the trial judge as to the facts, and from those it appears that on the 9th day of May, 1868, Edward Null, the original plaintiff, and afterwards the appellants' testator, was the owner in fee of about forty acres of land in the village of Canajoharie, containing deposits of building sand. These he opened and the sale therefrom at that time and ever since constituted his only business. His customers came from Canajoharie, Palatine Bridge, Amsterdam, and the city of Utica. Sales averaged about ten loads each day. This business being well established, one John D. Sloan applied to him for a small parcel of the land, being about one-half acre, as described in the complaint, but plaintiff declined to sell on the ground that by such sale he would be injuring his business and depriving himself of his living, and upon such objection being made, Sloan agreed to purchase the land and pay therefor \$650, and stipulate not to sell any sand off said land, and pursuant to such negotiation the plaintiff executed a written contract of sale of said parcel of land to him for such consideration, and containing a covenant to that effect, and Sloan afterwards having fully paid the consideration, plaintiff, by warranty deed, conveyed the contracted land to him. In that deed, immediately after the description, was inserted the covenant contained in such contract, viz. : "Said party of the second part hereby agreeing not to sell any sand off of said premises." The deed was duly recorded in the Montgomery county clerk's office on March 30, 1875. Sloan accepted the contract and deed, and possessed and occupied the land thereunder. On the 26th day of March, 1881, by warranty deed, John D.

Sloan conveyed the last-mentioned premises to his son, Richard Sloan, the defendant. That deed contained no exception, reservation or condition, and no reference to the covenant contained in the deed to John D. Sloan, but the defendant, before and at the time of taking the conveyance, had full knowledge of such covenant and that it was contained in the deed to his grantor. With this notice he entered upon the described premises, opened a bank or pit and sold sand therefrom, and notwithstanding the remonstrances of the plaintiff and his request to observe and keep the covenant of John D. Sloan, the defendant declared that he should continue to sell the sand notwithstanding such covenant.

The trial judge also found that the plaintiff "at the time of the sale of said land to John D. Sloan had and ever since then has had, and now has upon his said land retained by him sufficient sand to supply the demand for sand for local use, and to be transported to a distance and used, and that such supply will be sufficient for all time to come, and plaintiff during all such time has had facilities to supply the demand for such sand, and has fully supplied the same, and desires to continue the sale of sand and to fully supply such demand for the same in future."

And further, that the covenant was inserted in the deed from the plaintiff to John D. Sloan to prevent competition in the plaintiff's business of selling sand. But as conclusions of law he held, "1st. That the clause inserted in the deed from the plaintiff to John D. Sloan was not an exception, reservation or condition, but was a covenant, the deed having been accepted and the land therein described held by virtue thereof by the said John D. Sloan, such covenant was his covenant not to sell sand off the premises granted, and the same having been incorporated in the instrument by which title to the land was acquired, if not void as against public policy, ran with the land and bound the grantees and assigns of said Sloan; 2d. Said covenant was in restraint of trade contrary to public policy and void, and hence dismissed the complaint."

*D. S. Morrel* for appellants.

*H. L. Huston* for respondents.

DANFORTH, J. The conclusion of the trial court is against our ideas of natural justice, for it takes from one party an advantage which he refused to sell, and secures to the other without price a privilege which his grantor was unable to buy. Nor do we find that this denial of private right is required by any rule of public policy. Assuming with the respondent that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it, or in other words, if it was a proper and use-

ful contract, or such as could not be disregarded without injury to a fair contractor. This is the doctrine of *Chappel v. Brockway*,<sup>1</sup> and *Ross v. Sadgbeer*,<sup>2</sup> derived by a learned court from the leading case of *Mitchel v. Reynolds*,<sup>3</sup> and an examination of subsequent decisions. It is also so amplified and discussed in a case just decided by this court (*Diamond Match Co. v. Roeber*), opinion by Andrews, J.,<sup>4</sup> as to make any elaboration of the general rule quite superfluous.

The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy and which the plaintiff was willing to sell provided it should not be made an instrument for the destruction of his means of livelihood or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the State of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools, or instruments, or means by which he gains the support of his family, or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him upon a sale of the instrument to consent to that use, or prohibits him from binding his vendee against it.

We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way, and in order to do this it was necessary that he should preclude himself from so using it as that by its means he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of individual right with which the question of public policy has little if anything to do.

Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice

<sup>1</sup> 21 Wend. 157.

<sup>2</sup> id. 166.

<sup>3</sup> 1 P. Wms. 181.

<sup>4</sup> 106 N. Y. 473.

of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity at least bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. It is enough that a purchaser has notice of it. The question in equity being, as is said in *Tulk v. Moxhay*,<sup>1</sup> not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This principle was applied in *Tallmadge v. East River Bank*,<sup>2</sup> where the equity in regard to the manner of improvement and occupation of certain land grew out of a parol contract made by the owner with the purchaser, and was held binding upon a subsequent purchaser with notice, although his legal title was absolute and unrestricted.

In *Trustees v. Lynch*<sup>3</sup> the action was brought to restrain the carrying on of business on certain premises in the city of New York, of which the defendant was owner, upon the ground that the premises were subject to a covenant reserving the property exclusively for dwelling-houses. The court below held, among other things, that the covenant did not run with the land, and that the restriction against carrying on any business on the premises was liable to conflict with the public welfare, and judgment was given for the defendant. Upon appeal it was reversed, the covenant held to be binding upon a subsequent grantee with notice as well upon the original covenantor. So the restraint may be against the use of the premises for one or another particular purpose, as that no building thereon "shall be used for the sale of ale, beer, spirits," etc., "or as an inn, public-house or beer-house."<sup>4</sup> And it is said a man may covenant not to erect a mill on his own lands.<sup>5</sup>

Many other instances of restraint might be referred to, and where it is of such nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business or certain kinds of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a

<sup>1</sup> 11 Beav. 571; 2 Phillips 774.    <sup>2</sup> 26 N. Y. 105.

<sup>3</sup> 70 N. Y. 440.

<sup>4</sup> *Carter v. Williams*, L. R. 9 Eq. Cas. 678.

<sup>5</sup> *Mitchel v. Reynolds*, *supra*.

personal obligation so insisted upon by a grantor and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice.<sup>1</sup> Nor is it essential that the assignees of the covenantor should be named or referred to.<sup>2</sup> In *Tulk v. Moxhay*<sup>3</sup> it was said that the jurisdiction of the court in such cases is not fettered by the question whether the covenant does or does not run with the land. In that case the purchaser of land which was conveyed to him in fee simple covenanted with the vendor that the land should be used and kept in ornamental repair as a pleasure garden, and it was held that the vendor was entitled to an injunction against the assignee of the purchaser to restrain them from building upon the land. Upon the appeal the Chancellor (Cottenham) said: "I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this court ever since I have known it. Where the owner of a piece of land enters into contract with his neighbor, founded, of course upon a valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of his jurisdiction, to maintain that this court has authority to enforce such a contract. It has never, that I know of, been disputed." The question before the court was stated to be whether a party taking property with a stipulation to use it in a particular manner will be permitted by the court to use it in a way diametrically opposite to that which the party has stipulated for. . . . "Of course," he says, "of course the party purchasing the property which is under such restriction gives less for it than he would have given if he had bought it unencumbered. Can there, then, be anything much more inequitable or contrary to good conscience, than that a party who takes property at a less price because it is subject to a restriction should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding." And in language very applicable to the case before us, he adds: "Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present

<sup>1</sup> *Parker v. Nightingale*, 6 Allen 341, 344; *Burbank v. Pillsbury*, 48 N. H. 475.

<sup>2</sup> *Morland v. Cook*, L. R. 6 Eq. Cases 252.

<sup>3</sup> 1 Hall & Quell's, Ch. Rep. 105.

defendant took it with distinct knowledge of such equity existing ; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk." This case is cited and followed as to restrictive covenants in many cases.<sup>1</sup> Each case will depend upon its own circumstances, and the jurisdiction of a court of equity may be exercised for their enforcement, or refused, according to its discretion ;<sup>2</sup> but where the agreement is a just and honest one, its judgment should not be in favor of the wrong-doer. Such seems to us the character of the covenant in question ; it is restrictive, not collateral to the land, but relates to its use, and upon the facts found the plaintiff is entitled to the equitable relief demanded.

Brewer v. Marshall<sup>3</sup> is cited by the respondent as requiring a different construction. The general rules in regard to such covenants are not stated differently in that case. But in the opinion of the court it was not one for the interference of a court of equity. Among many other cases Tulk v. Moxhay (*supra*) is cited, and the learned court says : " It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point," and from a " review of the authorities," the court say, " it is entirely satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title." The only question which the court regarded as possessed of difficulty was whether the covenant then in controversy was embraced within the proper limits of this branch of equitable jurisdiction. By a divided court an injunction was denied. The circumstances were quite unlike those before us and the decision furnishes no precedent for us to follow.

The judgment appealed from should be reversed and new trial granted, with costs to abide the event.

All concur except Peckham, J., not voting, and Andrews and Earl, JJ., dissenting because, in their opinion, the covenant was a personal one and did not bind the grantee of the land.

Judgment reversed.

<sup>1</sup> Brown v. Great East. R. Co., L. R. 2 Q. B. Div. 406 ; London, etc., Ry. Co. v. Comm., L. R. 20 Ch. Div. 562, 576.

<sup>2</sup> Trustees, etc., v. Thacher, 87 N. Y. 311. <sup>3</sup> 4 C. E. Green, N. J. Eq. 537.

## JAMES A. NORCROSS AND ANOTHER v. WILLIAM JAMES AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 23, 1885.

[Reported in 140 Massachusetts Reports 188.]

HOLMES, J. One Kibbe conveyed to one Flynt a valuable quarry in Longmeadow, of six acres, bounded by other land of the grantor, with covenants as follows: "And I do for myself, my heirs, executors, and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seised in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work, or allow any person or persons to open or work any quarry or quarries on my farm or premises in said Longmeadow." By mesne conveyances the plaintiffs have become possessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land, like that quarried by the plaintiffs; and the plaintiffs bring this bill in equity for an injunction.

The discussion of the question under what circumstances a landowner is entitled to rights created by way of covenant with a former owner of the land has been much confused since the time of Lord Coke, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land and those which are said to be attached to the land itself: "So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land."<sup>1</sup>

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question how an assignee could sue upon a contract to which he was not a party.<sup>2</sup> But an heir could sue upon a warranty to his ancestor, because for that purpose he was *eadem persona cum antecessore*.<sup>3</sup> And this conception was gradually extended, in a qualified way, to assigns, where they were mentioned in the deed.<sup>4</sup>

<sup>1</sup> Chudleigh's case, 1 Rep. 120a, 122b; S. C. nom. Dillon v. Fraine, Poph. 70, 71.

<sup>2</sup> West, Symboleog. I. sect. 35; Wingate's Maxims, 44, pl. 20, 55, pl. 10; Co. Lit. 117a; Finch's case, 4 Inst. 85.

<sup>3</sup> See Y. B. 20 and 21 Ed. I. 232 (Rolls ed.); Overton v. Sydall, Poph. 120, 121; Oates v. Frith, Hob. 130; Bain v. Cooper, 1 Dowl. Pr. Cas. (N. S.) 11, 14.

<sup>4</sup> Bract. fol. 17b, 67a, 380b, 381; Fleta, III. c. 14, § 6; 1 Britton (Nich. ed.),

But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona*, *quoad* the contract. The privity of estate which is thus required is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books.<sup>1</sup> Of course, we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure.<sup>2</sup> We may add, that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir, as representing the person of his ancestor.<sup>3</sup>

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired, were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. "So a disseisor, abator, intruder, or the lord by escheat, etc., shall have them as things annexed to the land."<sup>4</sup> In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant, or grant, went with the servient land into all hands, and, of course, there was no need to mention assigns.<sup>5</sup> The phrase consecrated to cases where privity was not necessary was *transit terra cum onere*.<sup>6</sup> And it was said that "a covenant which runs and rests with the land lies for or against the assignee at the common law, *quia transit terra cum onere*, although the assignee be not named in the covenant."<sup>7</sup>

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant; it is enough for our present purposes that it carried the right of property.

255, 256; Y. B. 20 Ed. I. 232-234 (Rolls ed.); Fitz. Abr. Covenant, pl. 28; Vin. Abr. Voucher, N. p. 59; Y. B. 14 Hen. IV. 56; 20 Hen. VI. 34b; Old Natura Brevium, Covenant, 67, B, C, in Rastell's Law Tracts, ed. 1534; Doct. & Stud. Dial. 1, c. 8; F. N. B. 145, C; Co. Lit. 384b; Com. Dig. Covenant, B, 3; Middlemore v. Goodale, Cro. Car. 503; S. C. *ib.* 505; W. Jones 406; Philpot v. Hoare, 2 Atk. 219.

<sup>1</sup> See further Y. B. 21 and 22 Ed. I. 148 (Rolls ed.); 14 Hen. VIII. 4, pl. 5.

<sup>2</sup> F. N. B. 134, E.

<sup>3</sup> Y. B. 32 and 33 Ed. I. 516 (Rolls ed.).

<sup>4</sup> Chudleigh's case, *ubi supra*; See 1 Britton (Nich. ed.) 361; Keilw. 145, 146, pl. 15; F. N. B. 180, N.; Nevil's case, Plowd. 377, 381.

<sup>5</sup> See cases *supra et infra*.

<sup>6</sup> Bract. fol. 382a, b.; Fleta, VI. c. 23, § 17; See Y. B. 20 Ed. I. 360 (Rolls ed.); Keilw. 113, pl. 45.

<sup>7</sup> Hyde v. Dean of Windsor, Cro. Eliz. 552; S. C. *ib.* 457; 5 Rep. 24a; Moore 399.



Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is Pakenham's case,<sup>1</sup> where the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor.<sup>2</sup> Another, which has been recognized in this Commonwealth, is the quasi easement to have fences maintained.<sup>3</sup> Repairs were dealt with on the same footing; they were likened to estovers and other rights of common.<sup>4</sup> The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said that in this class of cases there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or quasi easement, or must be in aid of such a grant;<sup>5</sup> which is generally true, although, as has been shown, not invariably;<sup>6</sup> and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression "privity of estate" in this sense is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord Coke is sufficiently clear; and it is enough to say that the present covenant falls into the second class, if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and for the moment we will take it as intended to do so for the benefit of the land conveyed.

The restriction is, in form, within the equitable doctrine of notice.<sup>7</sup>

<sup>1</sup> Y. B. 42 Ed. III. 3, pl. 14.

<sup>2</sup> Spencer's case, 5 Rep. 16a, 17b.

<sup>3</sup> Bronson v. Coffin, 108 Mass. 175, 185; S. C. 118 Mass. 156.

<sup>4</sup> 5 Rep. 24a, b; Hyde v. Dean of Windsor, *ubi supra*; See F. N. B. 127; Spencer's case, *ubi supra*; Ewre v. Strickland, Cro. Jac. 240; Brett v. Cumberland, 1 Roll. R. 359, 360; and other examples might be given. See Bract. 382a, b; Fleta, VI. c. 23, § 17; Y. B. 20 Ed. I. 360; Keilw. 2a, pl. 2; Y. B. 6 Hen. VII. 14b, pl. 2; Co. Lit. 384b, 385a; Cockson v. Cock, Cro. Jac. 125; Bush v. Cole, 12 Mod. 24; S. C. 1 Salk. 196; 1 Show. 388; Carth. 232; Sale v. Kitchingham, 10 Mod. 158.

<sup>5</sup> Bronson v. Coffin, *ubi supra*.

<sup>6</sup> Pakenham's case, *ubi supra*.

<sup>7</sup> Whitney v. Union Railway, 11 Gray 359; Parker v. Nightingale, 6 Allen 341; Beals v. Case, 138 Mass. 138; See Austerberry v. Oldham, 29 Ch. D. 750; London & South Western Railway v. Gomm, 20 Ch. D. 562; Haywood v. Brunswick Building Society, 8 Q. B. D. 403; Tulk v. Moxhay, 2 Phillips 774.

But, as the deed was recorded, it does not matter whether the plaintiff's case is discussed on this footing, or on that of easement, if there is any difference so far as the present point is concerned.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must "touch or concern," or "extend to the support of the thing" conveyed.<sup>1</sup> They must be "for the benefit of the estate."<sup>2</sup> Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden.<sup>3</sup>

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in *Brooks v. Reynolds*,<sup>4</sup> and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly—an easement not to be competed with—and in that interest alone a right to prohibit an owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that, if this

<sup>1</sup> 5 Rep. 16a, 24b.

<sup>2</sup> *Cockson v. Cock*, *ubi supra*.

<sup>3</sup> *Keppell v. Bailey*, 2 Myl. & K. 517, 535; *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, 2 H. & C. 121.

<sup>4</sup> 106 Mass. 31.

covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it should be treated as merely personal in its burden. Whether the latter is its true construction, as well as its only legal operation, and whether, so construed, it is or is not valid, are matters on which we express no opinion.<sup>1</sup>

Bill dismissed.

*J. G. Dunning* for the plaintiff.

*C. L. Long* for the defendant.

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KING v. DICKESON.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION,  
MARCH 4, 1889.

[*Reported in Law Reports, 40 Chancery Division 596.*]

THIS action was brought by Henry King, claiming an injunction to restrain the defendants from building on a piece of land, situate in Ramsden Road, Balham, in their possession, any building within fifteen feet of Ramsden Road, except fences not more than six feet high.

King was the owner of some adjoining land situate in the same road. King's land and the defendant's land had both formed part of an estate belonging to the British Land Company, which had been sold by them in lots. King's land and the defendant's land had both formed part of Lot 258, which lot was purchased by King, and was conveyed by the company to him by a deed dated the 20th of June, 1874. Lots 258 to 298 of the estate were offered for sale by auction on the 27th of September, 1869, subject to certain stipulations, which were printed on a lithographed plan of the property. Lot 258 was not then sold, and King afterwards became the purchaser of it. The conveyance by the company to him contained a recital that Lot 258 was sold to him subject to the stipulations specified in a schedule to the deed, which were those which had been printed on the lithographed plan. The deed contained the following mutual covenants: "The vendors (as to so much of the land to which the said stipulations relate as remains vested in them) for themselves and their assigns, and the purchaser (as to the land hereby conveyed) for himself, his heirs, executors, administrators, and assigns, do hereby respectively covenant and grant with and to each other, and as to the purchaser also with and to the owners or owner of

<sup>1</sup> See further *Brewer v. Marshall*, 4 C. E. Green 537; *Taylor v. Owen*, 2 Blackf. 301; *Thomas v. Hayward*, L. R. 4 Ex. 311.

any other land to which the benefit of the said stipulation is attached, and their, his, or her respective heirs and assigns, that the covenantors respectively, and their respective heirs and assigns, will henceforth observe, perform and comply with the said stipulations, so far as the same relate either to the rights or to the duties of the purchaser, his heirs or assigns, in respect of the land hereby conveyed, and that nothing shall either be erected, fixed, placed, or done upon the land as to which they respectively covenant, or any part thereof, in breach or violation, or contrary to the fair meaning of the said stipulations." There was a proviso limiting the liability of the covenantors respectively to the periods of their ownership respectively. The stipulations specified in the schedule to the deed included the following: "Nothing is to be erected within fifteen feet of Ramsden Road except fences, and those not more than six feet high." Similar covenants were entered into by the purchasers of the other lots.

On the 15th of April, 1879, King made an equitable mortgage of part of Lot 258 to Messrs. Furber & Price. The mortgagees had notice of the restrictive covenant, but the mortgage contained no stipulation limiting the use of the land by them. The mortgagees afterwards brought an action for foreclosure against King, and on the 2d of November, 1883, an order was made in that action declaring that the then plaintiffs were entitled to the mortgaged property free from all right and equity of redemption in the same, and directing the defendant King to execute a proper conveyance thereof to the then plaintiffs. King refused to execute the conveyance, and on the 8th of December, 1883, another order was made vesting the mortgaged property in the then plaintiffs for all the estate therein of King. Furber & Price afterwards sold the mortgaged property to Robert Penstone, and he resold it to a Mrs. Ball. The defendants were in possession of part of the mortgaged property under a building agreement with Mrs. Ball, and they proposed to build beyond the line fixed by the restrictive covenant. It was admitted that Penstone, Mrs. Ball and the defendants respectively acquired the land with notice of the original restrictive covenant. The conveyance to Mrs. Ball was expressly made subject to the covenant.

*Napier Higgins*, Q.C., and *Mr. Eustace Smith* for the plaintiff.

*Cozens-Hardy*, Q.C., and *Chadwyck Healey*, for the defendants, were not heard.

NORTH, J. I think the case is free from doubt. [His Lordship stated the facts, and continued:] The defendants have acquired part of Lot 258, subject to the original restrictive covenant. Other lots of the estate have been conveyed to other purchasers, who, as it appears, have in many instances built on their lots houses having bay windows projecting beyond the building line.

The question for my decision is, whether the defendants who are purchasers of part of Lot 258, upon which they are proposing to build beyond the building line, can be restrained from so doing—not by the purchaser of another lot—but by the owner of the remainder of the same Lot 258. There was no agreement entered into between the plaintiff and his mortgagees as to the user of the land comprised in the mortgage, and though, no doubt, the mortgagees took the land subject to the obligations then existing in respect of it, and, therefore subject to the right of the owners of the other lots to compel the observance of the restrictive covenant, there was nothing to prevent the owner of Lot 258 from building upon it in any way he pleased, provided that none of the owners of the other lots objected to his doing so. It has been suggested that the owners of the other lots have in many cases lost by reason of their conduct the right which they originally had to object to a breach of the covenant by the owner of Lot 258. If they have all lost that right the owner of that lot would be entitled to build upon it in any way he pleased. It is suggested that the mortgagee of a part of Lot 258 entered into some new obligation with his mortgagor, the owner of the other part, as to the user of the mortgaged part. For that suggestion I can see no color whatever. In my opinion the owner of Lot 258 conveyed the part of it comprised in the mortgage to the mortgagee subject to all rights then existing in relation to it, but did not by implication create as against the mortgagee any new right or obligation in his own favor, and, not having created any such new right or obligation as against the mortgagee, he cannot now set it up as against a purchaser who derives title through the mortgagee. The action, therefore, fails, and must be dismissed; but this, of course, will not affect any claim which may be made by the owners of the other lots to prevent the defendants from building in contravention of the restrictive covenant.

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CLEGG v. HANDS.

IN THE COURT OF APPEAL, MARCH 7, 10, 1890.

[*Reported in Law Reports, 44 Chancery Division 503.*]

APPEAL from a decision of the Vice-Chancellor of the County Palatine Court of Lancaster.

At the date of the lease hereinafter mentioned Messrs. Clegg & Wright carried on business at the Alton Brewery, Toxteth Park, Liverpool, as brewers and buyers and sellers of ale and stout, and were the owners of a leasehold public-house at Toxteth Park, called the Alexandra Hotel, for a term of thirty-one years from the 1st of October, 1885.

By an indenture of lease dated the 19th of November, 1866, and expressed to be made "between James Clegg and Peter Wright, both of Toxteth Park, in the county of Lancaster, brewers (hereinafter called the lessors, including in such term each of them, and their each and every of their heirs, executors, administrators, and assigns), of the one part, and Benjamin Hands of Bootle, in the said county, licensed victualler (hereinafter called the lessee, including in such term his executors, administrators and permitted assigns), of the other part," in consideration of £700 the lessors demised the Alexandra Hotel to the lessee from the 21st of November, 1886, for nine and a half years, at the yearly rent of £100, and subject to certain covenants, agreements, and conditions, amongst which were covenants by the lessee with the lessors that he, the said lessee, would pay the rent to the said lessors, and would use and occupy the demised premises as and for an inn, tavern, or public-house only, and conduct the same and the business thereof in a proper and orderly manner, and would use his and their best endeavors to extend the custom and business of the demised premises, and would keep open the said premises for the sale of ales, wines, spirits, and other exciseable articles or liquors, at all times allowed by law; and also that he, the said lessee, would not transfer or remove any licenses or grants from the demised premises, but should and would, at the determination of the term, deliver them up to the lessors, and execute all documents for the purpose of transferring such licenses and grants, and all renewals of them, to the lessors; and then followed the restrictive clause upon the construction of which the question chiefly turned, which was in these terms: "And further, that he, the said lessee, will not at any time during the continuance of this demise buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said demised premises or any part thereof any ales or stout (other than best stout) other than such as shall have been *bona fide* purchased of the lessors, or from them or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee, of good quality and at the fair current market price thereof."

On the 8th of July, 1889, Clegg & Wright agreed to sell and assign all their brewery, plant, good-will, and business to Robert Cain, a brewer carrying on business at the Mersey Brewery, Liverpool, and in carrying out the sale Clegg & Wright, by an indenture dated the 2d of October, 1889, assigned to Cain the Alexandra Hotel, with the full benefit of the rents and covenants contained in the lease of the 19th of No-

vember, 1886, and in particular with the full benefit and advantage during the continuance of the term of nine and a half years of the restrictive covenant above set forth.

On or about the 2d of October, 1889, Clegg & Wright dissolved partnership and retired from business, and the Alton Brewery was shut up, and afterwards offered for sale without any restriction as to its being occupied as a brewery.

Cain was a brewer of ale and stout, and also a dealer in other ales; but Hands declined to purchase any ale or stout from him, and Clegg & Wright and Cain brought this action against him in the County Palatine Court of Lancaster, and claimed an injunction to restrain him from buying, receiving, selling, or disposing of in or about the Alexandra Hotel any ales or stout (other than best stout) other than such as should be *bona fide* purchased of the plaintiff Cain, either directly or through the plaintiffs Clegg & Wright, and from in any way committing a breach of the restrictive covenant above set forth.

Interrogatories were delivered to the defendant Hands by the plaintiffs; and the affidavit filed by the defendant in answer to such interrogatories contained the following paragraph: "I never ordered from or asked the plaintiff Robert Cain to supply me with any ales or stout."

The Vice-Chancellor of the County Palatine Court gave judgment in the action on the 20th of December, 1889,<sup>1</sup> and granted the plaintiff

<sup>1</sup> BRISTOWE, V.C. (after holding that, as Clegg & Wright had parted with their brewery, given up brewing, and retired into private life, they were not entitled to any relief by way of injunction against Hands; and, after disposing of certain contentions which were raised for the defense upon points not material for the purposes of this report, proceeded as follows):

It therefore comes to be a question, what are Mr. Cain's rights in the matter? Now, first of all we have to deal with the nature of the covenant itself; and upon that point I would venture to observe that, whether such a covenant is or is not one which might be injurious to the general public in case a brewer was rich enough to buy up every public-house in a district and then to say to the public, "You shall drink my beer or no other beer by means of these ties"—I say that whether these covenants were or were not wise covenants in the first instance, they have long been inserted in documents of this kind; they have frequently come before the court and have been supported by various decisions. It is not for me, therefore, to determine any case upon the question of these ties by brewers. It is for the Legislature, if it thinks fit, to make such alterations in the law as may be required for the benefit of the public. Until that is done I have merely to administer the law as it stands, and on this point I shall only refer to the observations of the Lords Justices in *Catt v. Tourle* (Law Rep. 4 Ch. 654). In that case Selwyn, L.J., said (Law Rep. 4 Ch. 659): "We should be introducing very great uncertainty and confusion into a very large and important trade if we were now to suggest any doubt as to the validity of a covenant so extremely common as this is." And again, Lord Justice Giffard in the same case said (Law Rep. 4 Ch. 661): "It is said that this covenant is uncertain,

Cain an injunction to restrain the defendant, his agents, servants, and workmen, from buying, receiving, selling, or disposing of, either directly or indirectly, or permitting to be bought, received, sold, or disposed of, either directly or indirectly, in or about the Alexandra Hotel, any ales or stout (other than best stout) other than such as should be *bona fide* purchased of the plaintiff Robert Cain, his executors, administrators, or assigns, provided they or he should at the time deal in or vend such liquors, and should be willing to supply the same of good quality

which it clearly is not. Nothing can well be more certain than that a man is to have the exclusive right of supplying a particular public-house with ale, beer, and porter." Then, after quoting cases decided in favor of such a covenant, he added. "Lastly, with respect to this covenant being invalid by reason of its being in restraint of trade, it does not go beyond the ordinary brewer's covenant, except in this particular, viz., that the ordinary brewer's covenant is generally between lessor and lessee, or mortgagor and mortgagee, whereas the present covenant is between the vendor and purchaser of the fee. This difference does not make the covenant void." I only refer to those two observations of many which could be cited to show that it is too late now to enter into the question whether these covenants are or are not covenants which could be challenged as being bad in the nature of restraint of trade, or bad as against the general public and in favor of a particular class of individuals. I think it must be held that these covenants are enforceable, can be enforced, and in right should be enforced.

Then comes the further question, can Cain as the assign of Clegg & Wright enforce his contract against the defendant Hands? And that involves the question, so ably argued by Mr. Collins, whether covenants of this kind do or do not run with the land. Now there is certainly some peculiarity in the form in which the lease is granted, as if the intention was to cover every possible legal mode of transfer that could be suggested. First of all, the term "lessors" is to include each of the lessors and their each and every of their heirs, executors, administrators, and assigns, and that seems to include everything that could be except a possible future partnership, and that future partnership is, I think, contemplated in the terms of the covenant itself. But that future partnership never did arise, and the question I have to deal with only relates to the assigns of the lessors. Now Mr. Collins' argument was, I think, based upon this, that all restrictive covenants of this kind are more or less to be looked upon as *red-denda*, and if so they may be divisible into two classes, one collateral with the land and one touching or of the land, and the distinction is, of course, a very difficult and narrow one. I think, taking it as a theoretical question, the result of the cases only comes to this, that the question whether a covenant does or does not run with the land must depend on whether it does or does not. I think the proper term is, "touch the land"; in other words, whether it is collateral to or an integral part of the enjoyment of the land. Well, I have gone carefully through all the authorities, and I do not think that the question here turns upon whether the covenant does or does not run with the land. I think it turns entirely upon the equitable question, whether a party who enters into a contract of which he gets the benefit can take that benefit and yet refuse to bear the burden. I think it falls within the class of cases which decide that if a man



and at the fair current market price thereof; and from in any way committing a breach of the covenant in the lease of the 19th of November, 1886.

From this judgment the defendant appealed. The appeal came on for hearing on the 7th of March, 1890.

*Henn Collins*, Q.C., *Mattinson*, and *McConkey* for the appellant.

*Cozens-Hardy*, Q.C., and *Rutherford* for the respondents.

COTTON, L.J. This is a case involving several points; but it has

who has had a distinct contract offered to him *sub modo* chooses to take the property with the restriction and refuses to give effect to it, a court of equity will afterwards be against him, and still more against anybody else who had notice, and will be in favor of anybody who for the time being shall be entitled to the benefit of that contract. I think that, irrespective of all those old cases to which my attention was called and other cases, the real question is whether there is here a legal contract capable of being enforced, and whether it ought or ought not to be enforced in equity.

Now the case of *Tulk v. Moxhay* (2 Ph. 774), which may be taken first as one of the leading cases upon the law as to vendor and purchaser in regard to the sale of land, shows that a legal contract for value will be enforced in equity against a subsequent purchaser, independent of the question whether it is one which runs with the land. I will follow that with the case to which I have already referred, *Catt v. Tourle* (Law Rep. 4 Ch. 654). There the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land; but the plaintiff did not enter into any covenant to supply it. It was a negative covenant. The defendant, a member of the society, was also a brewer; he acquired a piece of land, with notice of the covenant, and erected upon it a public-house, which he supplied with his own beer. The plaintiff filed his bill to restrain the defendant from supplying beer, alleging that the plaintiff had always been ready to furnish a supply of good beer at a fair price. Upon a demurrer, Vice-Chancellor Stuart held that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade. Lord Justice Selwyn, in his very full judgment on the case in the Court of Appeal, says (Law Rep. 4 Ch. 656): "Many objections have been raised to the legality of this covenant, and to the jurisdiction of this court to enforce such a covenant, or, at all events, to the propriety of the court's interfering to grant the relief which is sought; and it has been said that, even if the plaintiff has any right, he ought to be left to assert that right in a court of law. In the first place, I think it needless to consider the question which has been discussed, whether covenants of this nature run with the land. In *Tulk v. Moxhay* (2 Ph. 774, 778) Lord Cottenham says: 'That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.'" Then he refers to *Wilson v. Hart* (Law Rep. 1 Ch. 463), and continues (Law Rep. 4 Ch. 657): "This is a covenant entered into as a part of

been very fully and ably argued, and we think on the whole we had better give the judgment at which we have arrived at once.

The first question is, what is the true construction of the covenant as to the purchase of beer? And in my opinion, in the events that have happened, the covenant will prevent the defendant from buying beer except in the terms of the contract, if it can be otherwise enforced against him. [His Lordship then stated the facts of the case and continued:] The covenant in this case is that the said lessee will

the transaction on the sale and purchase of a piece of land, and what the vendor stipulates for is that he shall have the exclusive right of supplying all ale, beer, and porter which shall be consumed in any building erected on this particular piece of land which shall be used as a beer-house. This is a right which is capable of being abused, capable of being waived, capable of being lost, and if at any time, either in the progress of this suit or any other time, it can be shown that it has been so abused, so waived, or so lost, then there would be good ground for saying that this court ought not to interfere in favor of a person who might otherwise be entitled to the benefit of it. But I am at a loss to see how it can be said that there is anything like uncertainty in this covenant." Then he refers to *Collins v. Plumb* (16 Ves. 454) on the point of uncertainty, and then deals with the question of want of mutuality, and holds that it is sufficiently mutual.

Then in regard to the third objection, that the covenant was an unreasonable restraint of trade, he refers to *Mitchel v. Reynolds* (1 P. Wms. 181) and to *Wilson v. Hart*, and after making the observation that I have already referred to, he says (Law Rep. 4 Ch. 659): "I think there is no ground for the distinction which has been contended for, namely, that such a covenant might be good in a lease for 21, 50, or 100 years, but is not good if entered into as part of a transaction where the fee simple of a property is conveyed. I think, therefore, that none of the objections taken to the covenant can be sustained, especially at the present stage of this cause." That was with reference to the demurrer. Lord Justice Giffard gives a shorter judgment, entirely concurring with that of Lord Justice Selwyn, and holds that the demurrer was properly overruled in the court below.

Now it is quite clear that if it had been a covenant entered into upon a lease instead of a covenant entered into upon a sale, the decision would have been the same. Again, in *Hall v. Ewin* (37 Ch. D. 74), where the relief was not given, Lord Justice Cotton said (37 Ch. D. 79): "As I understand *Tulk v. Moxhay*, the principle there laid down was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Court of Chancery could not allow him to use the land in contravention of the covenants. That is a sound principle. If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restriction"; and Lord Justice Lopes in the same case said (37 Ch. D. 82): "According to the decision in *Tulk v. Moxhay*, a court of equity will not permit property to be used in a manner inconsistent with the restrictions to which it is subject, and with notice of which the pur-

not at any time during the continuance of the demise directly or indirectly buy, receive, sell or dispose of, or permit to be bought, received; sold or disposed of, in or about the demised premises, any ales or stout (other than best stout) other than such "as shall have been *bona fide* purchased of the said lessors, or from them, or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them." It is said that these latter words show that the covenant was not intended to extend to the assigns of Clegg & Wright, because part of the definition of the persons who are included in the expression "lessors" is repeated here in terms which exclude the full application of that definition. But I cannot think that that is so. The covenant, reading it by the light of the definition, was entered into with the lessors, Clegg & Wright, and each of them, and the heirs, executors, administrators, and assigns of them and each and every of them; and although it perhaps was not necessary to have added these words at the end of the covenant, I cannot think that that addition prevents the covenant from being a covenant with the assigns of those who were the grantors of this lease to the defendants.

But then it is said, as I understand the argument, that it can only have been intended to include such assigns as carry on the business of brewers at the particular brewery which was assigned to Cain, and where the business of brewing is no longer carried on. The case of *Doe v. Reid*<sup>1</sup> was much relied upon for the purpose of that construction, but it was a case where the language was different, and in my opinion there

chaser acquired it." In reference to Mr. Collins' argument, it makes no difference whether the case is that of the assignor or the assignee of the original lease. These cases, I think, show the true test by which this question should be tried.

That disposes of the case except as to the 10th section of the Conveyancing Act of 1881, which, if I am right in my view as to the enforcement of the negative covenant, becomes comparatively immaterial. I have not looked very carefully into that section; but so far as I can ascertain the intention of the Legislature from the words of the section, and giving, as I consider myself bound to do, a reasonable and not a very restrictive construction to the section, I think that Cain is the person entitled to the receipt of the rent, and is the person entitled to the benefit of the covenant by the lessee; and if I did determine the question under the Act, I should say that Cain was fully within the purview and meaning of the 10th section, and that, as being the immediate reversioner, he is entitled to the benefit of the covenant whether the covenant does or does not run with the land, the old cases notwithstanding. That, however, is not so material, as my general view is already given on the case. The result will be that my judgment is for the plaintiff, and the defendant must pay the costs of the action.

<sup>1</sup> 10 B. and C. 849.

is nothing here to show such an intention. Then there is this clause : " Provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee of good quality and at the fair current market price." Well, it was pointed out by one of us in the course of the argument that there is some protection granted here to the publican by this provision that the beer shall be of good quality, and that it shall be supplied at the fair current market price.

That, in my opinion, shows clearly that it was not intended in this case to restrict the benefit of the covenant to the persons who carried on this brewery at this particular place, for it does not in any way refer to the beer which is to be provided as being beer made by the landlords or their assigns. The words are, " provided they or he shall at such time deal in or vend such liquors." It shows that there was no intention whatever to stipulate that the persons entitled to the benefit of the covenant were to be persons who made beer. It was not provided that they should continue to make the beer they were selling ; but it was provided that it should be of good quality and be supplied at the fair current market price, and that they should deal in and vend beer. Considerable light was, to my mind, thrown upon the true intention of the parties by what was put before us by Mr. Collins in his reply, that at the time the covenant was entered into these landlords not only made beer, but bought beer, and supplied those who were not bound by any restrictive covenants to take beer from them alone. That, I think, shows what they were intending to provide for, viz., not that they should only supply beer which they themselves made, but that they should go on doing what they were then doing, supply beer either by making it or by buying it, so long as they were able to supply it of good quality and at the fair market price. Then there is the case of *Doe v. Reid*,<sup>1</sup> to which I have already referred. Now cases, so far as they give us a rule of construction, are very useful ; but it is very seldom, to my mind, that a case upon the construction of one particular document tells us much about the construction of another document, unless it lays down some principle to guide us. In *Doe v. Reid*, the defendant Reid, in taking a lease of a public-house from John Phillips & Samuel Miall, covenanted to purchase and take of and from Phillips & Miall, their executors, administrators, or assigns, or their successors in their late or present trade as brewers, all the porter, ale, and twopenny or amber, or such of the said liquors as by them should be brewed for sale, as should be sold or disposed of on the premises. Phillips & Miall sold their business and trade premises to Stanley & Cass, who again assigned to Calvert & Co., and these assignees shut up the old brewery and removed the plant, so

<sup>1</sup> 10 B. and C. 849.

that though they carried on the original lessors' brewing business, they did not carry it on at the place where the original lessors carried it on. The case turned almost entirely upon the construction of the covenant, and the words, "or their successors in their late or present trade as brewers," though not in terms limiting the assigns to assigns in that position, afforded in that case a rule of construction. The court accordingly held that what was meant was successors carrying on the same trade—not merely carrying on the trade of brewers, but carrying on the trade which was carried on by Phillips & Miall at that particular brewery. Now this particular clause which governs the construction of the covenant in *Doe v. Reid*<sup>1</sup> does not occur in the present case, and its absence leads me to put a different construction and effect upon this covenant from that which was put by the court in *Doe v. Reid* upon the different words occurring in that case. It cannot, in my opinion, be said here that this was a personal covenant with the particular landlords who granted the lease, or that it was impossible for the benefit of that covenant to be conveyed to anybody else who did not carry on their trade. It is not like entering into a contract with a particular painter to paint your picture. That is a contract made with him personally, and he must not hand it over to anybody else. In my opinion, this is not a contract which is incapable of being assigned.

Then it is said that this covenant does not run with the land. I think it does run with the land. That is my opinion; but there are other points on which this case may be decided independently of that question. It is a contract relating to the way in which the business at a particular house is to be carried on, therefore it is a contract relating to the public-house, just as much, in my opinion, as a contract as to the mode in which the cultivation of a particular bit of land is to be carried on relates to the land. It affects the value of the reversion, it affects the house, and in my opinion it is a contract running with the land. If that is so, that will enable the judgment to be supported, and will enable the present owner of the reversion in this case to sue.

But there is another ground on which I think the judgment may be supported. Here there has been a sale to the plaintiff by the lessors of the good-will of the business. The plaintiff is, therefore, independently of the question whether the covenant runs with the land, entitled to sue so far as by assignment the landlord who entered into this covenant could give him the right. That being so, the difficulty as to the title to sue which there was in the case *Renals v. Cowlshaw*<sup>2</sup> before Vice-Chancellor Hall is got rid of. There is no doubt that there is here an actual assignment of the benefit of the covenant to Cain, even if that benefit did not pass by the mere assignment to him of the reversion of this public-house. Then, in

<sup>1</sup> 10 B. and C. 349.

<sup>2</sup> 9 Ch. D. 125.

my opinion, as he is thus entitled to sue, the doctrine of *Tulk v. Moxhay*,<sup>1</sup> properly applied, will enable him to enforce that right as against the defendant—that is to say, considering that the defendant obtained this public-house at a less rent, as we may assume he did, by reason of the covenant, we ought not, as against the person entitled to the benefit of that covenant, to allow him to deal with the public-house in a way inconsistent with the covenant by reason of which he got it at a lower rent. Therefore, in my opinion, on that ground, even if this covenant did not run with the land, the judgment of the Vice-Chancellor is right.

But then it is said that this court has decided that the doctrine of *Tulk v. Moxhay* will not be extended beyond a restrictive covenant. Now, in *Tulk v. Moxhay* the covenant was not in its terms restrictive, but it implied that the piece of ground in question there was to be used only as an ornamental garden. That, again, implied that the purchaser was not to build on it, which was what he was about to do. In this case, even if the covenant was in form a contract to buy all beer from the plaintiffs, that would involve a negative contract that he should not buy his beer from anybody else; and, in my opinion, this case does not come within the rule which we laid down in the case of *Haywood v. Brunswick Permanent Benefit Building Society*.<sup>2</sup> In that case land had been granted in fee in consideration of a rent-charge and a covenant to build and repair buildings, and the court refused to enforce the covenant, considering the doctrine of *Tulk v. Moxhay* not applicable to the case of a covenant which was not in its nature restrictive, and could only be enforced by making the owner of the land put his hand in his pocket. In my opinion, both on the ground that here the covenant did run with the land, and also on the ground that the doctrine of *Tulk v. Moxhay* does apply, I think the order of the Vice-Chancellor is right.

LINDLEY, L.J. I agree with Mr. Collins in thinking that this case is one of very great importance both to brewers and tenants who take tied houses, because it certainly is rather a startling thing to anybody to be told that when you have agreed to buy beer of a particular brewer you may find yourself bound to take beer from somebody else. Whether you are or are not depends upon the agreement into which you have entered. The whole question here, to my mind, turns upon the true construction of this agreement, and the only difficulty that I think serious is to find out whether this agreement is or is not assignable—that is to say, whether the tenant here entered into a contract with certain persons relying upon their personal skill and reputation, and agreed to buy beer of them and them alone, or whether he did not enter into a very much wider contract, and agree to buy beer from them or anybody to whom they might assign their business or the public-

<sup>1</sup> 2 Ph. 774.

<sup>2</sup> 8 Q. B. D. 403.

house. The answer to the question whether this is a personal unassignable contract or not must be gathered from the instrument itself, having regard, of course, to the position of both parties.

The lease has been gone through, and I will refer to it very shortly. The lessors are described as brewers; there is no reference to any particular place of business or anything of that kind; and the lessee is described as a licensed victualler. Then there is an ordinary lease of a public-house, and then, reading it shortly, there come covenants by the tenant that he will use and occupy the premises demised as and for and in a tavern or public-house only, and will conduct the same so as not to forfeit his license, and will keep open the premises for the sale of the articles before mentioned, which I will call ale and beer. Then there is a covenant about not getting ale or beer from other people. Now, just let us see whether this lease does or does not contain any indication either one way or the other as to whether the benefit of this was capable of being assigned. The very first thing that one comes across is the interpretation clause saying that the term "lessors," which applies to the brewers, shall include "each of them and their and each and every of their heirs, executors, administrators, and assigns." Those words are never found in what are called personal contracts. If I were to enter into an engagement with an artist to paint my picture, I should not put those words in. If he died, I should not leave it with his executors to finish what he had done. Such words are out of place altogether in a contract which is personal in that sense.

Now, when we come to the covenant which more particularly relates to this matter, we find that the lessee has agreed with his lessors that he will not during the lease—I am again reading it shortly—sell or dispose of on the premises any ale or stout other than such as shall have been *bona fide* purchased of the said lessors, "or from them or either of them either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them." That clause lets in partners. The covenant on the true construction of the agreement does not exclude such persons as these. It is not that I will only take beer from Clegg & Wright, but it lets in the partners. Well, does it go further? It turns upon the construction of very few words. Mr. Collins says that by reason of the introduction into this clause of the words "from them or either of them" it is tolerably apparent that the definition was departed from. I thought at first sight that there was a great deal in favor of that construction; but when you come to see what the whole clause is, it appears to me that you cannot put that limited construction upon it, and that upon the true construction of it the word "lessors" is used there in the sense in which it occurs everywhere else.

That being the case, I think there can be no reasonable doubt that this contract is not a personal unassignable contract. The question then arises whether it has been assigned to Mr. Cain. It unquestionably has. If it is capable of being assigned it has been assigned. It has been assigned without any controversy in equity by the brewers to Cain, and, inasmuch as he and his assignors are both suing, I see no answer whatever to this action upon that ground.

It has also been said that it is assigned to Mr. Cain by virtue of his being an assignee of the reversion in the lease. That raises a technical question which, stated in legal language, amounts to this, whether the benefit of this covenant runs with the land. We have heard the authorities discussed by Mr. Collins, who has studied this branch of the law probably more carefully than anybody living and he has not persuaded me, I confess, that this is a covenant which does not run with the land. I rather think it does. If you look at the authorities which he has cited, and look at them carefully, this does, in lawyers' language, so "touch and concern" the land demised as to run with it at common law. But whether that is so or not, the benefit of the contract has been assigned to Mr. Cain, and Mr. Cain is entitled to it.

Then comes a question as to whether this contract is one which can be enforced in equity, having regard to the doctrine relating to specific performance and injunctions. Mr. Collins has suggested that, although this covenant is negative in point of form, it is affirmative in substance, and that therefore an injunction ought not to be granted. But when you look at the whole of this case, you find that the covenant, which he suggests is affirmative, really involves a negative element in it. If you treat the covenant to keep open this place as a public-house and to sell beer there as an affirmative covenant, you cannot treat the covenant as to the buying of beer as merely an affirmative covenant to buy beer of the lessors. You must put in the words "and the lessors exclusively." If you get that, you get a negative portion of the covenant which can be properly enforced consistently with the doctrine applicable to cases of this kind; and, therefore, whether you regard it as an affirmative covenant with a negative element in it, or whether you regard it as split up, as it is here, into these two parts, partly affirmative and partly negative, that negative part can be properly enforced.

For these reasons it appears to me that the decision is right, and the appeal must be dismissed, with costs.

LOPES, L.J. The question in this case is on the construction of the covenant. In the definition clause the word "lessors" includes assigns. It is contended with regard to this particular covenant that the words "from them or either of them, alone or jointly with any other person or persons who may hereafter become a partner or partners with them or



either of them," which follow the word "lessors" in the covenant, show an intention to exclude the operation of the definition clause, and accordingly that the covenant must be dealt with entirely apart from that clause. I cannot adopt that view. I am bound to say that at first I was somewhat taken with it, but on consideration I think it cannot be maintained. It appears to me that the words to which I have alluded, following the word "lessors," were introduced merely to cover the case of third parties becoming partners with the lessors or assigns—not only assigns of the brewery with which the covenantees were then concerned, but any assigns, provided only that they or he should at such time deal in or vend such liquors as aforesaid, and should be willing to supply the same to the said lessee of good quality and at a fair current price. The covenant, therefore, in my opinion, cannot be said to be a personal covenant.

But then a question is raised as to whether the benefit of this covenant runs with the reversion. It was contended by Mr. Collins that it did not run with the reversion, and that it was purely collateral. The benefit to run with the reversion must touch or concern the demised premises. Now, does this covenant touch or concern the demised premises? It relates to the mode of enjoyment of a public-house. The thing demised is a public-house, and the covenant compels the covenantee to buy the beer of the covenantor and his assigns.

In my opinion, it touches and concerns the demised premises; it affects the mode of enjoyment of the premises, and, therefore it runs with the reversion.

I entirely agree with what has been said with regard to the application of the case of *Tulk v. Moxhay*,<sup>1</sup> and I think this appeal should be dismissed.

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### MANDER v. FALCKE.

IN THE COURT OF APPEAL, JUNE 3, 1891.

[*Reported in Law Reports, 2 Chancery (1891) 554.*]

THIS was an action by the landlords of a messuage No. 34 Poland Street, to recover possession on the ground of breach of covenant, and for an injunction to restrain the defendants from using the premises or permitting them to be used as a brothel or disorderly house, or from otherwise permitting or committing breaches of the covenants contained in the lease.

The lease was granted on the 23d of December, 1858, by the plain-

<sup>1</sup> 2 Ph. 774.

tiffs' predecessor in title, and was a lease for thirty years from the 25th of December, 1868, at which time a then existing lease would expire. The lease contained a covenant not to do or cause or permit to be done upon the premises anything which might grow to the annoyance, damage, injury, prejudice or inconvenience of the premises or of the adjoining property of the lessor or of the occupiers thereof.

The defendants were D. Falcke, in whom the residue of the term was vested, and George Edward Hinde (sued under the name of Edwards), as the occupier of the premises. George William Hinde, the son of George Edward Hinde, was afterwards added as a defendant.

The case made by the plaintiffs was that the premises which were ostensibly used as an oyster bar and refreshment rooms were in fact notoriously used as a brothel, to the great annoyance of the neighborhood.

It appeared in evidence that in September, 1889, George William Hinde had purchased the residue of a term in the premises created by an underlease of the 22d of December, 1875. There appeared to be reason to believe that G. W. Hinde was a minor, but there was no distinct proof of it.

The plaintiffs gave notice of motion for injunction. Falcke gave an undertaking in terms satisfactory to them, and the injunction was only moved for against the other defendants. G. Edward Hinde set up the case that he had no interest in the premises and had nothing to do with the management of the business. The evidence satisfied the court that the house was used for immoral purposes, and there was evidence showing that G. Edward Hinde took such a part in the conduct of the business that he must be treated at all events as one of the persons carrying it on. Mr. Justice Kekewich thought that the result of the evidence was that the son must be considered trustee of the underlease for his father, and his Lordship granted an injunction restraining the two Hindes, their servants and agents, from using or permitting the premises or any part thereof to be used as a brothel or disorderly house, or from doing, causing, permitting or suffering therein anything which might grow to the annoyance, damage, injury, prejudice or inconvenience of the premises or the adjoining property of the plaintiffs or the occupiers thereof.

George Edward Hinde appealed.

*Oswald* for the appellant.

*Warmington*, Q.C., and *Gatey*, for the plaintiffs, were not called on.

LINDLEY, L.J. This is an appeal by George Edward Hinde from an injunction restraining him and his son, George William Hinde, from using or permitting certain premises to be used as a brothel or disorderly house, or from doing, causing, permitting or suffering therein

anything which may grow to the annoyance, damage, injury, prejudice or inconvenience of the premises or of the adjoining property of the plaintiffs. The plaintiffs are the freehold reversioners of the house in question. A lease of it was granted by their predecessor in title, and the defendant Falcke is entitled to the benefit of this lease, subject to an underlease, which, in 1889, was assigned to George William Hinde, who has not appealed. The father appeals on the ground that he has nothing to do with the property. Now, what the business relations between the father and son are is very obscure. Whether the father acquired the underlease in the son's name is uncertain, but that the father has much more to do with the business carried on in the house than he wishes us to believe appears to me quite clear. After perusing the affidavits, I have not the slightest doubt that the father is substantially the person interested in the business, and that the son is put forward as a screen. I have no doubt that the father is managing the house; and that he does so with full notice of the terms on which the son holds the property. I feel certain that he has a pecuniary interest in the concern. I do not proceed on the hypothesis that he is *cestui que trust* of the underlease, for that is uncertain. I treat him simply as an occupier managing the business. He may be neither an assignee nor purchaser, but he is in occupation, and that is enough to affect him, he having notice of the covenants in the lease. I have not followed all the cases from *Tulk v. Moxhay*,<sup>1</sup> but in *Wilson v. Hart*<sup>2</sup> it was held that a tenant from year to year was bound in equity by a restrictive covenant of which he had express notice, and though I cannot say that it has been decided that a mere occupier is in the same position, I am satisfied on principle that a simple occupier comes within the decision of Lord Cottenham in *Tulk v. Moxhay*. The appeal will be dismissed.

BOWEN, L.J. I am of the same opinion. This is an interlocutory application, and it is not necessary finally to determine what is the interest of the father in the premises; but it is to my mind quite clear that the dealings of the son with the premises are intended to cloak the real interest of the father. I suspect it will turn out that the father is the real owner of the underlease; but I do not decide upon that ground. I think we should be allowing ourselves to be hoodwinked if we did not act on the view that the father is in possession, either jointly with the son or solely by permission of the son. If a man by the leave of a person who is bound by a restrictive covenant as to the use of land enters into possession of the land with notice of the covenant, he will be restrained from violating that covenant. Why should not a person who enters into possession of land for his own convenience, and by the

<sup>1</sup> 2 Ph. 774.

<sup>2</sup> Law Rep. 1 Ch. 463.

permission of a person bound by a restrictive covenant, be as much bound as a tenant from year to year? We ought to extend the principle to such a case, if our holding it so to apply is in fact an extension.

FRY, L.J. I am of the same opinion, and agree that the appeal is ill-founded.

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LESTER A. LEWIS, APPELLANT, v. ERWIN G. GOLLNER

ET AL, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER 1, 1891.

[*Reported in 129 New York Reports 227.*]

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made April 28, 1891, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendants from constructing flats on certain premises in the city of Brooklyn.

The facts, so far as material, are stated in the opinion.

*William C. Beecher* for appellant.

*George C. Case* for respondents.

FINCH, J. All the facts alleged in plaintiff's complaint were found by the court, but were held to be insufficient to entitle him to equitable relief.

The plaintiff's residence was on President Street between Seventh and Eighth avenues in the city of Brooklyn. That street and Union Street, which runs parallel with it one block away, are occupied by private residences constructed by citizens of some wealth and social standing whose homes are more or less creditable to their taste, and in which, as giving character to their neighborhood, they feel a pardonable pride. That part of the city had never been invaded by flats or tenement-houses, which bring together a changing and floating population under one roof, having no ownership of their own, and caring little for anything beyond their personal comfort and immediate needs. Into this locality came the defendant Gollner, a builder of tenement-houses and flats. He bought a lot fronting on Union Street and immediately in the rear of plaintiff's premises, and at once announced his intention of erecting there a seven-story flat. Such a building in such a locality was regarded as offensive and injurious by the residents of the vicinity, and the court has found as a fact that its construction in that locality would cause injury and damage to the neighboring premises. Gollner was not without experience, and apparently knew what he was about

when he took some pains to let his plans be generally understood. The neighbors at first remonstrated, but found Gollner immovable and standing upon his rights. They then sought to buy him out for the sole and declared purpose of saving the neighborhood from flats. Gollner had no title, but simply a contract. The price he had agreed to pay was eighteen thousand dollars, which was the full and fair value of the property, and upon that he had paid only the sum of five hundred dollars. He began the negotiations with a very large price, but finally agreed to sell out for twenty-four thousand and five hundred dollars, or a net profit of six thousand dollars, and upon the further contract that "he would not construct or erect any flats in plaintiff's immediate neighborhood or trouble him any more." It is evident, since the lots were worth in the market but eighteen thousand dollars, since the sole motive of the purchasers from Gollner was to prevent his meditated construction, and since his declaration of his purpose was the cause and occasion of the final purchase, that the six thousand dollars was the consideration for the restrictive agreement of Gollner, and was the price paid for his covenant not to build flats in the neighborhood or trouble its residents with similar injurious and disagreeable enterprises. Neither party at all misunderstood that this was the material point of the contract. It would have been the extreme of folly for the purchasers to pay six thousand dollars to prevent the erection of flats on the one lot alone, leaving Gollner free to repeat the enterprise in the immediate neighborhood, and inflict the very injury to escape which the tribute had been paid. Gollner himself, according to the plaintiff's proof, accurately understood and clearly stated the pith of the agreement when he said, that after making it, if he should build flats in the vicinity, he "should be considered a blackmailer"; and when other lots were suggested by the witness Moody, Gollner said, "What, go for more blood-money after I had taken blood-money out of those people; I would not do it." And yet he did attempt to do it. At the moment when his contract with plaintiff was closed and the down payment was made, he began negotiations for the purchase of a lot on Union Street diagonally opposite his first purchase, and, obtaining title, at once commenced the erection of a seven-story flat. When reminded of his agreement and remonstrated with he seems, according to one witness, to have regarded it as a good joke upon his vendees, and added that "he guessed he could fight them with their own money, that he had \$6,000 of it in his clothes—patting his pocket—and he would see that go as far as it would last in that direction." Then came a letter from plaintiff's attorney threatening an action, and a refusal by one of his material-men to further supply him under the circumstances, and there-upon Gollner sought shelter for his enterprise and his breach of faith

under an ownership in his wife. His equity in the lot purchased was \$2,000, and that equity, together with his large expenditure upon the foundations, he conveyed to her for her equity in two other lots which amounted to seven hundred dollars; and then, as her agent and architect nominally and in form, continued the construction. Mrs. Gollner lent herself to this artifice and took the title with full knowledge of all the facts, and unquestionably for the purpose and with the intent of aiding and protecting her husband in his effort to avoid his own honest obligation.

This state of facts had its natural effect upon the courts below, and the General Term, after their recital, added that if there was any authority, directly or indirectly, in plaintiff's favor they would without hesitation grant him relief; but saying that, felt also bound to say that equity stood helpless before this cool and deliberate wrong. The inquiry which faces us is, therefore, whether in truth equity is thus helpless to enforce such a clear and admitted right.

I think we should first examine the situation, as between plaintiff and Gollner upon the supposition that the latter had remained owner of the land and was himself engaged in violating his contract, and ask of ourselves the question whether in such event it would have been possible for equity to interfere, or whether the objections and difficulties suggested by the respondents would have proved insuperable.

Two of those objections we may dismiss quite briefly. The agreement was not in the least indefinite or uncertain, as it respects the matter in controversy. The phrase "immediate neighborhood," taken in connection with the subject-matter of the contract, is not so indefinite as to be incapable of just and natural boundaries, but in any event covers and includes the locality of the construction in progress. The court has so found, and there is no reason for doubting its correctness. Nor is there any foundation for saying that, in its restrictive character, the agreement is against public policy. We have too lately discussed that subject to make a recurrence to it necessary. We have perhaps widened and extended the area within which restraints of trade and business may lawfully operate, and certainly should not narrow them till they are less than one neighborhood in a single city.

Nor is there any difficulty in the fact that the agreement is by parol and purely personal. If just grounds of equitable jurisdiction exist, any valid contract, however unsolemn, may be enforced by a decree of specific performance. The cases are very numerous in which agreements purely personal not to engage in a particular trade or business within certain reasonable boundaries have been enforced by injunction, and it certainly does not lessen the duty or imperil the right that the contract proved or established is by parol. In one possible view of this case we

are in fact dealing with just such a contract. The occupation of the defendant Gollner was that of a builder of flats and tenement-houses. He so describes himself and gives that as his specific business and occupation. He sought to carry it on in plaintiff's neighborhood, and was paid six thousand dollars not to carry it on in that locality, and because his doing so would in fact cause injury to the persons who paid him the money. Of course, there is a difference between the present case and those in which the contract purpose is to prevent competition; a difference which respects the nature and character of the injury resulting from a breach; but that difference does not disturb the doctrine common to both, that in a proper case equity will specifically enforce by affirmative decree or restraining injunction a definite and fully established and valid contract, although a personal one, and irrespective of the fact that it happened to be by parol. The jurisdiction attaches upon the ground that an action at law for damages will not do complete justice, or accomplish the purpose contemplated by the contract. Even though the agreement itself fixes a penalty for its breach, it will not follow that equitable relief must be denied, for, if the contract appears to be such in its character and purpose that its performance was contemplated by the parties and not merely damages for the breach, the equitable relief will be awarded.<sup>1</sup> When that relief is by injunction to restrain the commission of an injurious act, the complaint of the plaintiff is somewhat in the nature of a bill *quia timet*, in which equity acts to prevent a mischief rather than to redress it. There is, therefore, no reasonable doubt that if Gollner was still the owner of the land and engaged in constructing the flats his enterprise could be restrained by injunction. No other remedy would have the dimensions or proportions of the contract purpose. Money damages could not be an accurate substitute and would merely palliate and not redress the injury. It would be a continuing one whose full and actual effects could scarcely be foreseen, and which the plaintiff could only escape by breaking up his home and retreating to some possible locality in which tenements were not and their builders did not afflict.

But Gollner did not remain the owner of his new purchase, and that brings us to the difficulty which the courts below deemed insurmountable, and which needs to be thoughtfully considered. They reasoned that the new vendee could not be affected, except through or by the purchase of the land, and so, only when the land carried with it as an inseparable attachment the burden of the contract; that when the contract was made there was no land to which it did or could attach; and the agreement remained wholly personal to Gollner and

<sup>1</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 474.

did not affect or bind his wife. I do not see the contract in that way. Gollner might have fulfilled it by omitting to buy or lease any land within the prescribed limits, but his agreement left him at liberty to do so or not as he pleased, and yet required that if he did so purchase or lease, he should not erect upon the land so owned or possessed the prohibited structures. The moment he bought or leased any such land, he came under an obligation not to use it in a particular way; the land in his hands necessarily became restricted and limited in the use of which it was capable; and as much so, though bought of another, as if it had come from the contractor who imposed the restraint as vendor. I do not see why the equitable rights of the plaintiff did not attach to the land when bought if it came, as it did, within the scope of the contract. Why should it affect the result that the obligation and the land ownership were not simultaneous, or that the latter came from a vendor who did not restrict when the contractor could and did? In the case of a mortgage the lien may attach to and bind after-acquired property, or cover future and later advances, as between the parties themselves, and that is permitted because they have so agreed and their contract contemplates that precise result. In like manner I think the agreement under discussion was in substance and effect, that whatever land the defendant Gollner might thereafter possess in that immediate neighborhood should be restricted in its use by him, and should not be devoted to the construction of tenements or flats. In other words, when he bought the land the plaintiff's equitable rights at once attached to it, became a burden upon it so long as Gollner owned it, so that apparently the contract ceases to be merely and purely personal, because it affects and was intended to affect the use and occupation of Gollner's after-acquired land in that neighborhood. But if the contract remains technically a personal one, I think the reasonable and settled doctrine is that the contract equity is so attached to the use of the land which is the subject-matter as to follow the land itself into the hands of a purchaser with full knowledge of all the facts, who buys with his eyes open to the existing equity, and more especially when he buys for the express purpose of defeating and evading that equity. It has been held that the equity resulting from a valid agreement, although the latter was not a covenant running with the land, or a legal exception or reservation out of it, but stood solely upon the ground of a personal contract dictating the mode of user, would, nevertheless, go with the land into the hands of a purchaser, with notice, and who did not buy innocently or in good faith.<sup>1</sup>

<sup>1</sup> *Whitney v. Union Railway Co.*, 11 Gray 363.



In *Hodge v. Sloan*<sup>1</sup> we substantially affirmed that doctrine, holding that a purchaser without restriction in his deed, but from one who was restricted by a personal covenant not running with the land or binding his assigns, yet with notice of the facts, is bound by the restriction in a court of equity. Judge Danforth described the character of the agreement thus: "It is restrictive, not collateral to the land, but relates to its use."

It is true and should be noted that in these cases the restrictions followed the line of title and were imposed by the original owners and vendors of the land, while here they were not so imposed, but came from one never an owner of the land, but deriving his right from a contract with one who did become such owner. But why should that difference change the result? The original owner's right rests upon one consideration, and that of the stranger to the title upon another, but each are equally good and worthy of equitable regard. In *Parker v. Nightingale*,<sup>2</sup> it is declared not to be in the least material that the restrictive stipulations should be binding at law, or that any privity of estate should subsist between parties in order to render them obligatory and to warrant equitable relief in case of their infraction. I think that doctrine is sound and just. The source of the restriction would seem to be immaterial if itself binding and founded upon sufficient consideration; and a breach is no greater wrong to a privy in estate than to a stranger validly contracting about its use. Nor can the vendee in bad faith stand upon such a difference. Equity has no compassion for a fraud, and he who buys in aid of one with full knowledge of what is right, but with purpose to defeat it, should not escape the hand of equity by a criticism upon the origin of the restriction violated. If these views are correct it will follow that plaintiff should have been awarded the relief which he sought.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except RUGER, Ch.J., and ANDREWS, J., not voting.

<sup>1</sup> 107 N. Y. 250.

<sup>2</sup> 6 Allen 344.

NEW YORK BANK NOTE COMPANY, APPELLANT AND  
RESPONDENT, v. THE HAMILTON BANK NOTE  
COMPANY, RESPONDENT AND APPELLANT.IN THE SUPREME COURT OF NEW YORK, GENERAL TERM, JANUARY  
TERM, 1895.

[Reported in 83 Hun 593.]

CROSS-APPEALS by the plaintiff, The New York Bank Note Company, and by the defendant, The Hamilton Bank Note Engraving and Printing Company, from portions of an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the Clerk of the County of New York on the 17th day of November, 1894, upon the decision of the court rendered at the New York Special Term, sustaining the defendant's demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action, adjudging that there is not a defect of parties defendant in the action, and overruling the defendant's demurrer made upon such ground.

*Edward P. Lyon* for the plaintiff.

*W. L. Turner* for the defendant.

VAN BRUNT, P.J. This action was brought to restrain the defendant from using the press bought by it from the Kidder Press Manufacturing Company so as to compete with the plaintiff in strip-ticket printing. The complaint alleged the organization of the defendant, and that the New York Bank Note Company, a corporation organized under and pursuant to the laws of New Jersey, on the 12th day of October, 1891, entered into a contract with the Kidder Press Manufacturing Company, whereby the Kidder Press Manufacturing Company, for considerations in said contract expressed, agreed not to sell any presses on which strip tickets might be printed. This restriction, however, was not to deprive the Kidder Press Company from selling its presses to be used for other purposes; and the Kidder Press Company further agreed not to make alterations or additions to any existing presses that would enable such presses to print strip tickets without requiring the parties owning such presses to make the same terms and agreements regarding the same as though they were new machines. The complaint further alleged that prior to the time of said contract, and at the time and subsequent to the making of the same, one C. E. Gray was the secretary of said New York Bank Note Company, and sustained towards it the most close and confidential relations; that he was familiar with the first press made by the Kidder Company for said New York Bank Note Company, and with such attachments, etc., and

also with the provisions of the contract above referred to; that soon after the making of the contract Gray severed his connection with the New York Bank Note Company and became associated with the defendant corporation and its vice-president and general manager; that the defendant by its officers conceiving the idea of duplicating said presses and of using said Gray and the knowledge he had acquired in his confidential relationship with the New York Bank Note Company respecting the said presses, their said attachments and the said strip-ticket printing business and contracts therefor, and well knowing the terms of the said contract between said Kidder Press Manufacturing Company and said New York Bank Note Company, and well knowing that said Kidder Press Manufacturing Company had no legal right to sell or furnish to the defendant or to any person a Kidder perfecting press, except in such manner as would prevent said press from ever being used with or without alterations for strip-ticket printing, procured said Kidder Press Manufacturing Company, in violation of the terms of its said contract with the said New York Bank Note Company, to sell, furnish and deliver to it, the defendant, a Kidder perfecting press of substantially the same pattern as the ones to which said Kidder Press Manufacturing Company had made said attachments for the New York Bank Note Company; and that defendant procured attachments to be added to the press in such way as to enable the defendant to print strip tickets on equally favorable terms with and in substantially the same manner as was done by the said New York Bank Note Company; and thereafter, and in the year 1893, with full knowledge of the rights of the plaintiff under said contract, procured another press, etc.

The complaint further alleged that on or about the 1st day of January, 1893, the plaintiff was organized under the laws of West Virginia, and succeeded to all the rights of the New York Bank Note Company by assignment, etc., and prayed an injunction restraining the defendant from using any of the presses which it acquired from the Kidder Company for the purpose of strip-ticket printing, etc.

The defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, and that there was a defect of parties in that the Kidder Press Manufacturing Company had not been joined as a defendant in this action.

The court upon hearing the demurrer sustained the same upon the ground that it did not state facts sufficient to constitute a cause of action, in that the plaintiff had not paid, or offered to pay, the value of the press furnished to the defendant, or at any rate had failed to tender a compliance with the terms of the contract upon its part, and overruled the demurrer as to the defect of parties.

We do not see upon what theory the plaintiff was bound to tender

anything. If the defendant purchased from the Kidder Company the press in question, having knowledge of the contract between that company and the plaintiff's predecessors, whereby the Kidder Company agreed not to sell any presses except under restriction, it is difficult to see why the plaintiff is not entitled to enforce its contract. The result of the contract between the Kidder Company and the plaintiff's predecessor enabled the Kidder Company to give only a qualified title in the presses which it might produce. That company had by its contract agreed that its productions should be used only in a certain way, and when parties took those productions with knowledge of the restriction which accompanied the Kidder Company's title, the purchaser's title must necessarily have been affected the same as the seller's.

Independent of the acts in relation to the filing of chattel mortgages, if a party purchases personal property knowing that the same is mortgaged, can it be claimed that he would acquire a title relieved from the mortgage? It seems hardly necessary to discuss such a proposition. So in the case at bar, the defendant in this action knowing that the Kidder Company had no right or authority to sell its presses except with a restriction, which restriction the plaintiff had purchased, can it be said that in purchasing from the Kidder Company it acquired an absolute title relieved from such restrictions? Clearly not. The party purchasing under such circumstances takes the property burdened with the contracts made by its owner in reference thereto and which he had the power to make. Contracts prohibiting the manufacture of goods in certain localities are held to be valid; contracts restraining the carrying on of a trade or business within certain limits are held to be valid. Why not contracts prohibiting personal property from being used in a particular way? Is place different in this respect from method? It would not be argued for a moment that if the contract between the Kidder Company and the plaintiff had been that no Kidder presses should be used within the city of New York, such contract could not be enforced against the persons purchasing such presses with knowledge of this contract. What difference in principle is there because it is not an absolute prohibition from using, but only from a particular use?

It seems to be clear that the Kidder Company could place this restriction upon the use of its manufacture, and certainly, in respect to all persons buying with knowledge of this restriction, the plaintiff, for whose benefit it was made, would have a right to enforce the same.

The next question is in regard to the knowledge of the defendant of this restriction. It is alleged in this complaint as distinctly and as positively as any allegation therein contained. The allegation is that the defendant by its officers, ". . . well knowing the terms of the said contract between said Kidder Press Manufacturing Company and

said New York Bank Note Company, and well knowing that said Kidder Press Manufacturing Company had no legal right to sell or furnish to the defendant or to any person a Kidder perfecting press except in such manner as should prevent said press from ever being used with or without alterations for strip-ticket printing, procured said Kidder Press Manufacturing Company, in violation," etc. What more distinct allegation of knowledge could be made by the plaintiff than is therein contained? It is true the allegation is accompanied by allegations with regard to Gray's instrumentality. But these are not qualifying words, by any means. If true, they would show not only knowledge upon the part of the officers of the defendant, but a fraudulent design to evade the restrictions of which they had knowledge.

We think therefore that the complaint stated facts sufficient to constitute a cause of action; and we know of no reason why the plaintiff should be required to pay anything to anybody because of the breach of its contract by the Kidder Company by the sale of these presses to the defendant, the defendant being fully aware of the existence of the contract.

The objection, however, in regard to the defect of parties seems to have a better foundation. The question involved, amongst others, is as to the right of the Kidder Company to confer a title upon the defendant of its presses with an absolute right to use the same for any purpose for which they were adapted. When this right is assailed, as it is by the plaintiff's action in this proceeding for an injunction against a vendee of the Kidder Company, it seems to us that that company is entitled to be heard; and that the question of its right to deal with its property as it sees fit cannot be adjudicated upon without its presence, where the objection is taken in time as it is in the case at bar.

For these reasons we think that the demurrer should have been sustained upon the ground of defect of party.

The judgment therefore should be reversed so far as it holds the complaint defective as to facts, and also so far as it holds the complaint sufficient as to parties, without costs of this appeal to either party; the plaintiff to be allowed upon payment of the costs of the court below to amend by bringing in the Kidder Press Company as a party and serving an amended complaint.

O'BRIEN and PARKER, JJ., concurred.

So ordered.

## SECTION IV.—DEFENSES.

### (a) *Statute of Frauds.*

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THOMAS BUTCHER *v.* STAPELY AND RICHARD BUTCHER.

IN CHANCERY, BEFORE LORD JEFFERIES, C., FEBRUARY 10, 1686.

[*Reported in 1 Vernon 363.*]

THE defendant Butcher being seized of the lands in question, which he had mortgaged to one Colstock for £400, agreed with the plaintiff to sell the same to him for £700. A short note was drawn up of the agreement (but not signed by either party) as follows: December 9, 1682, Richard Butcher, for £740, does bargain and sell unto Thomas Butcher all those lands, etc., the plaintiff to have them from Lady-day next, and then the moneys to be paid; the plaintiff to have the hog pound, and dung, and the defendant to pay all taxes, etc., and is not to cut any trees, nor to put any cattle on the premises, and is to have the corn in the barn, etc., and to avoid it so soon as he can; the lands are in mortgage to Colstock for £400, and the plaintiff is to pay for the writings. Soon after this agreement the plaintiff puts in his cattle and makes encroachment on the defendant Butcher's other lands; thereupon the defendant to prevent differences desires the plaintiff to repeal the bargain, which he refusing, the defendant told him he should not have the bargain, and advised him not to procure any moneys to pay for it, and drove the plaintiff's cattle off the ground, and soon after sold the lands to the defendant Stapely for £740, and the 3d February, 1682, sealed articles for that purpose, and a bond of £1,000 to perform the same. The 26th March, 1683, the plaintiff tendered his purchase-money and writings to seal, which the defendant refused, and the 28th of the same month Stapely paid Butcher £240 and took a conveyance of the estate free from incumbrances, except a mortgage; and in June after paid off the mortgage, and took an assignment of it to a friend of his own.

The bill was to have the bargain and agreement between the plaintiff and defendant Butcher decreed, and charged Stapely with notice of

that agreement before his purchase, which Stapely and Butcher denied by answer; nor was there any direct proof of notice, save that some neighbors in discourse did say, they had heard the defendant Butcher had sold the estate to the plaintiff.

For the defendant Stapely it was insisted, that there was no sufficient proof of notice of the plaintiff's agreement, and that if there was notice, yet the agreement was not perfect nor binding by the act against Frauds and Perjuries, it not being signed.

The LORD CHANCELLOR declared, that inasmuch as possession was delivered according to the agreement, he took the bargain to be executed, and that Stapely had notice of it, and that it was a contrivance between the defendants to avoid the bargain; and therefore decreed the defendant Stapely's bargain to be set aside, and that Stapely should execute a conveyance to the plaintiff upon payment of £700 and interest, and the defendant Stapely to procure a conveyance from his trustee the assignee of the mortgage.

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VISCOUNTESS MONTACUTE v. SIR GEORGE MAXWELL.

IN CHANCERY, BEFORE LORD PARKER, C., EASTER TERM, 1720.

[*Reported in 1 Peere Williams 618.*]

THE plaintiff brought a bill against the defendant her husband, setting forth that the defendant before her intermarriage with him did promise that she should enjoy all her own estate to her separate use, that he had agreed to execute writings to that purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there it might shame him: but engaged that upon his honor she should have the same advantage of the agreement, as if it were in writing drawn in form by counsel and executed; upon which the marriage took effect, and afterwards the plaintiff wrote a letter to the defendant her husband, putting him in mind of his promise, to which the defendant her husband wrote her an answer under his hand, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command.

To this bill the defendant pleaded the Statute of Frauds and Perjuries by which "all promises in consideration of marriage, unless signed in writing by the party, are made void"; and averred that he never signed any promise or agreement before marriage for her enjoying any part of

her estate separately, which he pleaded in bar of any relief or discovery.

It was urged against the plea, that this promise was on the plaintiff's side executed by her intermarriage; and therefore like the several cases in which equity did relieve, and compel a mutual execution; that the letter written by the defendant, though after marriage, was an evidence under his hand of the agreement before the marriage, and so took it out of the statute.

On the other side it was said, that the express words of the statute made all such promises in consideration of marriage void, unless they were in writing signed by the parties; and that there was the greatest reason for it, since in no case could there be supposed so many unguarded expressions and promises used, as in addresses in order to marriage, where many passages of gallantry usually occur, and it was therefore provided by the statute, that all promises made in consideration of marriage should be void unless signed by the party. That it was very wrong to call marriage the execution of the promise, when until the marriage it was not within the statute; and the statute makes the promise in consideration of marriage void; therefore to say that the marriage was an execution which should render the promise good, was quite frustrating the statute; which the court took notice of and approved.

LORD CHANCELLOR. In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word or promise of the defendant, the statute making those promises void, equity will not interfere; nor were the instructions given to counsel for preparing the writings material, since after they were drawn and engrossed, the parties might refuse to execute them, and as to the latter, it consists only of general expressions; as "that the estate should be at the plaintiff's command or at her service"; indeed, had it recited or mentioned the former agreement and promised the performance thereof, it had been material. But as this case is circumstanced, allow the plea.

Also this plea being in bar of a discovery as to all matters, which if discovered and admitted might be barred by the statute, so far may the statute be pleaded in bar of such discovery.



## GUNTER v. HALSEY.

IN CHANCERY, BEFORE LORD HARDWICKE, C., TRINITY TERM, 1739.

[*Reported in Ambler 586.*]

THIS bill was brought for a specific performance of an agreement for sale of lands and houses, which was by parol, but reduced into writing by a person present, but never signed by the parties.

The defendant insisted on the Statute of Frauds; and there was evidence of facts to prove a part performance.

LORD CHANCELLOR, in this case, said the rule for agreements, by the statute, was very plain; but that since the statute, this court has, by construction, laid down some rules by way of exception to it; and will in some cases decree a performance, though the requisites of the statute are not observed.

As where the agreement is parol, and admitted by the answer, because here it is out of the mischief of the statute,<sup>1</sup> so when there has been material acts done in part performance.

But the general rule of those cases has been, where the acts have been such as would be a prejudice to the party who has done them, if after that the agreement was to be void.

And in all those cases where the ground of the decree has been part performance, the terms of the agreement must be certainly proved.

Then he went into the particular circumstances of this case, and as to certainty of agreement he thought it was not certainly proved, by reason there were queries in the margin, though no proof who made them.

As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement; and said, in this case it did not appear but that the acts done by defendant might be done with other views.

<sup>1</sup> Such an admission binds, of course, the heirs or personal representatives. —Pomeroy, Sp. Per. Con. § 141.

The defendant may, however, avail himself of the statute, notwithstanding the admission, if he relies thereon in his answer. —*Ibid.* —ED.

## WILLS v. STRADLING.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., MAY 24, 1797.

[Reported in 3 Vesey 378.]

THE bill stated the following case :

The plaintiff was lessee of a farm for seven years at the rent of £34 a year under the defendant, the widow of the lessor, under whose will she is entitled to the premises during her widowhood. The lease being to expire in 1794, the plaintiff in June, 1793, being desirous of making some improvements upon the premises, which would be attended with a very considerable expense, applied for a new lease for the term of 14 years. The defendant agreed to grant a lease for the said term, if she should so long live and continue a widow, at the rent of £36 a year; and immediately, or very shortly after the agreement, the plaintiff, upon the faith of the agreement and in confidence, that he should enjoy for the 14 years under the agreement, began to make improvements, and hath laid out a great deal of money upon the premises. The plaintiff continued in possession after the expiration of the former lease, and paid the increased rent, for which the defendant gave him receipts.

The bill prayed a specific performance of the agreement.

The defendant pleaded the Statute of Frauds, with an averment, that there was no agreement in writing.

*Mr. Romilly* for the plaintiff.

*Solicitor General* and *Mr. Short* for the defendant.

LORD CHANCELLOR. In *Whaley v. Bagenal* there were a vast many circumstances of conduct and behavior upon the supposition of an agreement; but none that amounted to part performance. One strong circumstance was, the vendor setting up that purchase, which he afterwards denied, as a defense against an *Elegit*.

Though in general I feel a very strong inclination to support the Statute of Frauds and to give the party the benefit of it by way of plea, I think I must in this case call upon the defendant to make an answer to one part of the bill. Three grounds are stated: Possession by the plaintiff, which he refers to the agreement; payment of an increased rent, which he also refers to the agreement, and the circumstance stated of considerable sums of money having been laid upon the improvement of the farm. As to the first ground, the possession, in the case of a tenant, who of course continues in possession, unless he has notice to quit, the mere fact of his continuance in possession (which is all the plea can admit, for *quo animo* he continued in possession is not a subject of admission) would not weigh. The delivery of possession by a person having possession to the person claiming under the agreement is

a strong and marked circumstance; but the mere holding over by the tenant, which he will do of course, if he has no notice to quit, would not of itself take the case out of the statute or even call for an answer. As to the money laid out, I feel the distinction pressed by the Solicitor General very strongly; that if it was part of the contract that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord), it is very strong to take it out of the statute. But the circumstance, which I think distinguishes this case, is the payment of the additional rent. Payment of additional rent *per se* is an equivocal circumstance, it is true. It may be that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the defendant to say whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence; it would be a good lease for three years, and would defend the tenant against an ejectment brought within the first three years. *Charlewood v. The Duke of Bedford*, which finally turned upon the want of authority in the steward, is an authority, upon which under the circumstances alleged in this bill the benefit of the plea ought to be saved to the hearing. Let the plea stand for an answer, with liberty to except.

As to the danger mentioned by the Solicitor General, and which I a little anticipated, if the defendant admits the agreement, as stated in the bill, there can be no danger; if he does not admit the agreement, as stated, it will come to be a very material question, whether I should permit that agreement to be substantiated by any parol evidence.

## CLINAN v. COOKE.

IN CHANCERY, BEFORE LORD REDESDALE, C., DECEMBER 8, 9, 13, 14,  
1802.

[*Reported in 1 Schoales and Lefroy 22.*]

THE bill was filed by two persons named Clinan, against Cooke and Cahill; and prayed a specific performance of an agreement for a lease of three lives of the lands mentioned, entered into between the Clinans and Cooke, and in case it should appear by Mr. Cooke's answer that he had put it out of his power to make a lease pursuant to the agreement, the bill prayed that he should be decreed to make compensation to the plaintiffs.

In the year 1798, Mr. Cooke caused an advertisement to be inserted in the public papers in the following words: "To be let for three lives or thirty-one years from the first day of May next, the lands of Purcell's Garden, containing, etc. (then followed a description of the lands): Application to be made to William Cooke, Esq., or Edmund Meagher of, etc., dated October 23, 1798." In consequence of this advertisement the plaintiffs applied to Meagher, and entered into a treaty with him for a lease of the lands, and on the 15th of February, 1799, the following article was executed: "Memorandum of an agreement concluded by and between William Cooke, Esq., of, etc., and Patrick Clinan and Michael Clinan, both of, etc., hath demised set and to farm let unto the said P. and M. Clinan all that and those that part of the lands of Purcell's Garden, now in the possession of Michael and Martin Cahill, containing, etc., at the yearly rent of two guineas per annum for the first year commencing from the first of May next, and £2 8s. annually for the remainder of the term; the said William Cooke is to give the said P. and M. peaceable possession, in case the said Michael and Martin Cahill dispute giving the possession, according to a notice served them in writing, on the first day of May next; otherwise the said P. and M. Clinan are to have lawful interest on the money they deposited; which sum a receipt specifies; same leases to be perfected at the requisition of either party.

"Given under our hands and seals this 25th day of February, 1799.

"Attested by two witnesses.

"E. MEAGHER. [SEAL.]

"P. CLINAN." [SEAL.]

The money alluded to in the memorandum was the sum of fifty guineas which Cooke had received from the plaintiffs in consideration of the lease, at the recommendation of Meagher, who also appeared to

have received a sum of twenty guineas from the plaintiffs for which no receipt was given. The plaintiffs had prepared and tendered a lease for three lives ; Mr. Cooke, however, refused to perform the agreement, and in May, 1709, granted a new term of the lands to the defendants, the Cahills, who knew of the agreement made with the plaintiffs. The bill alleged that Meagher was a general agent for Mr. Cooke, and as such was authorized to let the lands for him ; to this fact there was no evidence ; but the answer of Cooke admitted that he had caused the advertisement to be inserted and referred to it, and believed the lands were advertised to be set for three lives or thirty-one years, that being the limits of his power of demising under his marriage settlement ; it admitted that there was a reference to Meagher in the advertisement, but denied that he did either by power of attorney or by any other means authorize Meagher to set the lands ; but that he had a great reliance on the honesty of Meagher, that he would not impose on him ; and then it stated a conversation with Meagher concerning the proposal of the plaintiffs, and that Meagher knowing the defendant had some occasion for some ready money advised him to accept the fifty guineas which as he told him the plaintiffs had offered ; and admitted that he did accept the money and did thereupon order and direct Meagher to go to the defendants, the Cahills, and to the plaintiffs, and if he was satisfied that he could give peaceable possession with the concurrence of the Cahills, that then the plaintiffs should have said lands agreeable to their proposal, but not otherwise ; and that Meagher without being satisfied on that subject entered into the agreement stated. It appeared that shortly before the bill was filed, Cooke tendered the fifty guineas to the plaintiffs, who refused to accept it. As to the term, the answer did not state whether Mr. Cooke considered the proposal as a proposal for three lives or thirty-one years, but said that the parties were mutually to determine whether it should be for three lives or thirty-one years. Parol evidence was offered also, that the defendant acknowledged Meagher as his agent and said he would abide by his bargains, and referred persons to him on matters respecting the lands.

*Mr. O'Grady, Mr. J. Ball and Mr. C. Ball* for the plaintiff.

*Mr. Burston, Mr. Plunket, Mr. Lockington and Mr. Bushe* for the defendant.

LORD CHANCELLOR. Under these circumstances if it be not possible to make this a case of part performance it is impossible to make such a decree as is sought by the plaintiff.<sup>1</sup>

I should have great difficulty if there were evidence of a part performance. I must have directed a further inquiry, for the party has not

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

suggested by his bill that the agreement was for three lives, or for any specific time, and the case stands, both on the pleadings and evidence, imperfect on that head. As to the fact that leases were tendered to Mr. Cooke and what passed on that occasion, it is not said that he had read them, or that he knew the contents; and at most it amounts only to evidence of this, that if he found the leases not improper, and that the Cahills would give up possession, he agreed to execute them.

But I think this is not a case in which part performance appears; the only circumstance that can be considered as amounting to part performance is the payment of the sum of fifty guineas to Mr. Cooke. Now, it has always been considered that the payment of money is not to be deemed part performance to take a case out of the statute. *Seagood v. Meale*, Prec. Chan. 560, is the leading case on that subject; there a guinea was paid by way of earnest; and it was agreed clearly that that was of no consequence, in case of an agreement touching lands; now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part payment, and no distinction can be drawn; but the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said<sup>1</sup> that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands.

But I take another reason also to prevail on the subject. I take it that nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lister*;<sup>2</sup> there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to account for the rents and profits, and why? because he entered in pursuance of an agreement. Then for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded, in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it therefore that

<sup>1</sup> Sect. 13.

<sup>2</sup> Cited, Prec. Ch. 519; 2 Vern. 456; *vid.* Colles's Parl. C. 108.

nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance, for it may be repaid; and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Foxcraft v. Lister*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent.

On this ground therefore I think this is not a case in which I can consider that there is a part performance to warrant my decreeing performance of an agreement, the terms of which are left thus imperfect, and must be supplied by parol evidence, which would be contrary to the statute; there is no sufficient ground to consider this case out of the statute, and I am of opinion that the bill must be dismissed.<sup>1</sup>

<sup>1</sup> Littleton's Tenures were composed in 1475 and printed in 1481; but the common mode of conveying lands had long been by livery of seisin, that is, by going upon the land and in the presence of the neighbors called together as witnesses with apt words to designate the form of the gift making livery of seisin, visible transfer, actual investiture in the donee of the ownership of a freehold estate (in strictness an estate of inheritance) in the land by a delivery of the actual possession of the land itself, accompanied generally by the deed or charter of feoffment; not, however, as the efficient or as a necessary part of the gift, but only as a certain and lasting memorial of what had been done. It was a transfer of ownership of land effected and evidenced by a delivery of possession; and a delivery of possession of goods chattels is to this day the transfer and the evidence of the transfer of the ownership to the buyer. Without such livery of seisin, transfer of ownership by such solemn delivery of possession, the gift would be in one sense but a mere naked executory promise, yet the possession itself is regarded and protected as a species of property. A feoffment, considered simply and solely, is the livery of the seisin. (Challis, Real Prop. 321.) It was the only common-law assurance (not being matter of record, as a fine or recovery) by which legal estates of freehold in possession could be conveyed to a person having no subsisting interest in the land, and no privity with the person making the assurance. (*Id.*)

It has long been our statute law that "all real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery" (Code c. 71, s. 4); and that "no estate of inheritance or freehold, or for a term of more than five years in lands, shall be conveyed, unless by deed or will" (Code c. 71, s. 1), and such deed must now be signed as well as sealed and delivered.

Although such livery of seisin may have been generally followed by the continuous holding of actual possession, in the modern sense, on the part of the donee by himself or by his tenant, yet it was not necessary to its validity; and his seisin continued until disseisin. Still the livery of seisin operated as an estoppel *in pais* against the donor (Co. Litt. 352a; 1 Gilb. Ev. 76) for it was a ceremony had on the land itself, which put in the strongest light and with the greatest notoriety an owner who had title by visible dominion, transferring to

## FRAME v. DAWSON.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M.R., NOVEMBER 19,  
1807.

[Reported in 14 Vesey 386.]

THE bill stated, that the plaintiff, possessed of a house for a term of thirty-one years from Christmas, 1800, at the yearly rent of £35, with the usual covenant, among others, for repairing and keeping in repair, etc., having, in 1803, employed a builder to repair the house, the party-wall was discovered to be in a very ruinous state. The

and vesting in the donee such title by visible dominion, making livery of seisin of the ownership of a freehold estate held by the title of such visible dominion, by means of a transfer of the possession of the land itself, which had the effect of investing the donee with such ownership, so created, and evidenced by such title. (See Roberts, Frauds, 261 *et seq.*)

But, as time went on, sales of real estate became frequent, and livery of seisin quite common. Under a great change of circumstances relaxations of the ancient form followed, until there scarcely remained a vestige of the original ceremony. (Browne, Stat. Frauds, 4th Ed., 4.) The use of the old solemnities before the men of the country had ceased by allowing secret liveries in the presence of any two witnesses. (1 Gilb. Ev. 76.) The customary deed or charter of feoffment, as we have seen, was never indispensable; and down to the time of the Statute of Frauds (24th June, 1677) the ownership of a freehold estate in land could be transferred by livery of seisin, loose and informal as that ceremony had become; and consequently great danger was incurred of such transfers being attempted to be proved by false and fraudulent means." (*Id.*)

Then came the troublous times, the confusion of rights and possessions incident to the commonwealth and the restoration. The English Statute of Frauds and Perjuries (29 Car. II. c. 3) was enacted in 1676 by its terms to take effect from and after the 24th day of June, 1677. The first two lines contain the motive of the enactment, the mischief to be suppressed: "For prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury be it enacted," etc. It did not become the law of Virginia until it was substantially re-enacted by the legislature of the State on the 30th day of November, 1785. (See 1 Rev. Code 1819, p. 372.)

The first charter of Virginia was granted on the 10th day of April, 1606, the fourth year of James I., and it is only English statutes in force before that date that were saved as operative without special enactment. (Code, c. 13, s. 6.) It passed through the various revisals of 1819, 1849 and 1868 with slight verbal changes. The first part is now found as section 1 of chapter 71, and the fourth section of chapter 98. (See Code, p. 715.) Actual possession was still *prima facie* evidence of ownership in fee, and it was not the purpose of the statute to weaken or disparage it, or to dispense with the delivery of possession in many cases, but to provide a certain and stable memorial of the transaction; in other words, making the deed of feoffment, or some writing signed by the parties, essential to the creation of the estates mentioned.

It is said that "even before the Statute of Frauds equity would not execute a



plaintiff upon that discovery applied to the defendant, to whom, as purchaser of the premises, he had attorned; requesting that the defendant would either contribute to the repairs, or make some abatement in the rent. The defendant refused to do either, but promised in consideration of the plaintiff's repairing the party-wall to grant him a farther term of ten years. Upon the faith of that promise the

mere parol agreement not in part performed." (Sugd. Vend. 14th Eng., 8th Am. Ed., top. p. 230.) For a review of the English cases beginning with the statute, see Roberts, Frauds (3d Am. Ed.), 1833, 130 *et seq.*; 2 Com. Dig. 484. In such cases, for example, where the purchase-money had been paid, and the possession had been given and taken in part performance of a verbal contract clearly proved, the contract was fully executed on the part of the purchaser, and substantially executed on the part of the vendor. It only needed some certain and stable memorial to make it in every sense complete. Such as would have existed had there been a formal livery of seisin and deed of feoffment. Such cases were soon after the statute hardly considered within its meaning and did not need to be taken out of it, but were put on the ground of estoppel against the perpetration of a fraud. In *Butcher v. Stapley* (1 Vern. 363), decided in 1685, "The Lord Chancellor declared that, inasmuch as possession was delivered according to the agreement, he took the bargain to be executed"; and the doctrine was rested upon the ground that the vendor was in such case estopped from the perpetration of a fraud under cover of the statute by conveying to another or refusing to complete the sale of the land.

The importance at common-law, as well as natural significance of that kind of part performance, was never lost sight of, and so it remains to this day; for it is easy to find non-relievable cases, in which the whole or a good part of the purchase-money has been paid, but possession has not been taken, in which the vendor taking shelter behind the statute perpetrates a more serious fraud than would result from the purchaser having to return the possession. Therefore the general doctrine would seem to rest upon estoppel against committing a fraud, where the part performance is such as makes a visible transfer of the ownership pointing unmistakably to some contract, as well as to the vital point of its execution in the transfer of the possession of the land, the value of which generally consists in its use and enjoyment, and which puts the purchaser in the position of *prima facie* owner, and being notice of his claim to all subsequent purchasers. (See Roberts, Frauds, preface, p. 261 *et seq.*; Browne, St. Frauds § 467 *et seq.*; Pom. Cont. § 104 *et seq.*; Fry, Spec. Perf. § 384; Wat. Spec. Perf. § 257 *et seq.*; 2 Story, Eq. Jur., 13th Ed., § 764; Brett's Lead. Cas. 134; Beach, Mod. Eq. Jur. § 613; Bisp. Eq. § 385; 8 Am. and Eng. Enc. Law, 737; 22 Am. and Eng. Enc. Law, 975).

I confess I do not appreciate the importance of insisting on the distinction between the purchaser taking and the vendor delivering the possession, for, to be efficient, it must be their conjoint act. The vendor cannot effectively deliver the possession unless the purchaser accepts it, and the purchaser cannot effectively take it without the knowledge and consent of the vendor. It is the conjoint act—the giving and taking in part performance—that makes it so important a factor in the transaction; and, but for the authorities, which insist on treating it from the standpoint of part performance on the part of the plaintiff,

plaintiff proceeded, and laid out £460, being obliged to rebuild a great part of the wall. The bill therefore prayed, that the defendant may be decreed specifically to perform his agreement to grant an extension of the lease for ten years.

The defendant by his answer admitted, that upon the plaintiff's request, that he would contribute something to the expense of rebuilding or repairing the party-wall, the defendant said, that if the plaintiff should be obliged to pull down the wall, and rebuild it, he might be induced to grant a farther term of ten years; but denied that he made any absolute promise or agreement, and insisted upon the Statute of Frauds.

I should think it just as significant and appropriate to the relief sought, and less strained and artificial, for the purchaser in many cases to allege that in part performance the vendor delivered to him the possession, than to allege that he took possession in part performance. In truth it is the giving as well as the taking that gives the act in part performance of a sale, in view of its character and significance, so much importance. The case of *Butcher v. Stapley*, cited above, treats the act of part performance which creates the equity as the possession delivered by the defendant-vendor to the plaintiff, the purchaser; that is, the purchaser has been put by the vendor into the possession of the land, and the purchaser has fully or in good part performed the contract on his part by payment of all or a part of the purchase-money, which condition of affairs makes it against conscience in the vendor to insist on the want of a writing (so signed) as a bar to his relief. (See *Clinan v. Cook*, 1 Sch. and Lf. 22, 41; *Bond v. Hopkins*, *Id.* 433.)

Suppose a verbal contract, certain and definite in all its terms, is proved or admitted, the purchaser has paid all the purchase-money, and the vendor, in part performance, has put the purchaser in actual possession, and is to convey the property as soon as it can be conveniently done, but afterwards declines to do so, and relies upon the Statute of Frauds. The payment of the purchase-money was full performance on the part of the purchaser. It was all he had to do. The delivery of the possession and the conveyance were the things to be performed by the vendor. He performs it in part—that is, he puts the purchaser in possession—but there stops relying on the statute.

Equity treats such conduct as against conscience as a fraud, and applies to him the doctrine of equitable estoppel. He is estopped by his own conduct, by receiving the purchase-money and delivering the possession, from refusing to complete it; and the fraud cannot be compensated in damages, because it is a refusal by the vendor to complete a sale of a specific tract of land. The transfer of possession is the historical as well as natural mode, and, in any event, the usual concomitant of the transfer of the ownership, as well as of personal property, for the plain reason that it gives the vendee power and dominion over it, and is visible evidence of a right. He is *prima facie* owner in fee against all persons except the vendor, supposed to be the former true owner. He is not required to show how he came by such possession. And, when such demand of the former owner is made in a court of equity, he meets it by showing that he was put there by the demandant himself in part execution of a definite and certain contract of sale voidable, it is true, because verbal, but none the less prov-

Parol evidence was produced on both sides, proving the respective allegations in the bill and answer.

*Mr. Fonblanque* for the plaintiff.

*Sir Samuel Romilly, Mr. Thomson and Mr. Raynsford* for the defendant.

THE MASTER OF THE ROLLS. It is admitted, that supposing an agreement ever so clearly proved, yet, as a parol agreement, the plaintiff is not entitled to have it executed. It is necessary therefore to

able for the occasion ; and thus the vendee has justified as well as explained his attitude in relation to the land.

1. It was not necessary for him to sign any writing, even had there been one. He may have fully performed the contract on his part by payment of all the purchase-money. In any event he must complete the payment as a condition precedent to the vendor's conveyance.

2. The vendor partly performed his part of the contract by delivery of possession or consenting to the vendee's taking it, which for this purpose is the same thing. The act is conjoint, no matter from what standpoint we view it.

3. It was therefore no longer a mere executory contract (a chose in action against the vendor), but had created, as distinguished from it, a right of property in the land which the law recognizes and protects (some sort of equitable right or interest in a particular tract of land) ; and the vendee was also apparent owner, at least ; and in pursuance of the contract, as distinguished from its part execution by the vendor, the vendee may have made improvements.

4. Having gone thus far, it would be a fraud on the part of the vendor to repudiate the verbal contract, or stop short of its complete execution.

5. And the injury resulting from such fraud is not compensable in damages, because it is a sale of a particular tract of land.

6. It is not within the mischief of the statute, because, from the visible nature of such part performance by delivery of possession of such a thing as land, it points unequivocally to some contract ; and the certain and definite verbal contract, clearly proved, shows it to be a contract of sale (or lease).

7. Therefore the doctrine of equitable estoppel applies, defensive in its nature, it is true ; but to be available at all, must be asserted affirmatively.

8. The vendor has so dealt with the vendee in making the verbal contract, receiving all or a part of the purchase-money, in putting the vendee in actual possession of the land in part execution on his part of such contract of sale, that it would be a fraud for him to repudiate it, and stop short of its complete execution. This fraud a court of equity will not sanction, but will affirmatively, actively prevent, decreeing completion of the contract, none of the other essentials to specific performance being wanting, and no effectual matter in rebuttal being set up or proved. Our cases on the subject of part performance of verbal contracts for the sale of land have been quite numerous. In *Gallagher v. Gallagher* (31 W. Va. 9, 5 S. E. Rep. 297), Judge Snyder has clearly and accurately summed up the doctrine, and placed it on its true foundation of estoppel against the commission of a fraud by the vendor, such estoppel to be affirmatively enforced in a court of equity in favor of the vendee. (See, also, 2 Minor, Inst. 854 ; *Wright v. Pucket*, 22 Gratt. 370.)—Holt, J., *Miller v. Lorentz*, 39 W. Va. 160, 165.—ED.

show a part performance ; that is, an act, unequivocally referring to and resulting from the agreement ; and such that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement. But that is not the nature of the act in this case. First, it is equivocal. Secondly, it is such as easily admits of compensation, without executing the agreement. This is not an unequivocal act ; for it would have taken place equally, if there had been no agreement. The principle of the cases is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement ; and then parol evidence is admitted, to show what the agreement is. But this act would not infer the existence of any agreement, as it must have been done by the party either at his own or the landlord's expense. Then is there such injury as cannot easily be repaired in any other way than by executing the agreement ? No, for the money which he has expended, he may recover from the landlord, if it was by the landlord that the expense was to be borne. The circumstance that the party may be obliged to resort to an action to get back his money is no reason for taking the case out of the statute.

Lord Redesdale, in a case before him, states his opinion that payment of money is not a part performance ; yet there the act can hardly be said to be equivocal in its nature, as the payment of a price presupposes a sale ; but the money may be repaid, and the parties are restored to their former situation. This case is stronger ; for the expenditure does not imply a precedent agreement.

Suppose my tenant should set up an agreement for a purchase, and get a witness to swear to it, and then offer as evidence of part performance his possession and cultivation of the land ; could that be deemed an act of part performance, which would have existed precisely in the same shape, whether there was any agreement for a purchase or not ?

The bill was dismissed.

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NUNN v. FABIAN.

IN CHANCERY, BEFORE LORD CRANWORTH, C., NOVEMBER 2, 3, 9,  
1865.

[*Reported in Law Reports, 1 Chancery Appeals 35.*]

THE bill in this case was filed for the specific performance of an agreement to grant a lease of two houses at Brighton. The facts were as follows :

In May, 1862, Edward Bruton, since deceased, was seized of two

houses, Nos. 59 and 60 Western road, Brighton, and a house in Castle Street, at the back of them. The plaintiff, John Nunn, was the occupier of No. 60 Western road, and of part of the house in Castle Street, as yearly tenant, at the rent of £65, and George Wymark was the occupier of No. 59 Western road and the rest of the house in Castle Street, as yearly tenant, at a rent of £50.

The plaintiff alleged that in that month negotiations took place between himself and his landlord respecting a grant to him of a lease of the whole of the premises, and that Bruton offered to grant a lease of the three houses for twenty-one years at a gross rent of £130, with the option of purchasing the freehold for £2,500, either at once or within a limited period. No memorandum in writing of this offer appears to have been made, but on the 27th of May the plaintiff sent to Mr. Bruton the following letter :

"DEAR SIR:—I am sorry that I have not given you an answer before ; but in consequence of my not being able to decide as soon as I had promised to do to my friend, she thought I had given the matter up, and accordingly put it into another channel. Since then I have been waiting for an answer from her, which I have now got, stating that she has let another party have the money. Therefore I will take the lease for twenty-one years, with a clause to purchase at the terms given ; the period to extend as long as you can."

The plaintiff also alleged that it was verbally agreed at the same time that, in consideration of the grant of the lease, the plaintiff should make certain alterations in the house No. 60 Western road ; but the particulars of such alterations were not shown by the evidence.

On the receipt of this letter Bruton called upon his solicitor, Mr. George Faithfull (who had since died), and showed him the letter, and at the same time gave him instructions to prepare the draft of a lease. Mr. Faithfull wrote on the back of the plaintiff's letter the following memorandum, which was produced, and proved to be in Mr. Faithfull's handwriting :

"Nunn is a confectioner. Nos. 59 and 60 Western road and No. 1 Castle Street. Rent £130, payable quarterly. Term 21 years, from 24th of June. Purchase in 10 years. Price, £2,500. No. 59, and the back portion of No. 1 Castle Street, is occupied by Mr. Wymark, at a rent of £50, payable quarterly, as yearly tenant. The rest is in Nunn's occupation. In case of fire the landlord to rebuild."

Then followed a memorandum of Bruton's title to the freehold.

Mr. Faithfull accordingly prepared the draft of a lease on the terms mentioned in the memorandum, and on the 24th of June the plaintiff accompanied Bruton to Mr. Faithfull's office, when the draft lease, which was in the handwriting of Mr. Faithfull's clerk, was read to him,

and, after some alterations were made in it, the principal of which was the extension of the period allowed for purchasing the freehold from ten to fourteen years, it was approved by all parties, and Mr. Faithfull was directed to have the lease engrossed for execution.

In the meantime the plaintiff laid out a considerable sum of money, amounting to more than £100, in putting a new shop front and making other alterations in No. 60 Western road; and he stated that Bruton occasionally inspected the work, and approved it, while it was in progress.

On the 14th of January, 1863, the plaintiff paid Bruton £20 as the balance of the quarter's rent due at Michaelmas, 1862. Wymark had previously paid Bruton £12 10s. for the quarter's rent on his holding, which, with the £20 paid by the plaintiff, made up £32 10s., being the amount of a quarter's rent of the whole premises at the rate of £130 a year according to the terms of the proposed lease. The receipt given by Bruton was in the following terms:

“Received the 14th day of January, 1863, of Mr. J. Nunn, the sum of £20 for balance of rent due 29th of September last, for 60 Western road, Brighton.  
“E. BRUTON.”

The lease was engrossed, and several appointments were made to execute it, which failed in consequence of Bruton's engagements; and on the 16th of January Bruton made an appointment with the plaintiff to meet him at Mr. Faithfull's on the following day; but on the afternoon of the same day Bruton died suddenly.

By his will he gave the residue of his real and personal estate (including the houses in question) to the defendants upon trust to sell, and appointed them his executors. They proved the will on the 12th of March, 1863.

The defendants refused to execute a lease to the plaintiff. In October, 1863, they advertised the property for sale, but withdrew it on the receipt of a notice from the plaintiff.

In December, 1863, they again advertised the houses for sale without regarding the claim of the plaintiff, and he accordingly filed the present bill on the 23d of January, 1864, praying for specific performance of the agreement for a lease and an injunction to restrain the sale.

The defendants by their answers relied upon the Statute of Frauds; and they also insisted that the plaintiff had been guilty of laches in enforcing his rights. The plaintiff contended that the agreement had been partly performed, relying on the alterations which he had made in the house, and the payment of rent on the footing of the new agreement. The Master of the Rolls dismissed the bill, thinking that there was considerable difficulty with respect to the terms of the parol agree-

ment, having regard to the circumstance that the lease, as engrossed, was silent as to the alterations in the house. From this decision the plaintiff appealed.

*Mr. Baggallay*, Q.C., and *Mr. H. F. Bristowe* for the plaintiff.

*Mr. Selwyn*, Q.C., and *Mr. Speed* for the defendants.

Nov. 9. LORD CRANWORTH, L.C. This is a bill for the specific performance of an agreement for a lease for twenty-one years. The agreement was by parol, but the plaintiff seeks to avoid the Statute of Frauds by an allegation of part performance. Now, I should yield to no judge of a court of equity in my desire to refrain from extending the cases in which the court gets over the Statute of Frauds; but there being an established rule on this subject, a judge ought not to depart from it. The court is bound to consider, first, whether there was a parol agreement; and secondly, if so, whether there has been a part performance of it; and then, if there has been part performance, it is the duty of the court to act upon the established principle, and to decree performance of the contract.

[His Lordship then shortly stated the facts of the case as given above, and continued:] The question, therefore, is whether there was an agreement for a lease, the terms of which were settled by parol before the death of Bruton; and if so, whether there has been part performance of such agreement.

The plaintiff's case is, that the agreement was made in the previous spring, although the lease was not settled till December. This is sworn to by the plaintiff; but I agree with the Master of the Rolls, that in such a case the facts must be watched carefully to see what confirmation there is of the plaintiff's assertion. And in looking through the evidence with this view, the court is particularly careful to see if there are any documents which confirm it. Now, I think that in this case there are two very important documents: the first is the letter from the plaintiff to Bruton, of the 27th May, 1862, in which the plaintiff replies to a previous offer by Bruton, and says that he agrees to take a lease for twenty-one years, with an option of purchasing the freehold. At that time all that had been agreed upon was that there should be a lease for twenty-one years and an option of purchasing the freehold at a period not yet determined. This letter was submitted by Bruton to his solicitor, Mr. Faithfull, and that gentleman wrote on the back of it the following memorandum. [His Lordship then read the memorandum as set forth above.]

We have, therefore, the statement by the plaintiff of a parol agreement, confirmed by showing that he replied in writing to his landlord's offer, and that his letter was referred to the landlord's solicitor, who

wrote such notes upon it as a solicitor would naturally do if an agreement had been really entered into.

In conformity with this we find the draft of a lease in the handwriting of a clerk of Mr. Faithfull, with a stipulation in it that the tenant was to have the option of purchasing within ten years, which agrees with Mr. Faithfull's indorsement. The plaintiff says, in his affidavit, that a meeting took place to settle the draft lease on the 24th of June; that some alterations were made in the handwriting of Mr. Faithfull, and that the alterations were principally verbal, except that the period of ten years was extended to fourteen years. This being so, nothing remained but that the lease should be engrossed and executed. The plaintiff says that Bruton told him that he expected him to make some alterations in the house—what they were to be does not appear; but, in fact, he laid out more than £100 in altering the shop-front, which he says was done under the eye, and with the sanction, of his landlord; and he relies on this expenditure as part performance of the contract.

Now, I do not think we can exactly call this part performance. The parol agreement was embodied in the lease, which is silent about the alterations. But although it was not part performance, it is important as showing that there was an agreement for a lease. No yearly tenant would have spent that amount of money in improving the front of his house without some such agreement as is here alleged. It is certainly evidence that there was some agreement; I am not sure that even beyond this the fact of a landlord standing by and seeing his tenant laying out money on the faith of a promise of a lease, might not raise an equity, though not in a strict sense part performance, by analogy to the equity which arises in the case of a person standing by and seeing his neighbor spending money on his land.<sup>1</sup>

But here I am not driven to rely on this evidence, because I think that there was clear part performance by payment of the Michaelmas rent at the increased rate fixed by the agreement. The facts were these: According to the agreement a quarter's rent would be £32 10s. Wymark held one of the houses at an annual rent of £50; if the lease had been granted he would have had to pay £12 10s. to the plaintiff, and the plaintiff would have had to pay £32 10s. to Bruton. But Wymark paid his quarter's rent, £12 10s. to Bruton, leaving £20 to be paid by the plaintiff, and the plaintiff did, in fact, pay £20.

It was, indeed, suggested that the £20 may have been paid by the plaintiff, by reason of the increased value of his own house; but this is inconsistent with the form of the receipt, in which the payment is expressed to be the "balance" of the quarter's rent. Now, the rent had been all paid up to the 24th of June, 1863, and, therefore, there was

<sup>1</sup>Gregory v. Mighell, 18 Ves. 328.



nothing to which the word "balance" could apply except the payment by Wymark of his share of the rent. I think, therefore, that this payment is strongly corroborative of the agreement as alleged. It is true that Wymark paid the rent to Bruton and not to the plaintiff. But that was a mere difference of form; substantially, the payment carried into effect the rights of the parties according to the terms of the lease.

I therefore differ from the Master of the Rolls in his view of this case; I think there is a parol agreement clearly proved, and part performance to take it out of the Statute of Frauds.

It is, however, urged that the plaintiff has been guilty of what amounts to laches, because Bruton died in January, 1863, and the bill was not filed till January, 1864. But the question of laches must depend on the special circumstances of each case, and I think that here the delay has been very venial. The plaintiff was in possession and paid his rent, and the devisees, although they refused specifically to perform the agreement, did nothing to disturb his possession until the attempted sale in October, 1863.

On the whole, therefore, I think that the plaintiff is entitled to a decree for specific performance; but I shall give no costs either in the court below or of the appeal, on account of the plaintiff not having taken proceedings sooner.

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### CATON v. CATON.

IN CHANCERY, BEFORE LORD CRANWORTH, C., DECEMBER 4, 7, 8,  
1865; JANUARY 12, 1866.

[*Reported in Law Reports, 1 Chancery Appeals 137.*]

THE facts of this case, as stated by the bill, are as follows:

In the autumn of the year 1852, the Rev. R. B. Caton, who was then a widower, aged about eighty, and of good fortune, made proposals of marriage to the plaintiff, Mrs. Harriet Caton, then Mrs. Henley, a widow, aged about sixty. She had a life interest in certain real estates in Ireland, and she was possessed of personal estate consisting of mortgages, railway debentures, and other property, amounting to about £14,000. An agreement was made between Mr. Caton and Mrs. Henley that a settlement should be prepared, and Mr. Caton made a memorandum in his own handwriting, and signed it with his initials nearly in the following terms: "Mrs. Henley to have the whole of her fortune settled upon herself, and to go to the uses of her will, but the annual interest on her fortune to be received and taken by Mr. Caton, for and

during his life, with the exception of £80 a year to be paid to Mrs. Henley under the denomination of pin-money. The house No. 75 Seymour Place, the property of Mr. Caton, at his decease is given to Mrs. Henley for her life, at her decease to go to the uses of Mr. Caton's will. Also his household furniture, plate, linen, china, given at his decease to Mrs. Henley. Mrs. Henley to have liberty to withdraw £2,000 for the purchase of a house, said house to be settled on herself. All property that may fall into Mrs. Henley during the marriage to be her sole property, and subject to the uses of her will, but her husband to have the annual rent or interest of said property during his life. Mrs. Henley to be entitled to receive at my death the half-year's rents that shall then be due."

This memorandum was sent to a Mr. Emmet, who had been Mrs. Henley's solicitor, and he laid a copy of it before counsel as instructions, omitting, by the direction of Mr. Caton and Mrs. Henley, the provision as to the £2,000 and the half-year's rent.

A draft settlement was accordingly prepared and sent by Mr. Emmet to Mrs. Henley on the 5th of January, 1853, and she handed it over to Mr. Caton on the next day, and Mr. Caton and Mrs. Henley went with the draft settlement to Mr. Emmet, and expressed their approbation of the draft. A fair copy was then prepared by him, which included, as part of the property to be settled, the Irish property, in which Mrs. Henley had a life interest. On the 7th of January this was sent back by them to Mr. Emmet, with directions to strike out of the settlement all that related to the Irish property, and also to make certain alterations as to the mode of receiving the interest. The object of that was said to be that the Irish property was already so settled that Mrs. Henley would have it for her life for her separate use, and that it was unnecessary to encumber the settlement with any mention of it. Mr. Emmet accordingly got the alterations made, and sent the draft so altered to Mrs. Henley on the 11th of January, but on the same day Mr. Caton, in a conference which he had with his intended wife, represented to her that the engrossment of the settlement, as proposed, would cost a good deal of expense, which he was desirous of avoiding; and he promised that, if the plaintiff would forego the execution of the settlement, he would most strictly and faithfully carry out the terms of the marriage contract agreed upon, and would leave to her by his will the whole of her then and her after-acquired property if any, and would also leave her the house in Seymour Place for her life, and the furniture which might be in his residence at his death absolutely. Mrs. Henley assented, and on the next day Mr. Caton and Mrs. Henley went to Mr. Emmet, and said that they had given up all notion of having any settlement, and he need take no further trouble on the subject. Mr. Emmet

remonstrated very strongly against this, and told Mrs. Henley that she was doing a very imprudent thing, and strongly pressed her not to consent to anything of the sort. Mrs. Henley expressed her perfect confidence in Mr. Caton, who repeated his promise, and finally the draft settlement was given up to Mr. Emmet, certain parts of it having been struck out, but it did not clearly appear by whom.

Mr. Emmet again wrote to Mrs. Henley, remonstrating against what had happened, and pointing out to her that a will was always revocable, and that she was taking a very imprudent step in not requiring the property to be settled. She handed his letter over to her intended husband, Mr. Caton, who was very angry that his word should be doubted, and repeated his promise as above stated, and finally they agreed that there should be no settlement, and that she should trust to his promise.

On the 7th of February, 1853, the marriage took place. Mr. Caton had, previously to the marriage, prepared a will, and immediately after the marriage had been celebrated, the husband and wife, as stated by Mrs. Caton, went into the vestry, and there he executed his will. She further stated that after the execution he read out to her an absolute bequest to her of the whole of the fortune to which she was then entitled, or might become entitled, during the coverture; and also a bequest of the furniture and chattels in his house at his death to her absolutely; and also a bequest of the house in Seymour Place to her for her life.

Mr. Caton died on the 24th of January, 1864, leaving Mrs. Caton and two sons and a daughter, his children by a former marriage. He had made a will, dated the 4th of May, 1863, by which he appointed his widow and his two sons his executors, and bequeathed to her a life interest in a sum of £2,000, which had formed part of her property, and in a sum of £9,000 consols, and in two leasehold houses; and he gave her his furniture, etc., and some promissory notes and railway shares, absolutely. The will was proved by the sons alone.

In August, 1864, Mrs. Caton filed a bill against the sons as executors, stating as above stated, and alleging that she had married Mr. Caton upon the faith, and in consideration of his promise, that he would strictly and faithfully carry out the terms of their marriage contract as agreed to, and would by his last will leave her the whole of the property of which she was possessed, or to which she was entitled at her marriage; and also all her after-acquired property; and also the house in Seymour Place for her life, and all his furniture and effects; and that at all times during the coverture he had led her to believe that he strictly and faithfully observed and abided by the said contract, and the bill prayed a declaration accordingly, and accounts.

The defendants, by their answer, denied that any such agreement was

made as alleged, and denied the plaintiff's case generally, and pleaded the Statute of Frauds.

The cause went to issue, and much evidence was taken, which was either irrelevant or immaterial, according to the view of the case taken by the Lord Chancellor. There was some evidence to confirm the fact of the execution of the will in the vestry, but nothing further was proved as to the will itself, which was not forthcoming. The house in Seymour Place had been sold with the consent of the plaintiff. Mr. Caton had taken possession of his wife's property, and had paid her £80 a year. In a joint affidavit made by Mr. and Mrs. Caton, in May, 1853, on getting some money out of court, they swore that no settlement or agreement for a settlement had been made on their marriage, and the defendants alleged other facts tending to show that there was no agreement as to making any will. Two letters in Mr. Caton's handwriting were found, addressed to Mrs. Caton, in which he expressed his hope that his will would be found just and fair, and gave explanations about the terms of it. The other material facts in the case are mentioned in the judgment given below.

The cause came on to be heard before the Vice-Chancellor Stuart, who, on the 11th of May last, made a decree in favor of the plaintiff.<sup>1</sup>

The defendants appealed.

*Mr. Malins*, Q.C., and *Mr. L. Webb* for the plaintiff.\*

*Sir H. Cairns*, Q.C., *Mr. Greene*, Q.C., and *Mr. Elderton* for the defendants.

JAN. 12. LORD CRANWORTH, L.C., after stating the facts of the case, and saying that in the view he took of the case it would not be necessary to consider the exact evidence given by each of the witnesses, said :

The defendants by their answer deny that any such engagement as that alleged by the plaintiff to have been entered into was ever entered into by the testator. Certainly there was no contract in writing, signed by him ; and they insist on the Statute of Frauds as presenting an insuperable bar to the relief which is sought by the bill. The Statute of Frauds prevents the bringing of any action on any contract entered into in consideration of marriage, unless it has been reduced to writing and signed by the party to be charged ; and this court, unless there be equitable grounds for taking a case out of the operation of the statute, has always held itself as much bound by its provisions as the courts of law. That no action could be maintained on the alleged parol contract, on the foundation of which relief is sought in this suit, is a proposition which admits of no doubt. Courts of law are expressly forbidden to entertain any such actions. Unless, therefore, something can be discov-

<sup>1</sup> The opinion of the Vice-Chancellor has been omitted.—ED.

ered in the conduct of the parties varying their legal rights, no suit for the specific performance of this alleged contract can be entertained in this court. It would be a scandal to suppose that when the legislature has said that no action shall be brought on a parol contract of a particular description, it should be open to one of the contracting parties to escape from the consequence by simply shifting his sphere of operations from a court of law to a court of equity. This, indeed, was not contended for on the part of the plaintiff, but it was argued that there are in this case equitable grounds enabling the court to give relief, notwithstanding the statute. The same clause of the statute which forbids the bringing of an action on any parol contract made in consideration of marriage also forbids the bringing of any action on any parol contract for the sale of land. But, though courts of equity have held themselves bound by this last enactment, yet they have in many cases felt themselves at liberty to disregard it when to insist upon it would be to make it the means of effecting, instead of preventing, fraud. This is the ground on which they require specific performance of a parol contract for the sale or purchase of land when that contract has been in part performed. The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract. His Honor the Vice-Chancellor Stuart, according to the report of this case, appears to have thought that the decisions under this head of equity (and they are very numerous) are applicable to the present case, but with all deference to the Vice-Chancellor, I cannot think that this is a correct view of the law.

That marriage itself is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity.

It was not, however, on the mere fact of the marriage that the Vice-Chancellor rested his judgment. His Honor relied mainly on the circumstance which he considered to have been well proved, that, previously to the marriage, the intended husband, in conformity with the verbal promise he had solemnly made to his wife, prepared a will whereby he gave to her all that he had agreed to give her; and further, that he had executed this will in due form of law immediately after the solemnization of the marriage. I do not however think, even if all this had been clearly made out in proof, that it amounts to any part performance so as to prevent the operation of the statute. The ground on which the court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of

land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money. But such cases bear no resemblance to that now under consideration. The preparing and executing of the will caused no alteration in the position of the lady, and I presume it will not be argued that any consequence can be attached to acts of part performance by the party sought to be charged. If I agree with A, by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A to complete the purchase, but it certainly would afford no foundation for a claim by A to compel me to sell on the ground that I had partly performed the contract. The circumstance of the preparing and executing the will (supposing it satisfactorily proved) might afford strong evidence of the existence of the parol contract insisted on, if that were a matter into which we were at liberty to inquire; but it can have no effect as giving validity to an otherwise invalid contract. I must further observe that the nature of the alleged agreement was such as hardly to admit, even on the part of the party to be charged, of anything like part performance. As a will is necessarily until the last moment of life revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a contract of a negative nature—a contract not to vary what has been so prepared and executed. I do not see how there can be part performance of such a contract.

It was contended that this case might be likened to those where, notwithstanding the Statute of Wills and the Statute of Frauds, it has been held that when a person has induced another to make or abstain from making or altering a will, on the assurance that, on his death, his intention shall be carried into effect, there the court has held the person, who has so engaged, to be bound to fulfill his engagement, and has held that he took whatever had passed to him on the faith of such engagement, merely as a trustee for the purpose of fulfilling that engagement.

I do not feel myself called upon to discuss the principle on which several of the cases rest; such, for instance, as *Sellack v. Harris* and *Strickland v. Aldridge*. They have no application to the present case, for there is no question here, whether those who derive title under the deceased husband are affected by any personal equity arising from any assurance given by them; they merely claim what the law gives them. If there had been any principle which would intercept this property in its progress from the testator to them as legatees, their title no doubt would have been defeated; but there is nothing which, when the

property has reached them, makes it inequitable in them to insist on their full right to the enjoyment of what has been so bequeathed to them.

I am of opinion, therefore, that there was no ground for filing this bill, and that it ought to have been dismissed with costs.

It would have been a very satisfactory thing to me to find that I could honestly say here that there should be no costs ; but I have a very strong opinion upon that subject. It is that costs are not directed to be paid as a punishment, but that having been caused by the conduct of the losing party, they ought to be borne by those who have occasioned them.

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NEALE v. NEALES.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM,  
1869.

[*Reported in 9 Wallace 1.*]

APPEAL from the Supreme Court of the District of Columbia; the case being thus :

Benjamin Neale and wife filed a bill in the court just named against John E. Neale, father of the said Benjamin, stating that he the father was, in 1858, owner of lots Nos. 16 and 18 in Washington ; that at the time mentioned he, the son, one of the complainants, was seeking the hand of Mary Hamilton, the other complainant, and his now wife, in marriage ; that this intended marriage met with the approval and encouragement of the father, who, in promotion thereof, and as an inducement thereto, promised and agreed that if said marriage should be consummated he would, in consideration thereof, convey one or a part of one of the lots owned by him to his son and Mary his intended wife, or to one of them, in fee, to the end that with money then belonging to or expected to belong to the intended wife, they might erect thereon a dwelling-house for their habitation and home ; that confiding in the promise so made and influenced thereby, and partly in consideration thereof, the said Benjamin and Mary did intermarry in September, 1858 ; that at or immediately after the marriage the said father, mindful of the promise he had made, and with reference thereto, declared that he had given to his daughter-in-law Mary a lot in Washington on which to erect a dwelling-house for herself ; that shortly after the marriage, and in part performance of his agreement, he put his son and daughter, the complainants, in possession of the unimproved part of lot No. 18, that they accepted the possession, and with the consent of the father erected

thereon, with money belonging to the said Mary and which was her separate estate, a dwelling-house, at the cost of \$5,000; that the said Mary consented to this application of the money belonging to her, cheerfully, because it was understood between herself and her husband that the said ground with the house was to be conveyed to her and her heirs, or in trust for her and their use; that after the house was erected the complainants, Mary and Benjamin, took possession of it, with the knowledge and full approval of the father, who lived next door, and had been cognizant of the erection, and in part superintended it; and with his knowledge and approval rented it to a Mrs. Degges; that the daughter-in-law received and applied the rents to her own uses; and that during the erection of said house and after its completion the father often avowed his intention to execute and deliver a deed of the lot and premises to his daughter-in-law, in accordance with his promise.

The bill further stated that in 1861, whilst the said husband and wife, complainants in the case, were temporarily absent from the city of Washington, the father, without their consent, took possession of the house, and had continued to occupy it ever since, against the wishes of the complainants; that even since taking possession of the house in the manner mentioned, he the father had promised to execute a deed for the property to his daughter-in-law, but had when applied to refused to make such deed; and the bill charged that the dwelling-house and ground belonged in equity to said daughter-in-law, and that she was entitled to a conveyance thereof from the father, and to an account of the rents and profits thereof since he took possession of the same; and prayed that he might be accordingly ordered to convey to the complainant Mary, and her heirs, or to some one in trust for her and their benefit, the said parcel of ground and premises, and to render an account of the rents during his occupancy.

The father in his answer admitted that in 1858 he was possessed as owner of the lots, and that the complainant Benjamin was his son; but denied that he was desirous that his son should be married to the said Mary and settled in life, and promised to convey to the said Benjamin and Mary, or either of them, the lot if such marriage should be consummated; or that, in consideration of any such promise on his part, such marriage did take place, or that in part performance of such promise he put the complainants in possession of such lot, or that confiding in such promise the complainants did enter upon and take possession thereof and proceed to erect a dwelling-house thereon, as was alleged in the bill. He admitted that a dwelling-house worth about \$5,000 was erected by the complainant Benjamin on the ground; that he knew that the house was erected by the said Benjamin, who after its completion held the same until 1861; and he admitted that, in July, 1861, during



the absence of the complainants, he took possession of the house which had been abandoned by its tenant, and had since occupied it with his family.

The father denied further "that after taking possession he promised, as alleged, to convey the ground, or that he so promised at any time"; but admitted "that after the marriage of complainants, and in 1859, when the complainant Benjamin was about to receive certain moneys belonging to his wife from her guardian, he, the respondent, knowing that the habits of the complainant, Benjamin, were intemperate, and wishing to secure to his said wife and children the said moneys, and satisfied that the same would be in jeopardy if paid over to complainant Benjamin, and by him used in business, consented on the application of complainant Benjamin, to give him lot No. 16 in said square, provided he would allow the respondent or his wife's guardian to build with the said moneys a dwelling-house thereon, and provided that the said moneys should not be paid into the hands of the complainant Benjamin, but should for the said purpose be applied and disbursed by the respondent or by the said guardian; that the complainant Benjamin agreed to these terms, provided the said described part of lot 18, instead of lot 16, was given; and to this change that the respondent assented, subject to the terms and conditions aforesaid; that under this agreement the dwelling-house was begun, but that the said conditions were wholly violated by the complainant Benjamin, who, without the knowledge or approbation of the respondent, received the said moneys from his wife's said guardian and used the same in his own business, or otherwise, contrary to the agreement, disposed of same." That the erection of the house having progressed as far as the first story, his son informed him that he the son would be disgraced and ruined if the work was stopped, and that he was without means to proceed further; that he, the father, then borrowed from one Mrs. Sears \$2,008, for which he gave his note, in which his son joined, and that the note was secured by a deed of trust upon said described portion of lot 18; that this loan was paid over by him (the father) to the son, with the express agreement that it should be devoted to the erection of said dwelling-house, and should not be otherwise disposed of; but that the agreement was violated, and the money used by his son in his business. That this debt was one of those due when the son failed in business, and was paid by him the father; and the father averred that he never intended to give any part of lot 18, save upon the terms and conditions aforesaid, and that upon the violation thereof he considered himself absolved from his said promise, and more especially so, as his son was largely beyond the value of the house indebted to him.

The testimony, which was marked by some temper, was contradict-

ory and conflicting; but the weight of it showed that the father did encourage the marriage of his son with Miss Hamilton, his now wife, one of the complainants. That he did promise to give the lot in question to her as a bridal present, at the time and in furtherance of said marriage, it being understood that a dwelling-house was to be built on it with her money. And that with the father's consent, and upon the faith of the promise made by him, a house was erected on the lot with the wife's money. That the house was, after its erection, rented out by the complainants as their property, with the consent of the father, and that the rents thereof were received by them and applied to the use of the wife, with like consent, down to a certain time, when the tenants, becoming alarmed at the threatened invasion of the capital by the rebel army, abandoned the house, and when the possession of the father took place; his son and daughter-in-law being at the time in Maryland, from which State the latter originally came.

That the allegation of debt from the son to the father was not made out.

The father, however, set up and endeavored to show that a part of the money expended in the erection of the said dwelling-house was not the money of his daughter-in-law, but was, in reality, advanced by himself.

The evidence on this point showed that, the son having received from his wife's trustee enough to build the house, did not use it all in this way, but put about \$2,000 of it into his business; that early in 1861 he failed, and made an assignment of his entire stock and effects, amounting to about \$23,000, to his father, the appellant, upon secret trusts. The father testified that he himself paid the \$2,008 borrowed from Mrs. Sears from his own private funds; but the son testified, and in this he seemed to be supported by documentary and other evidence, that in making the assignment to his father, he made it subject to the prior payment of certain confidential debts, among which plainly was this one of \$2,008, for which the lot was mortgaged to Mrs. Sears; and that it was paid out of the proceeds of the stock and effects assigned.

The cause being at issue and set down for hearing, was heard in the first instance upon the original bill, answer, and testimony taken thereunder, by the Supreme Court of the District of Columbia, and after it had been heard, and the proceedings had been read and considered, the said court, of its own motion, and without assigning any reason for their action, "ordered that the complainants have leave to amend their bill filed in the cause on payment of costs, the amendment to be filed on or before the 15th of November, 1866."

The case was accordingly heard on an amended bill, which, instead

of alleging that the father had promised to give the son or his wife the lot, alleged that he promised to give the lot to the wife, it being understood that she would allow her money to be expended in building upon it a dwelling-house for herself and her heirs. On the amended pleadings, and on substantially the original evidence, the case was heard again, and a decree made that the father should make a deed to a trustee of the house and lot, for the sole use and benefit of his son's wife, freed from liability for the son's debts, or those of any other husband; and that he should account for the rents since the filing of the bill. From that decree the case was now here on appeal.

*Messrs. Davidge and P. Phillips*, for the father, appellant in the case.

*Messrs. Webb and Kennedy*, *contra*.

MR. JUSTICE DAVIS delivered the opinion of the court.<sup>1</sup>

It is unnecessary, in the view we have taken of the power of the court over amendments at the hearing, to discuss the question whether the amended bill is materially different from the original bill. It is enough to know, if different, that the subject-matter of both bills is the same, and that the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision, and, if supported by proof, entitle the complainants to the relief which they seek at the hands of a court of equity. The Statute of Frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed. And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. And this is particularly true, where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift.<sup>2</sup>

Was this gift in question made to Mary H. Neale and her children, and has the condition on which it was given been performed so as to make it inequitable for the donor to escape from his engagement? We do not propose to discuss the evidence at length, in order to vindicate the conclusion we have reached in regard to it. It is in many respects conflicting and contradictory, and it is to be regretted that the contest over this property, like all contests between near relations,

<sup>1</sup> A portion of the opinion discussing a question of practice has been omitted.—ED.

<sup>2</sup> 1 Leading Cases in Equity, American note to *Lester v. Foxcroft* 625.

has elements of bitterness in it. It is enough to say, for the purposes of this suit, that on the whole evidence it is reasonably certain that John E. Neale agreed to give to Mary Hamilton, who was about to marry his son, in furtherance of the marriage, the lot in controversy, for the benefit of herself and children, and for a home for the family, if, with her means, a suitable dwelling-house was erected on it, and that this has been done. On the other theory of this case are the undisputed facts reconcilable with the conduct of the parties. There is no dispute that the husband, before and after marriage, was of dissipated habits; that the father knew it, and had but little confidence in his ability to manage money with judgment, and was desirous that the property of the wife should not be embarked in the husband's business. What so natural as that a father, having a son of this character about to marry a lady of property, should wish to have her property secured against the consequences of her husband's improvidence and dissipation. This could not be done, as he had a lot to give on the occurrence of the marriage, by agreeing to give it to the son if he improved it with his wife's means, because he might sell it and waste the money, or become involved in debt and lose it in that way. Indeed, we are assured from the father's own estimate of his son's character, he feared the happening of one or the other of these events in case he donated the lot to the son, and, to avoid placing his own gift and the wife's inheritance in equal peril, he did what any other parent under like circumstances would have done, gave the lot to the wife, so that, if improved by her, it would be safe at all times from the effects of the husband's folly, and be a secure home for the family. It is true, the declarations of the father on the subject, are, literally taken, contradictory, but we place but little reliance as evidence on his statements made to some witnesses, that the gift was to the son, because they are in conflict with statements frequently made at different times to other persons, that the gift was to the wife, and are inconsistent with his conduct and motives fairly deducible from the other evidence in the case. Besides, in one sense, it is true the gift was to the son, as it was for his benefit, and would not have been made if he had remained single, and in this sense the father doubtless meant his declarations on the subject to be received.

As, therefore, the gift was to the wife, and in fee simple, for a less estate would not secure the object the father had in view, it remains to be seen what was done with the property after the intermarriage of the parties. And here the character of the evidence, and its effect on the issue we are considering, cannot be misapprehended. It appears that shortly after the marriage the house was built with money belonging to the wife, and with the knowledge of the appellant, who

lived on an adjoining lot, and acted, according to one witness, as general supervisor in the matter. It further appears that on the completion of the house the newly married couple lived in it, for a season, and afterwards rented it, and that during their absence on a casual visit to Maryland in 1861, it having become temporarily vacant by the withdrawal of the tenant, the appellant, without their knowledge and consent, moved into it and still retains possession of it. It is impossible, in view of these facts, which prove that the condition of the gift had been performed, to escape the conclusion that the father at the outset was satisfied with the arrangement, and that his subsequent conduct, tending to show that he had disavowed it, was an afterthought.

It is insisted that a part of the money used in building the house was advanced by the father, who, in conjunction with the son, borrowed it from Mrs. Sears, and that, therefore, the consideration, *pro tanto*, for the gift has failed. It is clear that the husband received from the wife's guardian more money than was required to build the house, and had agreed with her to devote enough of it to this purpose, but, instead of doing this, unfortunately, he employed a portion of it in his store, which rendered necessary the Sears loan. This loan, secured by the father on the property in controversy, stood on the books of the son as a confidential debt due his wife, and when he failed and assigned his property, he recognized it as such and preferred it over all other debts. There was certainly nothing wrong in this provision, which relieved the property of the wife of an incumbrance created because the husband had misappropriated her money, and, as the father accepted the trust under the assignment, with this debt thus preferred, and at the same time received sufficient property to pay it, it is hard to see wherein he has cause of complaint in this matter, or how he can truthfully say he paid any part of the money that went into the house. In any proper sense the house was built with the wife's money, and equity will give her the benefit of it in this controversy with the father.

As before remarked, the case as stated is made out with reasonable certainty, which is all that is required.<sup>1</sup> Any other degree of certainty in a case of this character is unattainable.

Damages will not compensate for the breach of this contract, nor answer the intention of the parties to it, and a specific performance is therefore essential to the complete ends of justice.

Decree affirmed.

<sup>1</sup> 1 Leading Cases in Equity, American note to *Lester v. Foxcroft*, *supra*; *Mundy v. Jolliffe*, 5 Mylne & Craig, p. 177.

## FREEMAN v. FREEMAN.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 25, 1870.

[*Reported in 43 New York Reports 34.*]

APPEAL from an order of the General Term of the Supreme Court in the sixth judicial district, reversing a judgment for the plaintiff entered upon the report of a referee, and ordering a new trial.

The action was ejectment, and the answer set up a claim for specific performance of a contract to give the premises in controversy.

The defendants are husband and wife, and the defendant, James W. Freeman, is a son of the plaintiff, Samuel Freeman. Soon after their marriage they moved to a small lot in the village of Smithville, in the county of Chenango. While residing there, and in February, 1860, the plaintiff purchased a place for them, situate in the town of Taylor, in the county of Cortland. This is the land described in the complaint. The premises contained forty acres of land, then all woodland, except about six acres. The defendants went into the possession of the premises in 1860, and cleared about twenty acres thereon, built an addition to the house, fenced the land, and made other improvements on the premises in question, and continued to occupy the same till April, 1866, at which time James W. Freeman left his wife, Julia Ann, and his family in possession of the premises, and went to reside with his father.

In August, 1866, this action was commenced by the plaintiff to recover possession of the premises, Julia Ann being in possession. Before the commencement of the suit, the plaintiff had served notice upon her to quit. James W. Freeman did not defend the action. The action was tried before a referee who made a report in favor of the plaintiff. He found as facts, that the plaintiff himself put the defendants in possession; that before doing so, he told them that the premises should be theirs as long as they lived, and that he afterward said to them that "he had bought the place for a home for them and gave it to them," and that the improvements were subsequently made by them. The defendant, Julia A. Freeman, appealed to the General Term of the Supreme Court, where the judgment of the referee was reversed, and a new trial granted,<sup>1</sup> and from this order granting a new trial, the plaintiff has appealed to this court.

*M. M. Waters* for the appellant.

*Miner & Kern* for the respondents.

GROVER, J. As the order of the General Term does not show that

<sup>1</sup> Reported 51 Barb. 306.

it was based upon errors of fact, it must be assumed by this court to have been based upon errors of law only. The facts must be assumed to have been correctly found by the referee. The only legal questions arise upon the exception taken by the respondent to the legal conclusion drawn by the referee from the facts found by him. That conclusion was, that although the plaintiff gave said premises to the defendant, yet said gift, being by parol, was not valid and passed no title either legal or equitable to the premises set out in the complaint, and therefore he ordered judgment for the plaintiff for the recovery of the possession thereof. If this legal conclusion from the facts found be correct, the General Term erred in reversing the judgment, and the order appealed from must be reversed. While the evidence contained in the case and exceptions cannot be looked into for the purpose of finding additional facts, as a ground for the reversal of the judgment, yet it may be for the purpose of determining the meaning of the findings of the referee. When these are read, aided by this light, the referee finds that when the plaintiff purchased the lands in controversy, being about forty acres of land, wild, with the exception of about six acres which had been wholly or partially cleared, he gave it to the defendants. That is, that he promised to give it to them for their lives and the life of the survivor, in case they would move to and reside thereon, and that in pursuance of such promise, the defendants moved to the premises and occupied the same from February, 1860, to the time of the trial of the action. That the defendants cleared twelve or fifteen acres of the land and fenced the same, and built an addition to the house upon the premises, being somewhat assisted therein by the plaintiff. That the defendants have paid a portion of the taxes assessed upon the land. I have assumed that the referee by the words "gave the land to the defendants" meant to be understood, that he promised to give it to them. That such was his meaning appears from the evidence, as there was no evidence of any attempt at the former, while the proof of the latter was ample. The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promissor, make comparatively large expenditures in permanent improvements upon the land. It is, and must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise under this precise state of facts would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by in-

ducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession; no part of the purchase-money having been paid, and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made. In the present case, possession has been taken under the promise and the expenditures upon improvements made, yet it is insisted that equity will not enforce the promise for the reason that it was to give, instead of having been to sell the land for a valuable consideration. Permitting the promissor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is, that possession has been taken, and valuable improvements made upon the faith of the promise. These acts constitute part performance by the respondents. It is true that the plaintiff has done nothing by way of performance on his part. It is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted, that an executory promise, not founded upon any valuable consideration, is a mere nude pact, furnishing no grounds for an action at law, and that performance of such a promise will not be enforced in equity. This is true so long as the promise has no consideration. Anything that may be detrimental to the promisee or beneficial to the promissor in legal estimation will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise.<sup>1</sup> The Statute of Frauds has no bearing upon the case. If the promise reduced to writing could, under the circumstances, be enforced in equity, it may be, although by parol.<sup>2</sup> The order granting a new trial must be affirmed, and judgment final upon the stipulation rendered against the plaintiff.

All concurring. Order of General Term affirmed and judgment for defendant ordered.

<sup>1</sup> *Lobdell v. Lobdell*, 33 How. 347; *id.*, 1, 32; *Crosbie v. McDaul*, 13 Vesey 147; *Shephard v. Bivin*, 9 Gill 32; *Parsons on Contract*, 3 vol., p. 359.

<sup>2</sup> 2 Statutes at Large 139, § 10.



HUGH MILLER, RESPONDENT, v. MARCUS BALL, APPELLANT

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 25, 1876.

[*Reported in 64 New York Reports 286.*]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to compel a specific performance of an alleged parol contract for the sale of land.

The referee found in substance the following facts: That in the fall of 1863, Robert Miller, agent of plaintiff, without disclosing his agency made a verbal contract with Philip Potter, defendant's agent, for the purchase of fifty acres of land at three dollars per acre, which he agreed to pay on delivery of a warranty deed, Potter agreeing to have a survey made and to procure the deed. The land was subsequently surveyed and its metes and bounds fixed. Defendant, upon receipt of the survey bill, executed a warranty deed of the premises to Robert Miller. The consideration was stated therein to be \$100, and there was a reservation of mines and minerals, and the right to use and occupy all streams for logging and milling purposes. The deed was delivered by Potter to Robert Miller, who delivered it to plaintiff, who objected to the statement of consideration and to the reservations and returned it to Robert, who returned it to Potter, who agreed to have it corrected and returned. The deed was sent back to defendant, who, after promising several times to fix the matter satisfactorily, in April, 1867, refused to execute a deed unless paid two dollars more per acre. Plaintiff tendered a deed and demanded that defendant execute the same, which he refused. The referee also found as follows:

"The land in question is situated about two and a half miles from a highway in one direction, and about five miles in another, and was a wild, uncultivated lot, and of no practical value for cultivation until cleared, nor for any purpose without means of access to it by teams. In November, 1864, the plaintiff entered upon the lot, cut and constructed a road thereto across the adjoining lands of Sawyer & Russell and others, under a parol license from the owners, to construct, occupy and use the same, said road connecting with roads which the plaintiff also made upon the lot in question. He underbrushed and cut up fallen trees, preparatory to clearing about a quarter of an acre of land; built a bough shanty, and since that time and down to the commencement of this action, on the 12th day of April, 1867, he continued in the oc-

cupancy of the said lot, cutting trees and timber upon it, and paying the taxes thereon, and also continued to labor upon and improve the roads upon the lot and those connecting the same with the public highway."

*Samuel Hand* for the appellant.

*Leslie W. Russell* for the respondent.

EARL, J. We will assume, for the present purpose, that there was not a sufficient note or memorandum of the agreement between the parties to satisfy the requirement of the Statute of Frauds, and we still reach a conclusion adverse to the appellant.

There was sufficient evidence to sustain the finding of the referee that Potter was an authorized agent of the defendant to make the agreement and receive payment for the land. Plaintiff's brother, Robert, acted as agent for him in the negotiation with Potter, without disclosing the name of his principal. Yet, whatever rights were acquired by Robert belonged to the plaintiff, who employed him as agent, and furnished the money to pay for the land. The case may therefore be treated as if the negotiation had taken place and the agreement had been made directly between plaintiff and defendant.

The parol agreement was that plaintiff was to pay for the land \$150, and receive a warranty deed thereof. This agreement was made in December, 1863, or January, 1864. The defendant and his wife executed a deed in April afterward, which was delivered to the plaintiff's agent, who then paid the whole consideration of \$150. The deed was subsequently delivered to the plaintiff, who upon examination of the same found that the consideration was not truly expressed therein, and that it contained certain reservations not authorized by the agreement; and he declined to receive it and returned it to defendant's agent, who agreed to have it corrected and returned to him. This was never done; but defendant did not repudiate the parol agreement, or decline, upon request, to perform it, until April, 1867, a short time before the commencement of this action. The land was a wild, uncultivated lot, part of a large tract of timber land. It was several miles from any public highway. In the fall of 1864, the plaintiff, by the consent of the owners of adjoining land, cut out and made a road for the distance of two and one-half miles from a public highway to this lot; and subsequently, prior to the commencement of this action, he made roads upon the lot, underbrushed and cut up fallen trees thereon preparatory to clearing about a quarter of an acre; built a bough shanty; annually cut and drew from the lot wood and timber, and paid the taxes thereon. These improvements, and the expenses to make them, were not very extensive, and yet the referee held, upon all the facts of the case, that there was a sufficient part performance of the argument to take it out

of the operation of the Statute of Frauds. Whether this holding was right is the sole question for our consideration.

It is not always easy to determine whether there has been sufficient part performance of a parol agreement for the sale of land, in the sense of courts of equity, to free it from the operation of the Statute of Frauds. The general rule is, that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed.<sup>1</sup> The principle upon which courts of equity hold that part performance is sufficient is, that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made; in other words, upon the ground of fraud, in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was in before such part performance by him. Taking possession under a parole agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute.<sup>2</sup>

The payment of the consideration alone, in a case where its recovery in an action at law would fully indemnify the party paying, would not be a sufficient part performance within the rule under consideration, and neither would mere possession be, without any other circumstance of hardship or fraud. But payment of the consideration and possession under the agreement, or by the consent of the vendor, are facts which may be considered with other facts upon the question of part performance. Here the whole consideration-money was paid, and the plaintiff took all the possession of such a lot which is ordinarily practicable. He built roads to it and upon it; built a shanty and made some clearing. His improvements thus made were probably equal in cost to the consideration paid for the lot, and that cost would be lost to him unless the defendant be compelled to perform his agreement. He paid the taxes, and the money thus paid he cannot recover back. I am therefore of opinion that enough was done by the plaintiff to bring his case within the equitable rule as to part performance.

But before acts, otherwise sufficient for part performance, can have that effect within the rule, they must have been done in pursuance or fulfillment of the parol agreement, or in just reliance thereon. They must have been done with a view to the agreement, and be referable

<sup>1</sup> *Malins v. Brown*, 4 N. Y. 403.

<sup>2</sup> *Lowry v. Tew*, 3 Barb. Ch. 407; *Freeman v. Freeman*, 43 N. Y. 34.

exclusively thereto.<sup>1</sup> In the respects here mentioned, plaintiff's acts were sufficient. The plaintiff paid the entire consideration under the agreement. The land was vacant, covered with timber, and distant from any highway. The defendant promised to give a deed, tendered one which was incorrect, took it back for correction, and then, after retaining the money paid for two years, repudiated the agreement, and refused to perform. The defendant could have no use of the land without the roads which he constructed. After he paid the entire consideration, and thus fully performed on his part, it must have been understood by both parties that he was to have possession and control of the land, and the right to commence and prosecute his improvements thereon. After plaintiff had paid the full consideration, in reliance upon the promise of the defendant to give him the title to the land, there was an implied consent, on the part of the defendant, that he might take possession as owner. It cannot be inferred that defendant meant to retain the money and, at the same time, retain control of the land from the only person interested in the use and protection of the same. It may be stated, as a general rule, that in all cases where the contract for the sale of land is silent as to the possession, the land being vacant, and the vendee has paid the entire consideration, and fully performed on his part, and all that remains for the vendor to do is to give the deed, there must be an implied agreement or license that the vendee may at once take possession and have the use of the land. In such a case where the contract is in writing, and thus valid within the Statute of Frauds, the vendee is, in equity, considered the owner of the land, and he may even call the vendor to account for any waste committed thereon. He is, then, the only person interested in the protection of the land against waste or trespass; and he should have that possession which will enable him to protect his interests, and receive, in the use of the land, an equivalent for the money which he has paid. The same rule of construction should apply to a parol agreement. In the absence of any evidence to the contrary, it could not be inferred that in such a case the vendor intended to retain the use of both the land and the consideration paid therefor.

Our attention has been called to no authorities in conflict with these views. In *Suffern v. Townsend*<sup>2</sup> it was held that an agreement for the purchase of land did not of itself amount to a license to the party agreeing to purchase to enter on the land; but that was in a case where there was a parol agreement, silent as to the possession, no part of the consideration having been paid. In *Erwin v. Olmsted*<sup>3</sup> and *Kellogg v. Kellogg*<sup>4</sup> the contracts were in writing, silent as to the pos-

<sup>1</sup> Story Eq. Jur. 762, 764.

<sup>3</sup> 7 Cow. 229.

<sup>2</sup> 9 J. R. 35.

<sup>4</sup> 6 Barb. 116.

session, but no part of the consideration had been paid. In *Spencer v. Tobey*<sup>1</sup> a part only of the consideration had been paid. It cannot, therefore, be said that the plaintiff was a trespasser in what he did upon the land; but all his acts thereon, and in building the road thereto, and in paying the taxes, must be referred to the agreement for the purchase, and must be considered as done in pursuance thereof, and in reliance thereon.

The judgment must therefore be affirmed, with costs.

All concur.

Judgment affirmed.

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UNGLEY v. UNGLEY.

IN THE COURT OF APPEAL, JUNE 19, 1877.

[*Reported in Law Reports, 5 Chancery Division 887.*]

THIS was an appeal from a decision of Vice-Chancellor Malins.<sup>2</sup>

The suit was instituted for the administration of the estate of William Ungley, who died intestate on the 10th of August, 1875.

The intestate's personalty was estimated at about the value of £1,260, including a leasehold house in which he carried on his business, and another in Westbourne Road, Barnsbury, which he acquired as a member of the Clerkenwell Bowkett Building Society in 1871.

He left one son, the plaintiff, William Henry Ungley, who took out letters of administration, and one daughter, Margaret Kendall, the wife of Richard John Kendall.

Mr. and Mrs. Kendall claimed the house at Barnsbury as having been a gift from Mrs. Kendall's father on her marriage.

She and her husband stated in their answer that in October, 1871, the intestate informed them that he had bought the house in question, which should in the event of their marriage taking place be his wedding present to his daughter, and that they were to take possession of it as soon as the marriage should be solemnized.

The intestate had, in fact, before that time acquired the lease of the house subject to the payment to the Bowkett Building Society of installments on the money advanced for it as they became due, these installments being secured in the usual way, by a mortgage of the house.

Immediately upon the marriage, which took place on the 16th of December, 1871, Mrs. Kendall and her husband entered into possession of the house, having placed therein their own furniture, and

<sup>1</sup> 22 Barb. 260.

<sup>2</sup> 4 Ch. D. 73.

they continued in occupation till the intestate's death, the husband paying the ground rent and rates and taxes. There was, however, evidence that on some occasions, if not always, W. Ungley supplied him with money for that purpose.

Some of the installments of the purchase-money fell due during the intestate's lifetime, and he regularly paid them. At his death there remained a sum of £110 still to be paid, which had since fallen due.

The answer also stated that Mr. Kendall had applied to the intestate to complete the gift by executing an assignment of the house to his daughter, and that he had declined to do so then, but expressed his intention of making the assignment when all the installments were paid. The answer claimed to have the gift complete and to have the £110 paid out of the personal estate, and if that were insufficient, out of the realty and to have an assignment made to or for the benefit of Mrs. Kendall.

Both parties went into evidence, and the witnesses were examined before the Vice-Chancellor.

The evidence of the defendants' witnesses generally supported the case made by the answer. In particular, Mr. Hayes, the lessor of the house, stated that the intestate had told him at the time when he took the lease that he wished to purchase a house for his daughter on her marriage.

On the part of the plaintiff evidence was given of statements by the intestate importing that he intended to make an equal division of his property amongst his widow and two children.

Vice-Chancellor Malins was of opinion that the promise by the intestate had been proved, and made an order that the plaintiff should assign the lease of the house to Mrs. Kendall, and should pay the £110 due to the building society out of the intestate's personal estate.

From this decision the plaintiff appealed.

*Glasse*, Q.C., and *Russell Roberts* for the plaintiff.

*J. Pearson*, Q.C., and *Speed*, for Mr. and Mrs. Kendall, were not called on.

*E. B. Michell* for the widow.

JESSEL, M.R. This is an appeal from a decision of Vice-Chancellor Malins, and two questions arise on the appeal, one of law and one of fact.

First, as to the question of law. A man, in consideration of the marriage of his daughter, promises his intended son-in-law that he will give his daughter a particular house on her marriage as a wedding present. This promise he makes orally without writing; and

immediately after the marriage he puts his daughter and son-in-law in possession, and they remain in possession till the death of their father. The father dies intestate, and it is now objected by his administrator that by reason of the Statute of Frauds all that goes for nothing, and that they must give up the house. I am of opinion that that is not the law. The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract in order that justice may be done between the parties. In the present case it is quite clear that the defendants were put into possession of the house in pursuance of some contract, and the only other question is one of fact, namely, what were the terms of the contract.

Before considering the evidence I must make this preliminary observation: that the Vice-Chancellor had the advantage, which we have not had, of hearing the evidence given and seeing the demeanor of the witnesses. In such a case the decision of a judge on a question of fact ought not to be overruled by a court of appeal on light grounds. I do not say that we ought to shrink from doing so in a proper case, but very strong grounds must be shown. On the particular question in the present case, having read the evidence which was given before the Vice-Chancellor, my opinion is that it has been proved that there was a promise—not a mere expectation, but an actual promise—to give the house. The son-in-law swears so distinctly, and it is confirmed by the independent testimony of Mr. Hayes, the landlord of the house, a perfectly unprejudiced witness, who says that Mr. Ungley told him for what purpose he wanted the house, namely, that he was anxious to purchase a house for his daughter on her marriage. Then it is proved that he let his daughter and her husband into possession immediately on their marriage, and that he said he would not pay any more ground rent or insurance, because his son-in-law was to pay them. There is no evidence on the other side in contradiction of this. There is no question here between two agreements; the appellant does not allege any other agreement in opposition to that contended for by the respondents. The evidence for the respondents is therefore substantially uncontradicted. The Vice-Chancellor believed it, and I see no reason for disturbing his conclusion. All the surrounding circumstances concur in favor of the case made by the respondents; and I am of opinion that the decision of the Vice-Chancellor must be affirmed.

With regard to the question of the £110 which was due to the building society on the property, it is clear that if you once prove that a man has made an agreement to sell a house, it must be taken that he means to sell it free from incumbrances, without his saying so. So, if a man agrees to settle a house in consideration of marriage, he must be taken to mean free from incumbrances. And I can see no difference in this respect between a freehold and a leasehold house. I am, therefore, of opinion that the respondents are entitled to have an assignment of this house free from incumbrance, and that the £110 must be paid out of the intestate's estate.

JAMES and BRAMWELL, L.JJ., concurred.

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BIGELOW v. ARMES.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 6,  
1882.

[*Reported in 108 United States Reports 10.*]

BILL in equity to enforce specific performance of an agreement to convey real estate. The following were the facts as stated by the court :

On the 22d of November, 1876, the parties to this suit made and signed the following memorandum in pencil :

“ NOVEMBER, 22d, 1876.

“ I propose to give my house on 8th Street, subject to \$2,000, for one house on Delaware Avenue, and one farm in Fairfax Co., Va., and \$525 cash.

“ Accepted : OTIS BIGELOW.

GEO. ARMES.”

Both parties fully understood at the time that the property referred to was that described in the bill, and that an exchange was to be made on the terms stated in the memorandum. As the wife of Bigelow was absent, the contract entered into could not be consummated by an interchange of deeds until her return, which was not expected until some time in January following. Armes, however, was in need of the money which was to be paid him, or a part of it, and so on the 24th of November, two days after the memorandum was signed, he and his wife executed a deed, in accordance with the terms of the contract, conveying the house and lot on Eighth Street to Bigelow. This deed Armes took to Bigelow and asked for \$400 on account of the money he was to have, offering to deliver the deed if the payment was made. Bigelow accepted the offer, paid the money, and took the deed, agreeing, however, on the request of Armes, not to have the deed recorded until the contract was otherwise performed. Notwith-



standing this agreement he did have it recorded at once. At the same time with the delivery of the deed Armes put Bigelow in possession of the property, and thus fully executed the contract on his part. Bigelow afterwards paid Armes \$105 more on the cash payment he was to make, and delivered him the possession of the property on Delaware Avenue. All this was done in part performance of the contract on his part, and it was so understood by both parties. Armes, after he got possession of the Delaware Avenue property, made some repairs on the house with the knowledge of Bigelow. Afterwards Bigelow refused to carry out the contract on his part by delivering deeds for the Delaware Avenue and Virginia property, and having the memorandum which had been signed in his possession, undertook to destroy it by tearing it in pieces and throwing the pieces into a waste-basket. The court below entered a decree for the conveyance to Bigelow, from which appeal was taken.

*Mr. S. S. Henkle* for appellant.

*Mr. C. H. Armes* for the appellee.

Mr. CHIEF JUSTICE WAITE delivered the opinion of the court.

After stating the facts as above, he continued :

Upon these facts, in our opinion, it was the duty of the court below to enter the decree it did requiring a completion of the performance of the contract by Bigelow. Whether, in view of the requirements of the Statute of Frauds, the memorandum signed by both parties was of itself sufficient to support the bill, is a question we do not think it important to discuss, because, if the memorandum is not enough, the terms of the contract have been otherwise clearly established by the evidence, and there has been full performance by Armes and substantial part performance by Bigelow.

The decree is affirmed.

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#### HUMPHREYS v. GREEN AND ANOTHER.

IN THE COURT OF APPEAL, DECEMBER 21, 1882.

[*Reported in Law Reports, 10 Queen's Bench Division 148.*]

THIS was an action against the defendants, as executors of the late John Humphreys, deceased, who was a brother of the plaintiff, for the breach of an alleged promise by the deceased to devise by will certain lands to the plaintiff and his son. The promise was a verbal one, but at the trial before Manisty, J., at the last Trinity Sittings at Westminster, it was contended on the part of the plaintiff that there had been acts of part performance sufficient to take the case out of the Statute

of Frauds. That learned judge was, however, of opinion that there was no evidence either of the promise or of part performance to entitle the plaintiff to a verdict, and under his direction a verdict was entered for the defendants.

A rule *nisi* for a new trial on the ground of misdirection was granted by this court, on appeal from a refusal of the Queen's Bench Division to grant such rule. The facts of the case and the reason for granting the rule *nisi* are fully stated in the judgment.

*McIntyre*, Q.C., and *A. L. Smith* showed cause.

*Wheeler* (*Sir H. Giffard*, Q.C., with him) argued in support of the rule.

*Cur. adv. vult.*

BAGGALLAY, L.J. The plaintiff in this action and one John Humphreys were brothers; John Humphreys died in August, 1880, and the defendants are the executors named in his will, which was dated the 18th of November, 1879, and was proved by the defendants on the 7th of April, 1881.

On the part of the plaintiff, it is alleged that John Humphreys, for a consideration which will be mentioned presently, promised to make a will in the plaintiff's favor; but that, after making a will in pursuance of such promise, he subsequently revoked it by the will which has been proved by the defendants, under which the plaintiff takes no benefit. The plaintiff claims damages against the estate of John Humphreys in respect of such alleged breach of contract.

Upon the trial, Mr. Justice Manisty gave judgment for the defendants, being of opinion that there was no evidence to go to the jury of any contract binding upon John Humphreys or his estate. A rule for a new trial, on the ground of misdirection, was refused by the Queen's Bench Division; but, upon an application by way of appeal to this court, a rule *nisi* was granted, under the circumstances to which I shall presently allude. Cause has now been shown before us, and I am of opinion that the rule *nisi* must be discharged. The plaintiff's case, as presented to us, was as follows: that in June, 1879, his brother, John Humphreys, as executor of another brother, William Humphreys, was desirous of selling a farm in Wales, known as Gwaen y Magley, and induced the plaintiff to enter into an agreement to purchase it at the price of £2,000, and to pay a deposit of £200, by a representation that it was worth £2,000 and that the rental of it was £70 per annum; but that, having shortly afterwards discovered that the farm was not worth £2,000, and that the rental of it was only £45, the plaintiff, on the 11th of August, 1879, wrote to John Humphreys, insisting that the contract should be cancelled and the deposit returned; that John Humphreys thereupon promised him that, if he would complete the

purchase, he would on his death devise by will certain other farms and lands, which were his own property, to the plaintiff and his son, and would consent to a reduction of the purchase-money from £2,000 to £1,800; that, in reliance upon such promise, and in consideration of it, the plaintiff paid the balance of the purchase-money and completed the purchase of the farm; and that by a will, dated the 20th of August, 1879, John Humphreys devised his own farms and lands as agreed, but afterwards revoked such devise by the will which has been proved.

By his statement of claim, the plaintiff not only claimed damages in respect of the alleged breach of contract, but also to have the will of John Humphreys, which was proved by the defendants, set aside, so far as it revoked the will in favor of the plaintiff and his son, and a declaration that the plaintiff was entitled to a life estate in the farms and lands expressed to be devised by the will of the 20th of August, 1879, with remainder to his son; but the claim, as urged in court, has been limited to damages for breach of the alleged contract.

The defendants, whilst admitting that a binding agreement for the purchase of Gwaen y Magley was entered into by the plaintiff in June, 1879, and that he subsequently, by the letter of the 11th of August, 1879, attempted to repudiate it, deny that John Humphreys represented to the plaintiff that the farm was worth £2,000, or that the rental of it was £70; and they allege that John Humphreys, on receipt of the letter of the 11th of August, 1879, refused to entertain the proposition that the contract should be cancelled. They further admit that John Humphreys did in fact make a will dated the 20th of August, 1879, and thereby purported to devise his own farms and lands to or for the benefit of the plaintiff and the plaintiff's son, and that the purchase of Gwaen y Magley was in fact completed by the plaintiff on the 27th of March, 1880; but they deny that any such promise as is alleged by the plaintiff was ever made by John Humphreys, or that the plaintiff completed the purchase of Gwaen y Magley in reliance upon or in consideration of any such promise.

In the arguments before us it was admitted on the part of the plaintiff, as it had apparently been admitted before Manisty, J., and in the Queen's Bench Division, that, inasmuch as the contract, of a breach of which the plaintiff complained, was a contract relating to land, and there had been no memorandum or note thereof in writing within the intent and meaning of the 4th section of the Statute of Frauds, it was necessary for the plaintiff to prove, not only a promise such as that alleged by him, but also a part performance of the contract sufficient to take the case out of the operation of the statute.

In support of the alleged promise reliance was placed by the plaintiff on certain correspondence between the plaintiff and John Humphreys,

and particularly on letters dated the 11th and 17th of August, 1879, and on a conversation alleged to have taken place between the plaintiff and John Humphreys on the 1st of September, 1879. The letter of the 11th of August was from the plaintiff to John Humphreys, and in it, after comments upon the difference between the value of an estate of which the rental was £70 and one of which the rental was only £45, there is a paragraph in the following terms: "Under these circumstances I must beg of you to cancel the contract and let me have a cheque for my deposit of £200." Certain other letters passed between the plaintiff and John Humphreys, in which the latter pressed the former to complete the purchase, and on the 17th of August, 1879, John Humphreys sent to the plaintiff the letter of the 17th of August, 1879, in which was contained a paragraph in the following terms: "I am very desirous of having no misunderstanding or unpleasantness respecting the purchase of Gwaen y Magley, and I think the best way to avoid it is for you to come down to Berriew and talk the matter over, as perhaps I might be able to tell you something which may induce you without further hesitation to complete the purchase, or you may say something to place me in a position to endeavor to find some one to take it off your hands." The invitation contained in that letter was accepted by the plaintiff, and on the 30th of August he went to the residence of John Humphreys at Berriew, near Welshpool. In the meantime, however, John Humphreys made his will of the 20th of August.

On the 1st of September an interview took place between the brothers at Berriew, at which no other person was present; the account of what occurred at this interview, as given by the plaintiff in his evidence at the trial, is as follows: John Humphreys asked the plaintiff whether he had come to any determination with regard to Gwaen y Magley, to which plaintiff replied that he had not; John Humphreys then said: "Well, Edmund, you remember what I promised you," and plaintiff answered that he did remember; and John Humphreys then added: "Well, Edmund, I have been thinking that, with Gwaen y Magley and with what I am going to leave you by will, you will have a nice little property in this county," and thereupon plaintiff said: "Well, under these circumstances, and taking into consideration your letter of invitation of the 17th, I am quite prepared to complete the contract of Gwaen y Magley, and you may depend upon my fulfilling it to the letter." The plaintiff, having thus stated the effect of the conversation between himself and John Humphreys, was asked by Mr. Wheeler, his counsel, "What was the promise which you were supposed to remember?" and replied that the promise so referred to was made in September, 1877, when he and John Humphreys and their sister were walking in the garden and speaking of the sudden death of a brother, and that

John Humphreys then said to him: "Edmund, we have come to the conclusion to make your son our heir, as he bears our name, and I think it will be large enough to enable him to stand his ground in the county," and that the plaintiff thereupon thanked his brother for his kind intentions; the plaintiff added that he could not speak with certainty as to whether John Humphreys said "your son" or "you and your son." It will be observed that the promise thus referred to was made nearly two years before the contract was entered into by the plaintiff for the purchase of Gwaen y Magley. It is further to be observed that, during the conversation on the 1st of September, no reference appears to have been made to the will which had been executed by John Humphreys on the 20th of August, nor to any reduction from the amount of purchase-money for the farm. As regards the former, it does not appear to be material whether the plaintiff was or was not aware, at the time when the conversation took place, that the will dated the 20th of August had been executed; a promise to devise or leave by will, if any such promise was made, would be as well performed by not revoking a will already made as by subsequently executing one of the same purport, and could be as well broken by revoking a will already made as by failing to make one. As regards, however, the reduction of the purchase-money, it appears, from the evidence given by the plaintiff at the trial, that, on the 2d of September, he went from his brother's residence to Gwaen y Magley, and that, having then formed an unfavorable opinion of the farm, he, on the evening of the 3d, described to his brother and sister the desolate state of the property, and that thereupon his brother suggested to their sister, who was a co-executrix, with John Humphreys, of the deceased brother William, that they should take off £200 from the price of the farm. The plaintiff returned home on the 4th, and, after his return, some further correspondence took place between him and his brother John, to which it does not appear to be necessary to refer. I believe that I have stated, in sufficient detail, the effect of all the evidence adduced in support of the plaintiff's claim in this action.

In the course of the arguments at the trial, and upon the applications to the Queen's Bench Division and to this court, the case of *Alderson v. Maddison*<sup>1</sup> was much discussed, and the principles enunciated, or supposed to be enunciated, in the judgment delivered in that case, were much relied upon by the counsel for the plaintiff; and it would appear from the shorthand writer's note of what took place in this court upon the application for the rule *nisi*, that it was granted in order that an opportunity might be afforded of considering whether the principles enunciated in the judgment in that case could be put in more strict and

<sup>1</sup> 7 Q. B. D. 174.

formal language. I was a party to that judgment, as were my late colleague Bramwell, L.J., and my present colleague Brett, L.J.; and having regard to the object which this court apparently had in granting the rule, and particularly to the view which appears to have been expressed by Brett, L.J., that there seemed to him to be something in the phraseology of the judgment in *Alderson v. Maddison*<sup>1</sup> which he did not understand, I, at the close of the argument upon the application to make the rule absolute, expressed my desire of having an opportunity of reconsidering the effect of that judgment, and for that purpose our judgment upon the matter under consideration was reserved. I have since given my best attention and consideration to the case of *Alderson v. Maddison*,<sup>1</sup> and to the several discussions which have taken place with reference to it, when the subject-matter of this action has been under consideration, and I have arrived at the conclusion that the general principle, enunciated in the judgment, as to the circumstances under which a part performance of a parol contract relating to land will be regarded as sufficient to take it out of the operation of the Statute of Frauds, is accurately stated.

That general principle is stated in the following terms: "Now, it is a well-recognized rule, that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement; it is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. As was said by Lord Hardwicke in the case of *Gunter v. Halsey*,<sup>2</sup> they must be such as could have been done with no other view or design than to perform the agreement." I believe that the general principle, so enunciated, is supported by all the recognized authorities upon the subject.

The enunciation of the general principle is followed by illustrations in the following terms: Thus payment of part, or even of the whole, of the purchase-money is not sufficient to exclude the operation of the statute, unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement. On the other hand, the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which pos-

<sup>1</sup> 7 Q. B. D. 174.

<sup>2</sup> Amb. 586.

session has been given. Again, the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending upon his tenancy."

It is to the language in which the illustration as to payment of purchase-money is expressed, that the criticisms of the Lords Justices upon the occasion of the application for the rule *nisi* would appear to apply; and, if I understand the views expressed by them aright, they intimate a doubt whether the general statement that "payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute," should be qualified by the addition of the words "unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement." It is doubtless true, as was suggested by the court when the rule *nisi* was granted, that if a man is found in possession of an estate with no apparent title in writing, he is a trespasser unless he is there by virtue of some agreement; and in such a case inquiry may be made as to what the agreement is; but I do not gather from the authorities that this is the only species of part performance which would be sufficient to take a case out of the operation of the statute, a proposition which might be inferred from some observations appearing upon the notes of the discussion.

During the arguments in *Alderson v. Maddison*<sup>1</sup> the case of *Nunn v. Fabian*<sup>2</sup> was cited. I was counsel in that case, and well remember it; the facts material to the judgment were as follows: A landlord verbally agreed with his occupying tenant to grant him a new or extended lease for twenty-one years at an increased rent, and with the option of purchasing the freehold; this was the parol agreement. The landlord died without executing any lease pursuant to the agreement, but before his death the tenant paid one-quarter's rent at the increased rate, which was in fact a part payment of the purchase-money for the interest in the land which he was to acquire, and a receipt in the following terms was signed by the landlord: "Received the 14th January, 1863, of Mr. J. Nunn, the sum of £20 for balance of rent due 29th Sept. last for 60, Western Road, Brighton."

The suit was by the tenant against the devisees in trust of the landlord for specific performance of the parol agreement. The Master of the Rolls had dismissed the plaintiff's bill, and the case came before the Lord Chancellor, Lord Cranworth, by way of appeal. The receipt for the balance of rent did not contain all the necessary elements of the contract; if, therefore, the plaintiff was entitled to a decree for specific performance, it must have been upon the ground of proof of a sufficient

<sup>1</sup> 7 Q. B. D. 174.

<sup>2</sup> Law Rep. 1 Ch. 35.

part performance to take the case out of the statute, and so Lord Cranworth held. The fact of the plaintiff being in possession of the property was not a sufficient part performance of the parol agreement, for it was equally consistent with his continuing in possession under his previous tenancy, as of his possession being due to some agreement between himself and his landlord; moreover, Lord Cranworth declined to treat a proved expenditure of money upon the property as a part performance; but he held that there was a clear part performance by payment and acceptance of the Michaelmas rent at the increased rate, being of opinion that the payment of the increased amount could be referable only to some agreement; and upon that ground, and upon that ground alone, he made a decree for specific performance. The decision in *Nunn v. Fabian*<sup>1</sup> has been criticised in various quarters, but I am not aware of any subsequent decision which would be inconsistent with it; it certainly has not, so far as I am aware, been overruled by any competent authority. It is quite true that the circumstances of the case were, in several respects, to which I need not allude, very strong in favor of the plaintiff from a moral point of view, and attempts have been made to explain the decision upon other grounds than those assigned by the Lord Chancellor, but nothing can be more clear and definite than the reasons assigned by him for the decision. If *Nunn v. Fabian*<sup>1</sup> was rightly decided, and speaking for myself, I feel bound by it, it would be difficult to distinguish from it a case in which, after a parol agreement for the purchase of a freehold estate at a fixed sum, payment is made by the purchaser of a portion of the purchase-money, and a receipt is given in some such form as the following: "Received of A. B. the sum of £1,000, being in part of the purchase-money for my freehold estate at C."; and I am unable to suggest better words than those used in the judgment in *Alderson v. Maddison*,<sup>2</sup> to cover such cases as *Nunn v. Fabian*,<sup>1</sup> and that which I have last suggested. So far as I am responsible for the judgment in *Alderson v. Maddison*,<sup>2</sup> the language which has been criticised was adopted to cover such cases as *Nunn v. Fabian*,<sup>1</sup> which had been pressed upon us in argument. I understand that the case of *Alderson v. Maddison*<sup>2</sup> is under appeal to the House of Lords; if so, I hope an opportunity will be taken of testing the propriety of the decision in *Nunn v. Fabian*<sup>1</sup> and the criticised passages in the judgment in *Alderson v. Maddison*.<sup>2</sup>

As regards the case now under consideration, there is, in my opinion, no ground for the suggestion that there was any misdirection on the part of Mr. Justice Manisty, when he directed judgment to be entered for the defendants in this action. That learned judge proceeded on the ground that there was no evidence to go to the jury, either of the

<sup>1</sup> Law Rep. 1 Ch. 35.

<sup>2</sup> 7 Q. B. D. 174.



alleged promise or of part performance; in other words, that there was no evidence to go to the jury of any contract binding upon the estate of John Humphreys. Apart from the admitted fact that the subject-matter of the alleged promise was land or an interest in land, there might have been ground for contending that there was evidence of some such promise to go to the jury, though I agree with Mr. Justice Manisty and with the judges in the Queen's Bench Division in thinking that the evidence pointed more to the plaintiff having been influenced by the representations made to him by his brother as to a probable disposition of his property, than to any definite and concluded agreement between them; but, inasmuch as it was admitted that the contract, of which the breach was alleged, related to land, and that there was no memorandum or note of it in writing signed by John Humphreys, no action would lie in respect of such breach, unless there was evidence of a part performance sufficient to exclude the operation of the statute, and of such part performance I can find no trace. The part performance relied on is the completion of the purchase of Gwaeny Magley; but it cannot be successfully contended that the completion of the purchase was referable only to an agreement that John Humphreys would devise his property in a particular way. Apart from the parol testimony of the plaintiff, which is of course inadmissible for this purpose, the completion of the purchase would appear to be referable to the existing binding contract, and certainly not to any agreement to refrain from repudiating it. The fallacy which appears to me to pervade the arguments on the part of the plaintiff, based upon the supposed authority of *Alderson v. Maddison*,<sup>1</sup> consist in this, that they relied upon the parol agreement itself to prove that the alleged acts of part performance were referable to that agreement.

BRETT, L.J. I think at the time of granting the rule *nisi*, or at all events at the end of the arguments of counsel when showing cause, no member of this court had any doubt as to what must be the result of the judgment in this particular case, but we granted the rule, and we afterwards reserved the form of the judgment, in consequence of the mode in which part of the judgment in *Alderson v. Maddison*<sup>1</sup> had been expressed. If I differ in any respect from what my learned brother has said, it is in the supposition which he seems to entertain, that on the motion for the rule *nisi* we criticised the language which had been used in *Alderson v. Maddison*.<sup>1</sup> I think we should not have ventured to criticise it. We doubted whether my learned brother who wrote the judgment in that case had exactly expressed what we intended to say in part of that judgment, and inasmuch as he was to be a party to this judgment, we wished that he should be the person who should explain

<sup>1</sup> 7 Q. B. D. 174.

the language which he himself had used in *Alderson v. Maddison*.<sup>1</sup> The judgment in *Alderson v. Maddison*<sup>1</sup> was the judgment of the court, but it was expressed in words written by my learned brother, and I think naturally so, because this doctrine as to taking the case out of the 4th section of the Statute of Frauds is peculiarly an equitable doctrine, which did not depend on any construction of the statute, but on the authority of some cases decided in the Court of Chancery, which we were not prepared to differ from, and we therefore naturally referred the expression of that judgment to the member of the court who was most conversant with, or at all events as we thought the most competent to deal with, that doctrine, but in adopting his phraseology with the deference that is due to him, we did not quite sufficiently see whether we agreed to every word that was used in that judgment.

As regards this rule in equity, I think it is expressed in the judgment in *Alderson v. Maddison*<sup>1</sup> according to the authorities there referred to. But amongst the illustrations the following is there stated: "Payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute, unless it is shown"—(it does not say how it is to be shown, and it leaves it open to this that it may be shown by parol evidence or otherwise)—"that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement." It was with that part of the phraseology of the judgment that, when we came to examine it closely, we thought we could not agree. For my part, I think it unnecessary, and therefore unwise, in the present case to attempt to state affirmatively what are the circumstances which, according to the equitable doctrine, will take a case out of the 4th section of the Statute of Frauds. I must say that I adopt the phraseology of the general rule that there must be acts of part performance, but what those acts must be I think it would be unwise for the present to state my opinion. I have, however, a very strong opinion (and I venture to think that it is not mine only, but that of the Court of Appeal), that payment of part or even of the whole of the purchase-money under any circumstances that I am aware of, is not sufficient to exclude the operation of the statute. In saying this, I venture to doubt that there having been a part performance was the reason for the judgment in *Nunn v. Fabian*.<sup>2</sup> There could be no judge sitting on the Bench desiring to do justice between two parties who would not have strained every effort of his mind to give the judgment which was given in *Nunn v. Fabian*<sup>2</sup> if he possibly could. *Nunn v. Fabian*<sup>2</sup> was a very peculiar case. It was not the case of the payment of part or even of the whole of the purchase-money simply. There was a contract prepared in writing with

<sup>1</sup> 7 Q. B. D. 174.

<sup>2</sup> Law Rep. 1 Ch. 35.

all the terms upon which the parties had agreed, the whole of the purchase-money had been paid, and there was a receipt in writing signed by the party sought to be charged. It might, perhaps, then be said that the receipt sufficiently referred to or was identified with the agreement in writing, which contained all the terms. I know not how that may be, but I feel a difficulty in putting the decision in *Nunn v. Fabian*<sup>1</sup> on any principle of equity which had before that been determined. If one must say that one differs from *Nunn v. Fabian*,<sup>1</sup> very respectfully I say I do. It seems to me that according to all the cases in equity payment of part or even of the whole of the purchase-money, if that be all, is not sufficient to exclude the operation of the Statute of Frauds, and if the payment of the purchase-money, even of the whole, be the only act relied on, it seems to me that no evidence can be given to explain that act, which shall make it a sufficient one to take the case out of the 4th section of the Statute of Frauds. With regard to the decision in *Alderson v. Maddison*,<sup>2</sup> I say again what I have said before, that I have the most earnest and sincere hope that the House of Lords will see its way to overrule the decision of this court.

Rule discharged.

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ELIZABETH MADDISON, APPELLANT, *v.* JOHN ALDERSON, RESPONDENT.

IN THE HOUSE OF LORDS, JUNE 4, 1883.

[*Reported in Law Reports 8 Appeal Cases 467.*]

APPEAL from an order of the Court of Appeals (Bramwell, Baggalay, and Brett, L.JJ.) reversing a decision of Stephen, J. The facts are stated in the report of the decision of Stephen, J., and in the judgment of the Lord Chancellor in this House.

April 17, 19, 20, and 23. *Rigby*, Q.C., and *W. D. Rawlins* for the appellant.

*Davey*, Q.C., and *Gainsford Bruce* for the respondent.

JUNE 4. EARL OF SELBORNE, L.C. My Lords, the appellant in this case lived for many years as housekeeper in the service of Thomas Alderson, who died on the 16th of December, 1877. She originally entered his service in 1845, and having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton, in Yorkshire, called the Manor House Farm, in extent about ninety-two acres, and in value about £137 per

<sup>1</sup> Law Rep. 1 Ch. 35.

<sup>2</sup> 7 Q. B. D. 174.

annum, which had been devised to him by the will of an uncle, who died in 1863. It is certain that he intended to leave the appellant (subject to a small annuity) a life interest in this estate, for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation.

The appellant having possessed herself of the title deeds, the heir-at-law, to whom the estate descended, brought the present action to recover them; and she by her statement of defense and counterclaim insisted that she was entitled to the same benefit which she would have taken under the will, if duly executed, by virtue of a parol agreement alleged to have been made with her by her master for sufficient consideration, and to have been on her part performed. I do not think it necessary to read the averments contained in the 3d, 4th, and 5th paragraphs of her pleading, because, so far as the facts are concerned, they must now be taken from the verdict of the jury, together with the judge's notes of the evidence at the trial, if (as seems to have been assumed in both the courts below) that evidence, as well as the verdict, may be regarded. Whether that assumption was correct or not is in my view immaterial, because in either view my own conclusion would be the same.

The question which (at the instance of the appellant's counsel, and without objection from the respondent) was left by Mr. Justice Stephen to the jury was, "whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise, made by him to her, to make a will, leaving her a life estate in Moulton Manor Farm, if and when it became his property?" That question the jury answered in the affirmative. The evidence on which the verdict proceeded was that of the appellant herself, without any corroboration other than the unattested will, which made no mention of any such inducement. I abstain from stating her evidence in detail, because, in the condensed form in which it appears upon the judge's notes, it certainly does not go beyond (if indeed it is sufficient to justify) the verdict. The material parts of it were to this effect: That the appellant, having been long (as already stated) in Thomas Alderson's service, contemplated leaving him, and had some idea of being married, in May, 1860, and so informed him. She had ten years before "begun to leave wages in his hand"; the arrear went on from that time, owing to his straitened circumstances; and, in May, 1860, £23 7s. 6d. remained due to her. He told her of his expectations from his uncle, and that his uncle wished her to stay with him as long as he lived, and wished him to "make her all right" by leaving her the Moulton Manor Farm, which he promised to do if she lived with

him. "And so therefore" (she said) "I took his advice, and I remained on by his promises" (in another place, "I did not leave, because he advised me not"). She did not afterwards "press him" for wages; but, after his death, she brought an action against his administrator for them, which was dropped (as I understand) before or at the time when the present action was commenced. When he signed his will, he read it over to her and asked whether it was right, and "whether she was satisfied."

The case, thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his services at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

It was admitted, in the argument at the bar, that the appellant had endeavored to bring her case within the supposed authority of *Loffus v. Maw*,<sup>1</sup> decided by Vice-Chancellor Stuart (under circumstances not dissimilar) on the doctrine of representation; for which purpose the Vice-Chancellor relied upon some expressions used by Lord Cottenham in *Hammersley v. De Biel*,<sup>2</sup> and considered himself at liberty to disregard the reasons assigned by Lord Cranworth and Lord Brougham for the later decision of this House in *Jorden v. Money*.<sup>3</sup> Mr. Justice Stephen and the Court of Appeal (rightly in my opinion) took a different view. I have always understood it to have been decided in *Jorden v. Money*<sup>4</sup> that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts—a distinction which is illustrated by such cases as *Prole v. Soady*<sup>5</sup> and *Piggott v. Stratton*.<sup>6</sup> *Hammersley v. De Beil*<sup>6</sup> was a case of contract for valuable consideration, duly signed so as to fulfill the requirements of the Statute of Frauds, in the view both of Lords Langdale and Cotten-

<sup>1</sup> 3 Giff. 592.

<sup>4</sup> 2 Giff. 1.

<sup>2</sup> 12 Cl. & F. 45, at p. 62n.

<sup>5</sup> 1 D. F. & J. 33.

<sup>3</sup> 5 H. L. C. 185.

<sup>6</sup> 12 Cl. & F. 45.

ham in Chancery and of Lord Campbell in the House of Lords.<sup>1</sup> Those decisions are consistent with each other; *Hammersley v. De Biel*<sup>2</sup> does not justify, and *Jorden v. Money*<sup>3</sup> is irreconcilable with the reasons stated by the Vice-Chancellor in his judgment in *Loffus v. Maw*.<sup>4</sup>

Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it necessary for your lordships now to examine the doctrine of equity as to part performance of parol contracts.

The cases upon this subject (which are very numerous) have all, or nearly all, arisen under those words of the 4th section of the Statute of Frauds, which provide that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It has been recently decided by the Court of Appeal in *Britain v. Rossiter*<sup>5</sup> that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject-matter than land; an opinion which seems to differ from that of Lord Cottenham (see *Hammersley v. De Biel*<sup>6</sup> and *Lassence v. Tierney*<sup>7</sup>). That equity has been stated by high authority to rest upon the principle of fraud: "Courts of equity will not permit the statute to be made an instrument of fraud." By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by Lord Justice Cotton, in *Britain v. Rossiter*,<sup>8</sup> that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds or of the established limits of the equitable doctrine of part performance.

It has been determined at law (and, in this respect, there can be no

<sup>1</sup> 12 Cl. & F. 63, 64n. and 87; 3 Beav. 474-6.

<sup>2</sup> 5 H. L. C. 185.

<sup>3</sup> 11 Q. B. D. 123.

<sup>4</sup> 1 Mac. & G. 572.

<sup>5</sup> 12 Cl. & F. 45.

<sup>6</sup> 3 Giff. 592.

<sup>7</sup> 12 Cl. & F. 64 n.

<sup>8</sup> 11 Q. B. D. 130.

difference between law and equity), that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced.<sup>1</sup> *Crosby v. Wadsworth*<sup>2</sup> was an action of trespass brought by the purchaser against the vendor of a growing crop. The contract was by parol, and it was held to be concerning an interest in land, within the 4th section of the statute. "But" (said Lord Ellenborough) "the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof; which description of action does not properly apply to the one now brought, viz., a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol (so that, if the same had been executed, the parties could have treated it as a nullity), yet, being executory, and as for the non-performance of it no action could have been, by the provisions of the 4th section, maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it."

From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment

<sup>1</sup> *Crosby v. Wadsworth*, 6 East 602, 611; *Leroux v. Brown*, 12 C. B. 824; *Britain v. Rossiter*, 11 Q. B. D. 123.

<sup>2</sup> 6 East 602, 611.

brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract ; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed ; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.

It is not in England only that such a doctrine prevails ; a similar (perhaps even a larger) equity is also recognized in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland, "written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity ; as obligations relative to land ; or obligations agreed to be reduced to writing ; or those required by statute to be in writing." To constitute any such contract there must be a "final engagement" ; and as a corollary to that rule a "*locus penitentiae*" is given ; *i.e.*, "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape." But to this, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiae*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect : provided they are unequivocally referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable."<sup>1</sup>

This must I think have been the principle on which the House of

<sup>1</sup> Bell's Principles, §§ 18, 25, 26.



Lords proceeded in 1701 when it reversed the decree of Lord Somers in *Lester v. Foxcroft*.<sup>1</sup> Lord Redesdale in *Clinan v. Cooke*<sup>2</sup> and *Bond v. Hopkins*<sup>3</sup> referred to that case as if it had been the earliest decision on the subject. But there were, in fact, two prior cases before Lord Guilford—*Hollis v. Edwards*<sup>4</sup> and *Butcher v. Stapely*<sup>5</sup> decided in 1683 and 1685, within the first ten years after the enactment of the Statute of Frauds, in the earlier of which the Lord Keeper had refused, and in the latter had granted, relief. *Butcher v. Stapely*<sup>5</sup> was a strong case upon its circumstances; for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser (with notice) of the same land from the vendor, the defendant having paid his purchase-money under a signed agreement and having obtained a conveyance of the legal estate. Lord Guilford “declared that inasmuch as possession was delivered according to the agreement, he took the bargain to be executed.”

Among later cases I may refer to *Pengall v. Ross*,<sup>6</sup> decided by Lord Cowper in 1709; *Lockey v. Lockey*,<sup>7</sup> by Lord Macclesfield in 1719; and *Potter v. Potter*,<sup>8</sup> by Strange, Master of the Rolls, in 1750. “There must be something,” said Lord Cowper,<sup>9</sup> “more than a bare payment of money on the one part to induce the court to decree a specific performance on the other part, either by putting it out of the party’s power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, etc.—in such case, where the agreement hath proceeded so far on one part, the statute never intended to restrain this court from decreeing a performance of the other.” Lord Macclesfield said<sup>10</sup> that an unwritten agreement, “if executed on one part, had been always looked upon so far conclusive as to induce the court to decree an execution on the other part, not to destroy or avoid the agreement so far as it was already carried into execution.” Sir John Strange said,<sup>11</sup> “If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity.”

The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illus-

<sup>1</sup> Colles Par. Cas. 108.<sup>2</sup> 1 Sch. & Lef. 22.<sup>3</sup> 1 Sch. & Lef. 433.<sup>4</sup> 1 Vern. 159.<sup>5</sup> 1 Vern. 363.<sup>6</sup> 2 Eq. C. Ab. 46.<sup>7</sup> Prec. Ch. 519.<sup>8</sup> 1 Ves. Sen. 441.<sup>9</sup> 2 Eq. C. Ab. 46.<sup>10</sup> Prec. Ch. 519.<sup>11</sup> 1 Ves. Sen. 441.

trates the wisdom of the rule, which requires some *evidentia rei* to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.

Lord Hardwicke in *Gunter v. Halsey*<sup>1</sup> said: "As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement" ("the terms of which," he added, "must be certainly proved"). He thought it indeed consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance.<sup>2</sup> This Lord Cowper in *Pengall v. Ross*<sup>3</sup> and Lord Macclesfield in *Seagood v. Meale*<sup>4</sup> had refused so do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full.<sup>5</sup> Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities show that the acts relied upon as part performance must be equivocally, and in their own nature, referable to some such agreement as that alleged.<sup>6</sup> "The acknowledged possession" (said Sir T. Plumer in *Morphett v. Jones*<sup>7</sup>) "of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the court regarding what has been done as a consequence of contract or tenure."

"It is in general," said Sir James Wigram,<sup>8</sup> "of the essence of such

<sup>1</sup> Amb. 586.

<sup>2</sup> *Lacon v. Mertens*, 3 Atk. 1; *Owen v. Davies*, 1747, 1 Ves. Sen. 83.

<sup>3</sup> 2 Eq. C. Ab. 46.

<sup>4</sup> Prec. Ch. 561, A.D. 1721.

<sup>5</sup> *Clinan v. Cooke*, 1 Sch. & Lef. 40; *Hughes v. Morris*, 2 D. M. & G. 356; *Britain v. Rossiter*, 11 Q. B. D. 123.

<sup>6</sup> *Cooth v. Jackson*, 6 Ves. 38; *Frame v. Dawson*, 14 Ves. 386; *Morphett v. Jones*, 1 Sw. 181.

<sup>7</sup> 1 Sw. 181.

<sup>8</sup> *Dale v. Hamilton*, 5 Hare 381.

an act that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase-money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the court does not in general give relief.<sup>1</sup> The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in 1, *Clerk v. Wright*<sup>2</sup> and *Whaley v. Bagenal*,<sup>3</sup> where acts preparatory to the completion of a contract were held not to be part performance; 2, *Wills v. Stradling*,<sup>4</sup> where the mere holding over by a tenant (unless qualified by the payment of a different rent) was held not to be enough "even to call for an answer"; 3, *Lamas v. Bayley*,<sup>5</sup> where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on an agreement that he should have part of it when so bought at a proportionate price; but his "desisting from the prosecution of his purchase" was held to be no part performance; and 4, *O'Reilly v. Thompson*,<sup>6</sup> where the agreement alleged was that upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but, nevertheless, a plea of the Statute of Frauds was allowed, Chief Baron Eyre saying, "These circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract": meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract, and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to

<sup>1</sup> See also *Britain v. Rossiter*, 11 Q. B. D. 130, per Lord Justice Cotton.

<sup>2</sup> 1 Atk. 13.

<sup>3</sup> 1 Bro. P. C. 345.

<sup>4</sup> 3 Ves. 381.

<sup>5</sup> 2 Vern. 627.

<sup>6</sup> 2 Cox 271.

the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in *Lamas v. Bayley*.<sup>1</sup> The alleged acts of part performance preceded, and therefore could not be evidence of any contract on her part; their performance was (as in *O'Reilly v. Thompson*<sup>2</sup>) a condition precedent, without the fulfillment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.

Two cases, on which I think it well to add some remarks, were cited by the learned counsel for the appellant, as favorable to their argument, *Walker v. Walker*<sup>3</sup> and *Parker v. Smith*.<sup>4</sup>

In *Walker v. Walker*<sup>3</sup> Lord Hardwicke did not execute any parol contract on the ground of part performance or otherwise; all that he did was to relieve the defendant from a liability which the plaintiff's conduct had made it inequitable to enforce. There had been a parol agreement between A and B, that A would surrender a copyhold belonging to him to C, charged with annuities in favor of B, if B would surrender another copyhold of his own to C. A surrendered his copyhold accordingly, charged with the annuities, and died; B did not surrender; but he sought nevertheless by his bill to enforce payment of the annuities against C. Lord Hardwicke dismissed the bill, saying that "he was not clear" that the agreement might not have been established by cross bill, upon the principle of part performance. To such a dictum, not even the authority of so great a judge can give much weight. It does not appear how, if there had been a binding agreement, C, who was no party to it, could have claimed specific performance. The true equity was that which was actually administered, viz., to relieve A's copyhold, in the hands of C, from the charge which B unconscientiously sought to enforce.

Of the other case<sup>5</sup> (before Vice-Chancellor Knight Bruce), I think it enough to say that it was dealt with in an extraordinary manner, and is difficult to reconcile with *Cooth v. Jackson*.<sup>6</sup> The acts to which the court gave the effect of part performance were done before any definite terms of agreement had been, even by parol, concluded between the parties. It might well have been held that there was an

<sup>1</sup> 2 Vern. 627.<sup>2</sup> 2 Cox 271.<sup>3</sup> 2 Atk. 98.<sup>4</sup> 1 Coll. 608.<sup>5</sup> *Parker v. Smith*, 1 Coll. 608.<sup>6</sup> 6 Ves. 38.

agreement duly signed according to the Statute of Frauds on the 30th of November, 1842 ; but the supposed acts of part performance were done before that time ; and, until then, everything, as to the terms of the intended new lease, remained unsettled. I cannot, therefore, regard *Parker v. Smith*<sup>1</sup> as a satisfactory authority.

I am sorry for the appellant's disappointment through the ignorance of her late master as to the attestation requisite for a valid testamentary act.\* But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would be extended far beyond those salutary limits within which it has hitherto been confined, if your lordships were to reverse the order of the Court of Appeal. I should have been glad if that court had dealt differently with the costs ; as she has lost, not only the estate intended for her, but also her wages ; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal ; and I humbly venture to recommend to your lordships that it should be dismissed without costs.

LORD O'HAGAN. My lords, I have had the advantage of perusing the opinion which has just been delivered by the Lord Chancellor ; and it has dealt so exhaustively with the case and with all the authorities which bear upon it, that, concurring as I do with the conclusions of my noble and learned friend and the reasons on which they are grounded, I do not feel justified in occupying time by any lengthened repetition of them. I shall briefly indicate the grounds of my concurrence.

It seems to me impossible to hold that, without a dangerous extension of the principles on which the operation of the Statute of Frauds has been held to be avoided as to certain parol contracts, on the ground of part performance, your lordships can refuse to affirm the unanimous judgment of the Court of Appeal.

There have been, I think, two errors in the conduct of the case, which have created difficulty and contradiction in the decision of it.

In the first place, the reliance of the plaintiff on the ruling of the Vice-Chancellor in *Loffus v. Maw*,<sup>2</sup> and the consequent effort to shape the evidence so as to make that ruling applicable, tended to raise a false issue, and place her controversy on an untenable foundation. I quite agree that the authorities on which that ruling was based do not sufficiently sustain it. This case must be dealt with not on the ground of representation, but as one of contract, having relation to

<sup>1</sup> 1 Coll. 608.

<sup>2</sup> 3 Giff. 592.

some binding engagement for future conduct, and not to a responsibility created by any misleading averment of existing facts. The result of the argument has made the mistake apparent, and it is now confessed.

Next, assuming that the action must be considered maintainable, if at all, for the purpose of enforcing a parol contract, partly performed, the course of the argument appears to me to have been further erroneous in this, that, instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The court was asked, from the findings of the jury and the testimony supporting them, to say there was a contract; and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained. Too much attention was bestowed upon the proof of the contract and too little on the sufficiency of the performance, which was the more substantial part of the burden on the appellant in supporting her claim. The alleged agreement regarded an interest in lands and the statute nullified it for the purpose of the action. *Per se*, it was of no account and could have no value given to it unless, in the first instance, it was evidenced by acts to be accounted for only on the supposition of its existence. The allegation of it could not be made the subject of judicial consideration as founding any right of suit, in the absence of such acts, satisfactorily ascertained.

In this case, the learned judge who presided at the trial and the judges of the Court of Appeal seem all to have thought that an unwritten contract capable of execution by a court of equity, on the fulfillment of proper conditions, was established by the verdict and the reported testimony. In my view, it is not necessary to decide the point, though it was the subject of ingenious argument at the bar, on the one side and the other. For my own part, I have some hesitation in holding upon it with the appellant for the want of definiteness in the supposed arrangement and the obscurity of the proof as to some of its material elements. If at any time, as I conceive—consistently with the proved agreement—during the life of Thomas Alderson he might, at his will, have dismissed the appellant from his service, and if she reciprocally might have declined to serve him further and so have prevented the fulfillment of the alleged condition of his promise, which could only have had effect on the continuance of her service until he died, and if, as the Lord Chancellor has, in my opinion, correctly stated, there is no evidence to show that she agreed to serve without the wages which she claimed and sued for after her master's death, I do not see that a bargain so obscure in its terms, so

uncertain in its effect, and so doubtful in its intention, could have been properly enforced. I do not see that we have before us that "certain proof" of the agreement which the authorities appear to require.

But I do not deem it necessary to discuss further the grounds of the view adopted by the learned judge. The previous question as to the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached. "The principle of the case is," says Sir William Grant, "that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is."<sup>1</sup> Then, but not till then.

I confess I have found it hard to follow the reasoning of the judges in some of the cases to which the Lord Chancellor has referred—to reconcile the rulings, in others of them—and to regard as entirely satisfactory the state of the law in which the taking of possession or receipt of rent is dealt with as an act of part performance, and the giving and acceptance of any amount of purchase-money, confessedly in pursuance and affirmance of a contract of sale, is not. As to some of the judgments, prompted no doubt by a desire to defeat fraud and accomplish justice, I am inclined to concur with the present Master of the Rolls in *Britain v. Rossiter*,<sup>2</sup> when he called them "bold decisions."

But there is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words,<sup>3</sup> "as could be done with no other view or design than to perform that agreement." It must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

The appellant's case fails in the fulfilment of this indispensable condition. It seems impossible to say that the mere statement of the acts on which she insists of necessity implies the existence of the agreement which she is bound to establish. Those acts are manifestly capable of an explanation in no degree involving the assumption that such an agreement ever was made. Briefly summarized in

<sup>1</sup> *Frame v. Dawson*, 14 Ves. 387, 388.    <sup>2</sup> 11 Q. B. D. 129.    <sup>3</sup> Amb. 587.

the way suggested by Sir William Grant, and most favorably for the appellant's contention, they may be taken to represent her service in Alderson's house, her abandonment of a purpose, as she describes it, of "making a home of my own," and her continuance to serve from 1860 until the death of her master, without the wages she had theretofore claimed and partially received.

But, though her long service is consistent with her present case, it is not demonstrative of any contract to give her the life estate she claims. She might unquestionably have remained with her master, in the enjoyment of some present comforts and the expectation of some future provision, though no such contract had been ever dreamt of. There have not been wanting recorded cases in which time and care have been bestowed by one person upon another, even from a vague anticipation that the affection and gratitude so created would, in the long run, ensure some indefinite reward. And legal tribunals have refused in those cases to turn courtesy into contract and compel any payment although such service had been performed. In such circumstances, and even where there may have been a general undertaking to afford a suitable acknowledgment, there would be no ground for inferring a contract for the conveyance or devise of landed estate to the person rendering the service, however valuable it might have been, and however clear might be the right to remuneration for it in another way, the rendering of it not being necessarily referable to any such contract.

Then, as to her service without wages, I repeat that there is no proof of any engagement so to serve, or anything to show that she might not have demanded and recovered them, at any time, in a court of law. But, even if the appellant had made such an engagement, she might have done so from motives and with hopes such as those I have indicated, or others of a like kind, strong enough and persuasive enough to induce her, for the time, to labor gratuitously and without any agreement to give her in return an interest in land. The fact that her master designed and strove to give her such an interest, at the close of his life, cannot be taken to establish the existence of such an agreement a dozen years before.

As to her continuance in a state of celibacy the evidence does not show that she ever had a real purpose to abandon it. She only "thought of" "making a home"; and that she failed to make it may have been attributable to very many reasons, having no relation whatever to the contract on which she would now rely. She may have taken other views of life, or found such a connection as she had "thought of" undesirable or impossible. Her case does not appear



to me to be helped by the suggestion that, at one period, she contemplated an arrangement of the kind.

I have come, very reluctantly, to the conclusion that the judgment of the Court of Appeal was right and that the appeal must be dismissed.

LORD BLACKBURN. My lords, I have great difficulty in understanding how Mr. Justice Stephen came to the conclusion that there was a contract between Thomas Alderson and the defendant to the effect alleged. It seems to me impossible to say that the jury found that there was such a contract by their answer to the question asked.

I do not think that the course taken at the trial amounted to a reservation to the judge of power to draw inferences of fact from the evidence, and if it had amounted to such a reservation I do not think that the evidence appearing on the notes would have justified such a finding. It is not merely that the sole witness is a person deeply interested, giving testimony as to what took place between herself and a person deceased, and that no judge sitting in equity and deciding both the law and fact would have acted on such evidence without confirmation; and that the causing of a draft will to be prepared in 1872 in favor of the defendant cannot be considered as confirmation of a promise alleged to have been made at least twelve years earlier. I do not think there is any rule of law which prevents such unconfirmed evidence from being admissible, or that would prevent a jury from believing and acting on such evidence, though it ought to be strongly pointed out to them how dangerous it would be to do so. The risk of a jury coming to such a decision, and the consequent practical change in the doctrine of specific performance, is one of those which the legislature, in amalgamating law and equity, did not perhaps sufficiently provide for.

But it seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties. I doubt, therefore, whether in any way the judgment in favor of the defendant could have stood, though perhaps it might have been necessary to have a new trial. I do not decide this, for it is quite clear that the contract alleged is a contract for an interest in lands; and it is not denied that there was no note or memorandum of the contract signed by Thomas Alderson.

And I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract (assuming that there was one) specifically performed, though I speak with diffidence, as I have not been able to discover to my satisfaction what

is the principle which is involved in the numerous cases in equity on the subject.

I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. At first this was not universally accepted as the true construction. It was thought by many very high authorities that the statute did not apply when, from the nature of the proof, there could be no risk of perjury. Sales by auction and sales negotiated through brokers were by some thought, for this reason, not to be within the statute. Lord Mansfield intimates such an opinion in *Simon v. Motivos*.<sup>1</sup> I do not think it can be said to have been finally settled that such sales were within the statute till *Schofield v. Kenworthy*,<sup>2</sup> as late as 1824. And there are indications that great equity judges on a similar principle thought that whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute and the only question was the sufficiency of the proof of what the contract was. I so understand some of Lord Hardwicke's remarks in *Gunter v. Halsey*<sup>3</sup> and *Lacon v. Mertins*.<sup>4</sup> This principle would apply whether the unequivocal act was a giving possession of the land or paying the price in whole or in part.

As soon as it was established that the construction of the statute was not what had been supposed, and that a contract within the 4th section was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged or otherwise unexceptionally proved, I think this class of cases ought to have been considered overruled; but though I speak with diffidence as to the effect of decisions in equity, it seems to me that to some extent at least they were not. Those which tended to show that payment in whole or in part would take the case out of the statute are overruled by the authorities cited by the Lord Chancellor, but there are cases that for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land, a delivery of possession of the land will take the case out of the statute. This is I think in effect to construe the 4th section of the Statute of Frauds as if it contained these words, "or unless possession of the land shall be given and accepted." Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was *res integra* in refus-

<sup>1</sup> 1 W. Bl. 599.

<sup>2</sup> 2 B. & C. 945.

<sup>3</sup> Amb. 586.

<sup>4</sup> 3 Atk. 1.

ing to interpolate such words, or put such a construction on the statute. But it is not *res integra*, and I think that the cases are so numerous that this anomaly, if as I think it is an anomaly, must be taken as to some extent at least established. If it was originally an error, it is now I think *communis* error and so makes the law.

There are many rules laid down as to what should guide a judge, determining for himself what the facts are, in thinking the proof of a contract sufficient. I see great difficulty, now that equity is to be administered by a court which has the facts found by a jury, in applying these to a trial by jury, but that is a question not raised now. But I do not think this anomaly should be extended; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession.

The conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Wherever that is the case, I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party. The moral justice of the case was completely with the appellant in *Lester v. Foxcroft*,<sup>1</sup> and as that case was decided more than 180 years ago by this House, it is too late now to inquire whether the decision there overruled was not more consistent with technical equity. If there was proof of the allegation that the heir-at-law kept back the deeds from the dying man when he wished to execute them, it would seem that the reversal was quite right. Lord Redesdale doubts whether the cases founded on it have been as well considered.<sup>2</sup>

But the cases where this is given as the ground of decision are all cases in which there has been a change of possession, and I do not think that, as far as they are anomalous, they should be extended to a case where there has not been such a change. I do not doubt that, without any such change, actual fraud might give a ground for equitable relief. But Alderson, whether he only held out hopes that he would make a will in the defendant's favor, or actually contracted so to make his will, did mean to make it. There can be no fraud on his part, therefore, unless it is said that in equity it amounts to fraud not to complete a contract when the consideration is one that cannot be restored or compensated for. But this would go a great deal too far. Where a parol promise is in consideration of marriage, and the marriage actually takes place, the consideration can neither be restored

<sup>1</sup> Colles, Par. C. 108.

<sup>2</sup> *Bond v. Hopkins*, 1 Sch. & Lef. 433, 434.

nor compensated for; when a parol promise is to answer for the default of another and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by fulfilling the contract of guarantee. In those cases such a principle would render the statute a nullity, and it has been decided in *Britain v. Rossiter*<sup>1</sup> that this principle does not apply to contracts not to be performed within a year. And it would, I think, be a strange construction to apply this principle to one of the four cases in the same section of the statute where it cannot be applied to the three others. It has never been done, and it is impossible not to see that if there is any case in which the policy of the Statute of Frauds clearly applies, it is such a case as this, where the promise set up is one not to come into force till after the death of the person who is alleged to have made it.

I have therefore come to the conclusion that the judgment below should be affirmed. The costs are entirely in the discretion of this House. I do not myself see any sufficient reason for departing from the usual rule as to costs; but if the rest of your lordships are of a different opinion I will not contest the point.

LORD FITZGERALD. My lords, I entirely concur in the judgment pronounced by the Lord Chancellor, affirming the judgment of the Court of Appeal.

The decision of your lordships' house is to rest on the ground that there was nothing in the case to take the supposed agreement out of the operation of the 4th Section of the Statute of Frauds. I have had the advantage of reading the judgment of the Lord Chancellor on this question, and I adopt his reasons. The Lord Chancellor has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their own nature referable to some such agreement as that alleged, and I may add must necessarily relate to and affect the land the subject of that agreement. I quite agree that the doctrine, whatever may have been its foundation, has been too long established to be now questioned. We are bound to follow, but should rather confine than enlarge its limits. There was no part performance in the case before us such as has been defined as necessary, and I may add that the peculiar character of the alleged agreement does not admit of such a part performance by the defendant as could affect the operation of the statute.

If there was such an agreement as the defendant alleges, she had done all that was to be performed on her part, that is to say, she remained in the service of Alderson up to the time of his death, and there is no proof that she received any wages or was paid the arrears

<sup>1</sup> 11 Q. B. D. 123.

due to her in 1860. Mr. Justice Stephen thus deals with this part of the case: "As it was a contract relating to land it obviously falls within the 4th section of the Statute of Frauds. But as it is obvious that it was completely performed on the part of the defendant, it is equally clear that according to the well-known doctrine of equity the application of the statute is barred." But it is equally obvious that the acts of the defendant had no necessary reference to any contract such as is relied on, or indeed to any contract whatever, or to the land, and would be properly accounted for by some expectation of bounty from her master. At an early stage of the discussion I had satisfied my mind that there never had been any such agreement as that relied on, and that the jury did not find that there had been any such agreement.

The case made by the defendant at the trial would not probably have lasted many moments had it not been for the document called the will, which was supposed to afford confirmation of the defendant's story, but is not such a reality. There is not to be found in it any allusion to any agreement or promise or representation, nor is the intended devise for her benefit said to be as a reward for her services; and whilst she alleges a promise to leave her the manor farm, the will gives her a life estate in it, and in all other the intended testator's real estate and in all his personal estate. The intended will does indicate a desire to benefit the defendant very largely, but contains not a word that is referable to such an agreement as is alleged.

The agreement relied on by the defendant in her defense is thus put forward in the 3d paragraph of her defense, "and it being inconvenient to him, or he being unable to pay the said arrears of her said wages, he, in order to induce her to continue so to serve him, proposed to the defendant, and represented to her that if she would not press him for payment of her wages, and would continue to serve him and remain with him whilst he lived, he would leave her a life estate in the property which he expected his uncle would leave him, and in any property of which he might die possessed"; and in the 4th paragraph, "that it was agreed between the said Thomas Alderson and the defendant, that in consideration of the defendant remaining and continuing so to serve him during his life, and of the defendant forbearing to press him for payment of the said arrears, and in lieu of wages for the future, the said Thomas Alderson would by his will leave to the defendant a life estate in his property to take effect at his death, and that he would duly secure to her the said life estate." It is obvious that these two paragraphs were taken from the dispositions found in the intended will, and that there was no evidence to sustain either; but without intending to confine the defendant to the

technical statement put forward by the pleader, and giving her the full benefit of her evidence, and of the verdict of the jury, it seems to me that the correct view is that although Alderson probably made representations to her of the benefits he intended to confer on her if she remained with him during his life, there never was any agreement binding on him to do so.

I concur in the observations which have been made in the course of the case as to the inexpediency of giving effect to an agreement of the character in question, alleged by the defendant to have been verbally entered into over twenty years since, not binding on her, and not to come into effect, so far as Alderson was concerned, until after his death, and resting on the unaided testimony of the defendant. If an instance was wanted to justify the wise provisions of the Statute of Frauds and of the Wills Act we find it in the case now before us.

On the question of costs I confess that I have some difficulty. My view at the commencement was that the costs should follow the event; but on reflection, considering that the defendant succeeded in obtaining the judgment in the primary court, and that she has lost everything, not only the intended provision made for her by the imperfect will, and the benefits conferred upon her by it, but also her wages; and further, taking into account that the Court of Appeal has, in the exercise of its discretion, with which we cannot interfere, given against her the costs in the primary court and in the Court of Appeal, I think that here we may, under these circumstances, exercise our discretion in favor of the defendant in the manner indicated by my noble and learned friend the Lord Chancellor.

Order appealed from affirmed, and appeal dismissed.

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### JANE KAUFMAN v. THOMAS COOK.

IN THE SUPREME COURT OF ILLINOIS, MAY 15, 1885.

[*Reported in 114 Illinois 11.*]

APPEAL from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, J., presiding.

*Mr. J. C. Pepper* for the appellant.

*Messrs. Bassett and Wharton* for the appellee.

MR. JUSTICE MULKEY delivered the opinion of the court:

This was a bill in chancery, filed by Jane Kaufman, in the Circuit Court of Mercer County, against Thomas Cook, the appellee, to compel the latter to convey certain real estate in pursuance of an alleged

parol gift. The subject of the controversy is known to and designated by the witnesses as the "Atcheson property."

The bill charges, in substance, that appellee, who is the uncle of appellant, and without children, being displeased with the treatment the latter had received from the Stonier family, who were related to appellee by marriage, told her he would "give her a home"; that he would, for the time being, rent for her the Atcheson property, which was shortly afterwards to be sold, and if he could buy it when offered for sale he would deed it to her for a home for herself and children; that he accordingly did rent the property, subject to sale, and left a bid of \$800 for it; that he got the property at his bid of \$800, and obtained the title thereto; that he put the complainant in possession of the property, with the agreement that it should be hers and her children's forever, if he got the title; that she went into possession of said property, under the said promise and agreement, in April, 1882, and made lasting and valuable improvements on the same, under said agreement and promise; that she had the inside of the house altered, at an expense of from \$25 to \$30, built a stable at an expense of from \$30 to \$50, built and repaired fences at an expense of from \$15 to \$20, put a porch at the north end of the house, and made other lasting and valuable improvements thereon, and has resided on the property since April, 1882; that the defendant refuses to complete his gift by deed, and is trying to get possession of the property and oust her therefrom. The court, upon the hearing, rendered a decree dismissing the bill, and the present appeal is from that decree.

In the view we take of the case, it is not important to discuss the evidence in detail, or the claim that there is a variance between it and the allegations of the bill. It may be stated, in general terms, that we are of opinion that when the testimony is considered as an entirety, in the light of the relations of the parties and of all the surrounding circumstances, about which there is no controversy, it substantially sustains the bill.

The Statute of Frauds having been interposed by the answer, the question is presented whether proof of the facts alleged in the bill makes out a case of equitable cognizance not falling within the Statute of Frauds. As the property in question was not purchased by appellee until in May—near a month after appellant had taken possession of it—it follows that at the time of making the promise relied on, appellee had no title to the premises whatever, either legal or equitable, and this was well known to appellant. This being so, it is clear the entry of appellant was not under the title which she now seeks to obtain. On the contrary, it was under a mere license from one having a chattel interest only. The leasehold was in appellee, and appellant's occupancy

was that of a tenant at sufferance. She entered, therefore, solely upon the voluntary promise of appellee that he would, if he succeeded in acquiring it, convey to her a title which he did not possess, or even have a promise of. Nor did his promise to appellant impose any legal obligation on him whatever to purchase the property in question. Suppose he had withdrawn his bid of \$800 for the property, and had not bought it at all, it will not be pretended appellant could have maintained an action against him for not doing so; and yet she unquestionably could, if what occurred created a valid contract between them. It is clear, therefore, appellant's entry was not under any binding contract or engagement with one having title, either in possession or expectancy, with which to connect her subsequent expenditures on account of improvements, so as to take the case out of the statute. We do not desire to be understood as intimating, much less holding, that a vendor who, for a valuable consideration, enters into a verbal contract for the sale of premises to which he has no title, will not, on subsequently acquiring the title, be bound to specifically perform his contract where the purchaser has taken possession under it, and has made valuable improvements thereon. That he would be bound to do so under the circumstances stated, we have no doubt. But this is not a case of that kind. Here, the promisor not only had no interest in possession or expectancy, but his promise was without consideration, and the entry made under it was before anything had been done by the promisee to make it binding upon him. In such a case we are of opinion there is no ground for equitable relief.

The judgment will be affirmed.

Judgment affirmed.

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### GALLAGHER v. GALLAGHER.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, FEBRUARY  
18, 1888.

[*Reported in 31 West Virginia Reports 9.*]

*J. W. English* for appellant.

*J. B. Menager* and *W. H. Tomlinson* for appellee.

SNYDER, J. Suit in equity brought in the Circuit Court of Mason County in July, 1883, by Michael Gallagher against Hugh Gallagher and others to compel the specific performance of an alleged parol contract for the sale of real estate. The defendants answered the bill. Depositions and exhibits were filed on which the cause was heard, and on February 17, 1885, the court entered a final decree ordering the



specific execution of said contract, and directing a conveyance of the real estate by the defendant, Hugh Gallagher, to the plaintiff. From this decree said defendant has obtained this appeal.

The plaintiff's bill alleges that some time in the year 1878 the appellant, Hugh Gallagher, who is the father of the plaintiff, purchased a house and lot in Hartford City, Mason County, which is fully described, from the Hartford City Coal & Salt Co., and paid a part of the purchase-money thereon, but finding he would be unable to pay the balance, agreed with the plaintiff that if he would pay said balance of the purchase-money the deed therefor should be made by said company to him, the plaintiff, thereby selling his equitable interest in said property to the plaintiff; that in pursuance of said agreement the plaintiff took possession of the property, made valuable improvements upon it, and paid to said company about \$500 in full of the balance due on the original purchase; that said company is ready and willing to make the plaintiff a deed for the property, but the appellant refuses to permit it to do so.

The appellant, in his answer, positively denies that he ever sold said property to the plaintiff, or made any such contract with him as is alleged in the bill; he denies that the plaintiff was ever put in possession of the property, or that he made any improvements thereon; he also denies that the plaintiff ever had any interest, legal or equitable, in the property, or that he paid \$500 on the purchase thereof.

The proofs in the cause show that in the year 1859 or 1860 the appellant purchased from said company a part of the lot in controversy at the price of \$100; that he was put in possession of the same, and built a house and made other improvements thereon, and has lived in said house ever since; that soon after the first purchase he agreed to purchase the residue of the lot, constituting the whole of lots Nos. 23 and 24 of said town, at the price also of \$100, making \$200 for the whole; that before the year 1878 he had paid in full for said first purchase, but still owed the price of the second purchase with its accumulated interest; that in the fall of 1878, about the time his son, the plaintiff, became of age, he made an arrangement with the president of said company, by which his son should work for it, and that the balance due on the property was to be taken out of the son's wages. The books of the company show that from March, 1879, to October, 1880, the plaintiff's wages are credited with the aggregate sum of \$300, on account of this property. At the time these wages were earned the father and son were both living together in the house on the property as they had been before and after the alleged purchase by the son was made. The father was engaged in cultivating some rented land, raising corn and hogs, and butchering.

About these facts there is no room for controversy ; but there is a direct and irreconcilable conflict between the testimony of the plaintiff and appellant as to whether or not there ever was any contract or agreement for the sale of the property to the plaintiff, and also in regard to the arrangement by which the wages of the plaintiff were used to pay the balance due on the property. The appellant testifies positively that no such contract was ever made, and in regard to the use of the plaintiff's wages to pay the balance due from him on the property, he testifies that it was agreed between him and the plaintiff that the latter should work for the company and pay the debt on the property, and he, the appellant, would board and pay him an equal amount in money out of the sale of his hogs and other means, and that he did so pay him the full amount of the wages so used and much more ; and there is other evidence to prove that he sold hogs at different times and received money therefor to an amount more than sufficient to repay the plaintiff the sum taken from his wages to pay on the property, and that a large part of this money was in fact paid over to the plaintiff. On the other hand, the son testifies that there was a positive contract that the property was to be conveyed to him, and that the hogs which his father sold and the proceeds of which were paid to him were his own hogs, not his father's.

On these controverted matters there is little or no corroborating testimony, though the attendant facts and circumstances tend to sustain the father rather than the son. But I do not deem it necessary to refer to these, because in a suit of this character, unless the contract stated in the bill is established by a clear preponderance of evidence, the court will not enforce it. If the evidence is conflicting, and it is not clear that a contract was in fact made, a bill for specific performance will be dismissed.<sup>1</sup>

But if it were admitted not only that there was a contract of sale, but also that the purchaser had paid the purchase-money, still the plaintiff would not be entitled to relief in this suit. The principles, upon which courts of equity will avoid the Statute of Frauds on the ground of part performance of a parol contract for the sale of land, are now as well settled as any of the acknowledged doctrines of equity jurisprudence. To entitle a party to relief in such cases it must appear—First, that the contract relied on is certain and definite in its terms ; second, the acts proved in part performance must refer to, result from or be made in pursuance of, the contract proved ; and, third, the contract must have been so far executed that a refusal of full execution would operate a fraud upon the purchaser, and place him in a situation which does not

<sup>1</sup> *Haskin v. Insurance Co.*, 78 Va. 700 ; *Graham v. Hendren*, 5 Munf. 185 ; *Baldenberg v. Warden*, 14 W. Va. 397.

lie in compensation.<sup>1</sup> It is now settled that the payment by the purchaser to the vendor of the whole or a part, whether substantial or unsubstantial, of the purchase-money is not an act of part performance which will take the parol contract out of the statute.<sup>2</sup>

The fraud, which will entitle the purchaser to a specific performance, is that which consists in setting up the statute against the performance, after the purchaser has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the vendor is held by force of his acts or silent acquiescence, which have misled the purchaser to his harm, to be estopped from setting up the Statute of Frauds; therefore, a purchaser seeking the performance of such agreement must be able to show clearly not only the terms of the contract, but also such acts and conduct of the vendor as a court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the purchaser, in reliance on this representation, has proceeded, either in performance or pursuance of this contract, to so far alter his position as to incur "an unjust and unconscientious injury and loss," in case the vendor is permitted after all to rely upon the statutory defense.<sup>3</sup> From this it is apparent that the payment of the purchase-money is not such part performance as would entitle the purchaser to specific execution, because the money may be recovered back at law, and the parties be thus restored to their original position; and therefore it does not put the purchaser in such a position that he will suffer "an unjust and unconscientious injury and loss" if the contract is not enforced.<sup>4</sup>

Possession is an important element in the enforcement of such contracts. Possession alone will, under some circumstances, entitle the purchaser to a decree for specific performance.<sup>5</sup> In all cases in which possession, either as delivered by the vendor, or assumed by the purchaser, is relied upon, it must appear to be a notorious and exclusive

<sup>1</sup> *Campbell v. Fetterman*, 20 W. Va. 398, 404; *Wright v. Pucket*, 22 Gratt. 370; 1 *Lead. Cas. Eq.*, 2d Am. Ed., top pp. 557-574.

<sup>2</sup> *Jackson v. Cutright*, 5 *Munf.* 308; *Fry. Spec. Perf.* § 403; 2 *Story Eq. Jur.* 760.

<sup>3</sup> *Browne, St. Frauds*, § 457*a*; *Glass v. Hulbert*, 102 *Mass.* 34; *Swain v. Seamens*, 9 *Wall.* 254.

<sup>4</sup> *Story Eq. Jur.* § 761.

<sup>5</sup> *Harris v. Crenshaw*, 3 *Rand.* 14; 2 *Story Eq. Jur.* § 761.

possession of the land claimed, and to have been delivered or assumed in pursuance of the contract alleged, and so retained or continued. Where the purchaser moves upon the premises and remains there in company with the previous occupant, not as the ostensible and exclusive proprietor, or where the metes and bounds of the land alleged to be purchased are not fixed and recognized and the purchaser occupies it in common with adjacent land of his own, such possession, as an act of part performance, will not be sufficient to entitle the purchaser to specific performance.<sup>1</sup>

It is always regarded as strongly confirmatory of the rights of a purchaser seeking the specific execution of a verbal contract for an estate in land, that he has proceeded, upon the faith of the contract and with a knowledge of the vendor, to expend money in the improvement of the land. But the improvements relied upon must be of a character permanently beneficial to the land, and involving a sacrifice to the purchaser who made them. Although the improvements are required to be beneficial to the land, a court of equity will not inquire whether the expenditures have been judiciously or injudiciously made, or whether the money has been well or ill laid out.<sup>2</sup> It must appear, however, that the loss of his improvements would be a sacrifice to the purchaser. If, therefore, he had gained more by the possession and use of the land than he had lost by his improvements, or if he has been in fact fully compensated for the improvements, they will not be available to him as a ground for specific execution.<sup>3</sup>

In the case at bar, the plaintiff has wholly failed to prove either that he ever had the exclusive possession of the property in controversy, or that he made any permanent improvements upon it. In respect to these matters, the plaintiff, in answer to the question, "State how the defendant, Hugh Gallagher, was living there after you took possession of the property," testifies, "we were both living there together on what I made until I became of age. After I became of age, the contract for the land was made, and we have lived in the same condition ever since up to October 10, 1882. I went off and boarded for a couple of months before I was married, and then I went there to live. He lived some three or four mouths with us, and then to himself, in the same house." And in reply to the question as to what improvements he had put upon the property, since he took possession, the plaintiff testifies as follows: "I paid for the stripping the doors and for locks for same, and built a

<sup>1</sup> *Fry v. Shepler*, 7 Pa. St. 91; *Haslet v. Haslet*, 6 Watts 464; *Browne, St. Frauds*, §§ 467-486.

<sup>2</sup> *Davenport v. Mason*, 15 Mass. 85; *Whitehead v. Brockhurst*, 1 Brown Ch'y 417.

<sup>3</sup> *Browne, St. Frauds*, §§ 487-491.

well frame on the premises and put a bucket in the well or to a rope." This is the only evidence in the record in regard to the character of the possession of the property by the plaintiff and of the improvements made thereon by him. It clearly shows that the appellant never surrendered the possession, and that the plaintiff never had the exclusive possession as purchaser or otherwise. The alleged improvements were merely repairs of the most trifling character and not improvements at all.

According to the principles hereinbefore announced and the authorities cited, the plaintiff has had no such possession of the property nor had he made such improvements thereon as would entitle him to a specific execution of his alleged contract of purchase, even if he had clearly shown, as he has not, that a contract of sale had been actually made, and in pursuance of it he had paid the purchase-money in full, for the reason that he has an ample remedy at law to recover back his purchase-money, and thus he could be fully compensated and restored to his original position. I am therefore of opinion that the decree of the Circuit Court should be reversed, and the plaintiff's bill dismissed.

Reversed.

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TEUNIS SLINGERLAND v. TEUNIS S. SLINGERLAND.

IN THE SUPREME COURT OF MINNESOTA, SEPTEMBER 10, 1888.

[Reported in 39 Minnesota Reports 197.]

PLAINTIFF brought this action in the district court for Dodge County, to compel the defendant to convey to him a certain farm in that county in specific performance of the agreement stated in the opinion. The action was tried by Buckham, J., who ordered judgment for defendant. The plaintiff appeals from an order refusing a new trial.

*Geo. B. Edgerton, Burt W. Eaton, Gordon E. Cole, and Davis, Kellogg & Severance* for appellant.

*Chas. C. Willson* for respondent.

GILFILLAN, C.J. The parties stand in the relation of father and son. The defendant, the father, owned a large farm in the county of Dodge. On the 5th day of March, 1886, there were pending in the district court in said county five several actions or proceedings—one an action by plaintiff against this defendant to recover about \$15,000, for services rendered between June, 1879, and January, 1886; one an action by plaintiff against defendant to recover \$850, the value of five shares of the capital stock of the First National Bank of Kasson, claimed by plaintiff to have belonged to him, and to have been wrongfully con-

verted to his own use by defendant, January 29, 1886; one against said bank, of which this defendant was the president, to recover \$850, the value of five shares of the stock of the bank claimed by plaintiff to have belonged to him, and to have been converted and disposed of by the bank January 29, 1886, which stock was also claimed by this defendant to belong to him; one against said bank to recover \$190, money deposited by plaintiff in the bank prior to January 30, 1886, and which money this defendant claimed belonged to him; and one a proceeding by mandamus, on the relation of this defendant, against the county auditor of Dodge County, to compel him to issue to the relator his warrant upon the county treasurer for the payment to the relator of certain moneys which had been paid into the treasury in redemption of lands sold for taxes, both this plaintiff and this defendant claiming to be entitled to such moneys. These actions and proceedings were all defended, the controversy in each being really between this plaintiff and defendant. They were all on the calendar of the March term, 1886, of the court for trial, and the first was on trial, when, on said 5th day of March, 1886, the defendant orally offered to plaintiff that if he would dismiss said actions brought by him, and turn over to defendant said money in the county treasury, he (defendant) would convey said farm to him, with the stock, machinery, and personal property, on the day when he should be married to a certain young lady, to whom he was then, and for some time had been, engaged to be married as soon as his pecuniary circumstances would warrant his assuming the support of a family, which engagement, and the reasons for delay in it, were known to and approved of by defendant. Plaintiff thereupon orally accepted said offer, and forthwith dismissed said actions, and withdrew his claim to the money involved in said mandamus proceeding, and such money was thereupon paid over to defendant, and the proceedings dismissed. On the 31st of March, 1886, plaintiff and said young lady were married. From March 5th till some time after the marriage defendant intended to carry out his agreement, but on December 8th following, on a formal demand by plaintiff for a conveyance, he refused to execute it, and denied any agreement or obligation to do so.

It is not found by the court below that plaintiff's marriage, or that any agreement by him to marry, formed any part of the consideration for defendant's agreement to convey. The marriage is therefore to be left out of account in considering the matter of part performance. So is the matter of possession; for, although plaintiff worked on the farm under the direction of the defendant after the agreement, it is not found that such working was because of the agreement, and it is found that plaintiff never was at any time in the possession or control of the premises, or any part thereof, and never made any improvement thereon.

The question, then, is, was the doing by the plaintiff of the things which we have mentioned, to wit, dismissing the various suits and proceedings, and permitting the money in the county treasury to be paid to defendant, such part performance as to take the agreement out of the operation of the Statute of Frauds?

The principle that must control the decision of the question is stated (in accordance with all the authorities) in *Brown v. Hoag*<sup>1</sup> thus: "The doctrine of part performance rests on the ground of fraud. The underlying principle is that where one of the contracting parties has been induced or allowed to alter his situation on the faith of an oral agreement within the statute, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute." That is, equity will not permit the statute, the purpose of which was to prevent fraud, to be used as a means of committing it. The difficulty is in applying the principle to the facts of the particular case, and in determining whether a fraud will result unless the agreement be enforced. Acts of part performance may be done which will not take the case out of the statute. Thus, though the purchasers pay a part or the whole of the purchase-money, it will not suffice; because (although some authorities give a different reason for it) a recovery may be had of the money paid, and that is, in law, deemed an adequate remedy to prevent fraud. And so where the consideration is paid in services of such a character that their value may be estimated and liquidated in money, so as measurably to make the vendee whole. And it may be stated, generally, that where the party has another remedy that will restore him substantially and adequately to the situation he was in before, the statute will avoid the agreement. In case of payment in services, if their character be such that it is impossible to estimate their value by any pecuniary standard, and it is evident they were not intended to be measured by any such standard, the performance of them is a part performance. Instances of that kind are furnished in *Rhodes v. Rhodes*,<sup>2</sup> *Davison v. Davison*,<sup>3</sup> *Gupton v. Gupton*,<sup>4</sup> *Sutton v. Hayden*,<sup>5</sup> *Hiatt v. Williams*,<sup>6</sup> in which the services agreed on were the care and support during life of one of the parties.

Another class of cases, more or less analogous to this, are those where something else was done besides payment of the consideration in money or services, and in which it was held that, because the party could not be substantially restored to his original situation, nor adequately compensated in damages, the agreement ought to be enforced to prevent fraud. In *Eldredge v. Jenkins*<sup>7</sup> it was considered strong ground to en-

<sup>1</sup> 35 Minn. 373; 29 N. W. Rep. 135.

<sup>2</sup> 13 N. J. Eq. 246.

<sup>5</sup> 62 Mo. 101.

<sup>6</sup> 72 Mo. 214.

<sup>3</sup> 3 Sandf. Ch. 305.

<sup>4</sup> 47 Mo. 37.

<sup>7</sup> 3 Story 181.

force the agreement that the party had surrendered up his present rights and just expectations under an agreement for a conveyance with a prior owner of the land, suffered his equity to enforce such agreement to expire, consented to the prior owner conveying to defendant, and had surrendered up all remuneration for his past advances and services upon the land under the agreement with such prior owner. In *Malins v. Brown*<sup>1</sup> the plaintiff had agreed orally with the owner of real estate and Munroe, the defendant's testator, who held a mortgage upon it, that he should purchase it, paying part of the consideration to Munroe on his mortgage, and that Munroe should then execute a release. Plaintiff performed on his part, and the agreement to release was enforced, the court saying: "The recovery of the \$700 [the amount plaintiff paid to Munroe] and interest would not indemnify the vendee. He has been drawn into a purchase which he would not have made independent of the agreement of Munroe. That will always be considered a part performance which puts a party in a situation which is a fraud upon him unless the agreement is executed." In *Daniels v. Lewis*<sup>2</sup> plaintiff was preparing to bring an action against defendant to recover real estate. It was orally agreed between them that plaintiff should refrain from bringing the action, and pay defendant \$75, and the latter should convey to him the real estate. Plaintiff did so refrain till his cause of action was barred by the statute of limitations, and paid part, and tendered the remainder, of the money. The agreement was enforced. In *Paine v. Wilcox*,<sup>3</sup> W was about to take an appeal and stay of sale upon a decree in foreclosure recovered by A against him. He refrained from so doing, and allowed the sale to proceed, upon the oral agreement that it should go on, and A bid in the property, and convey it to him on certain conditions. Held, a part performance. In *Seaman v. Aschermann*<sup>4</sup> A agreed orally with B to accept from him and execute a lease of certain real estate and buildings for five years, thereby inducing him to break off pending negotiations to rent to a third person, and to materially alter the structure of the buildings, to adapt them to A's use; and A went into and held possession for two years, paying rent as agreed for the lease. Execution of the lease by A was enforced. In *Van Dyne v. Vreeland*,<sup>5</sup> an uncle agreed orally with a father to adopt and keep an infant son of the latter, and that at his (the uncle's) death all his property should belong to the son. The agreement was performed by the father and son, so far as they were to do so, and the agreement was enforced. In *Brown v. Hoag*, *supra*, a mother had executed a contract to convey the real estate in question, with other real estate, to one of her sons, C, and subsequently conveyed it with covenants to another son,

<sup>1</sup> 4 N. Y. 403.<sup>2</sup> 16 Wis. 140.<sup>3</sup> Id. 202.<sup>4</sup> 51 Wis. 678.<sup>5</sup> 11 N. J. Eq. 370.



F, and the latter had negotiated a sale of such other real estate, which was prevented by notice of the contract with the first son. To settle the matter, it was agreed orally, between the mother and two sons, that the mother should convey other real estate and certain personal property to the wife of C, and that C should relinquish all claims to the property in question and that which F was about to sell, and permit F to convey. The mother conveyed to C's wife the real and personal property as agreed on, and F conveyed that part which he had so negotiated to sell, and with the proceeds paid off mortgages on the whole property, and then conveyed that in question to Brown. The court held that if C, the defendant, were permitted to assert his claim under the contract of the mother to convey to him, her estate would be liable on her covenants in her deed to F, and an action at law for the value of the property transferred to C's wife would not afford adequate relief; and also that F, having conveyed with covenants, would be liable on his covenants, and would have no remedy except against the estate of the mother on her covenants; laying stress on the fact that the property transferred by the mother to C's wife was not transferred for a money consideration, and that it was evident its value was not intended to be measured by a money standard. So it was held to be a case of sufficient part performance. It was stated, as the general principle for determining such cases: "It must appear that his (the plaintiff's) position is such that an action at law for damages will not afford him adequate relief."

In this case no remedy is apparent that will restore plaintiff to the situation he was in, or put him in as good a situation as he was in, at the time of making the agreement. If the actions and proceedings then pending could be reinstated by vacating the dismissals, still plaintiff irretrievably lost the opportunity to try them at the March term, 1886. An opportunity to try them a year or two years after that time, when, perhaps, plaintiff's ability to present his claims would not be the same, would not be an equivalent for the right to try them at that term. But they could not all be reinstated. The proceeding against the county auditor certainly could not be, nor could a new similar proceeding be instituted. If the bank, relying on the settlement between plaintiff and defendant, and the dismissals of the actions against it, changed its position, so that restoring the actions would operate as a fraud upon it, those actions could not be reinstated; and, for the same reason, new actions for the same causes could not be maintained against it. As to the actions against defendant, plaintiff might succeed in having them reinstated, or, if he did not succeed, might bring new actions; but, in the latter event, a part of the cause of action in one of them would, in the meantime, have become barred by the statute of limitations.

The only other suggestion of a remedy to plaintiff is that he might have brought an action for damages for the loss sustained by his dismissal of the former actions and proceedings. Such an action would be novel, though it might be maintained. The difficulties in the way of prosecuting it, so that the recovery would put him in as good position as he was in before, would be great. He would have to show to what extent he had lost his original claims, and the value of what was so lost. Take the cases against the bank. He would have to show that his rights as against it were gone, and then show the value of his claims against it. And so with the other actions. The dismissals were not made on a money consideration, nor did the parties intend the value of the actions to be measured by a money standard. In no way could the loss of the advantage which the right to try the actions at the March term, 1886, gave him be estimated in damages, nor any recovery be had for it. Among all the cases we have cited, in no one was it clearer that an action for damages was not an adequate remedy than it is in this case.

Order reversed, and new trial ordered.

NOTE.—A motion for reargument of this case was denied October 10, 1888.

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## EDWARD W. MORRISON ET AL. v. HARRY HERRICK ET AL.

IN THE SUPREME COURT OF ILLINOIS, OCTOBER 31, 1889.

[*Reported in 130 Illinois Reports 631.*]

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, J., presiding.

*Mr. L. H. Boutell* for the appellants.

*Mr. S. K. Dow* for the appellant Edward W. Morrison.

*Messrs. Smith & Forch* for the appellees.

Mr. JUSTICE BAILEY delivered the opinion of the court. In this case, Harry Herrick and Charles K. Herrick filed their bill in chancery against Edward W. Morrison, to compel the specific performance by him of an oral agreement, alleged to have been made on or about June 1, 1884, for a lease, for a term of five years from May 1, 1885, of a certain store and basement known as number 115 East Madison Street, Chicago. George A. Miner and others, comprising the firm of Miner, Beal & Co., were also made parties defendant, it being alleged that said Morrison had fraudulently executed to them a lease of said premises, and had entered into an unlawful and fraudulent con-

spiracy with them to eject the complainants therefrom, and to deprive them of their right to the possession and enjoyment thereof. The bill prayed that said lease to Miner, Beal & Co. be held to be subject to the complainants' rights and inoperative as against them, and that said Miner, Beal & Co. be restrained from interfering with the complainants' possession of said premises.

Defendant Morrison answered denying said oral agreement and setting up the Statute of Frauds, and also admitting that he had demised said premises, together with certain other premises thereto adjoining, to Miner, Beal & Co. for the term of five years from May 1, 1886. Miner, Beal & Co. answered and filed their cross-bill, asserting the validity of said lease to them, and the priority of their rights thereunder, and praying that the complainants in the original bill be decreed to surrender and deliver up said premises to them. A demurrer to the cross-bill was sustained, and the cause coming on for hearing as to the original bill on pleadings and proofs, a decree was rendered in accordance with the prayer of said bill. Said decree was affirmed by the Appellate Court, and the record is now brought here on appeal from that court.

It appears that Edward W. Morrison is, and for many years has been, the owner of a four-story business building on the northeast corner of Clark and East Madison Streets, Chicago. The first story of said building is divided up so as to be used by several occupants for mercantile purposes, there being, in addition to one or more stores on the corner not in controversy here, three stores fronting on East Madison Street known as numbers 113, 115 and 117, and a double store fronting on Clark Street known as 131 and 133. For several years prior to the time said oral agreement is alleged to have been made, the complainants had occupied number 115 East Madison Street, as a hat and cap store, under yearly leases executed by Morrison to them, and at the date of said oral agreement, they were occupying it under a written lease for the term commencing May 1, 1884, and ending April 30, 1885, the rent reserved being \$3,000 payable in monthly installments of \$250 each.

The allegations of the bill in relation to the making of the oral agreement and the circumstances connected therewith are, in substance, that the complainants, during the time they had occupied said premises, had been doing a flourishing, profitable and constantly increasing business, and that they and their place of business had become widely known to the public; that for the purpose of retaining their position and competing successfully with rival establishments, and of still extending their business and patronage, it became very desirable that they should make extensive and costly improvements in their store,

provided they could obtain a further lease for a sufficient length of time to warrant such expenditure; that they so informed said Morrison, and proposed to him, that if he would grant to them a lease of said premises for a term of five years, to commence at the expiration of their then existing lease, they would make certain expensive and permanent improvements in said store, and would also put in new and expensive cases and fixtures, thus rendering it as fine if not the finest and most beautiful and attractive hat and cap store in the city of Chicago; that said Morrison approved of and assented to said proposition, and that it was thereupon agreed between him and the complainants that he would execute to them a further lease of said premises for the term of five years, beginning on the first day of May, 1885, and continuing until the 30th day of April, 1890, at a yearly rental of \$3,000 for the first year, payable in monthly installments of \$250, and at a yearly rental of \$3,300 for each of the four remaining years, payable in monthly installments of \$275 each.

It appears from the evidence, without any material controversy, that shortly after the time this agreement for a lease is alleged to have been made, the complainants proceeded to make their proposed improvements, those of a permanent character consisting of expensive panel work upon the ceiling, fresco painting on the walls, remodeling the front doors and windows and putting in stained or cathedral glass, costing in all about \$1,700. They also constructed new cases of hard wood and plate glass, fitted and adapted to the store, with pulleys to raise and lower the doors and sashes, and also plate glass mirrors fitted and adapted to the spaces which they were to occupy on the walls, the total expense of such fixtures being about \$3,300. To make room for these fixtures, those previously in use, and which cost \$700, were removed and disposed of for only \$150, that being all they would bring. A new furnace and new gas-fittings were put in at a cost of about \$490. These expenditures were all made during the months of July and August, 1884. The time occupied in fitting up the store in the manner above indicated was from four to six weeks, and during that time the complainants' business was largely if not wholly interrupted, thus causing them considerable additional loss.

Regarding the oral contract for a lease as sufficiently proved, the question arises whether such part performance has been shown as will take it out of the operation of the Statute of Frauds.<sup>1</sup> The authorities in this country as to what acts of part performance will be sufficient, in the view of a court of equity, to take an oral contract for the sale or lease of lands out of the statute, are not altogether

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

harmonious, and this court has not been disposed to carry the doctrine of part performance quite to the extent to which it has been carried by the decisions of some of the courts. Certain acts of part performance, however, have uniformly been held sufficient. Thus, we have held in many cases, that taking possession of the land with the consent of the vendor, paying the purchase-money, and making lasting and valuable improvements, are sufficient acts of part performance to justify the specific performance of an oral contract of purchase.<sup>1</sup> In other cases it is held that taking possession and paying the purchase-money is sufficient.<sup>2</sup> In other cases it is held that taking possession and making valuable improvements is sufficient part performance.<sup>3</sup> It is under the rule established by the decisions last cited that the complainants in this case must base their right to have their oral contract for a lease specifically enforced.

The evidence shows beyond controversy that the complainants expended large sums of money in making permanent improvements upon the demised premises and in fitting up and furnishing the same for use in carrying on their business, and it is equally beyond controversy that these expenditures were made under and in reliance upon the oral contract for a lease for a further term of five years. So far then as the making of valuable improvements can constitute an element of part performance, the complainants have established their right to a decree. It is true the improvements were all made before the term contemplated by the oral agreement was to commence, and while the complainants were in possession under their former lease, but that circumstance does not seem to us to be material, so long as the improvements were in fact made in reliance upon and in pursuance of the provisions of the oral agreement.

The more difficult question relates to the possession which the complainants must establish and rely upon as an act in part performance. It is undoubtedly the rule that acts of part performance, whatever they may be, must refer exclusively to the contract, and be such as would not have been performed but for such contract. They must

<sup>1</sup> *Thornton v. Heirs of Henry*, 2 Scam. 218; *Udike v. Armstrong*, 3 *id.* 564; *Stevens v. Wheeler*, 25 Ill. 300; *Blunt v. Tomlin*, 27 *id.* 93; *Mason v. Bair*, 33 *id.* 194; *Fleming v. Carter*, 70 *id.* 286; *Laird v. Allen*, 82 *id.* 43; *McNamara v. Garrity*, 106 *id.* 384; *Gorham v. Dodge*, 122 *id.* 528.

<sup>2</sup> *Fitzsimmons v. Allen's Admr.* 39 Ill. 440; *Temple v. Johnson*, 71 *id.* 13; *Ferbrache v. Ferbrache*, 110 *id.* 210; *Ramsey v. Liston*, 25 *id.* 114; *Shirley v. Spencer*, 4 Gilm. 583.

<sup>3</sup> *Keys v. Test*, 33 Ill. 316; *Kurtz v. Hibner*, 55 *id.* 514; *Wood v. Thornly*, 58 *id.* 464; *Langston v. Bates*, 84 *id.* 524; *Kaufman v. Cook*, 114 *id.* 11; *Bohanan v. Bohanan*, 96 *id.* 591; *Bright v. Bright*, 41 *id.* 97; *Padfield v. Padfield*, 92 *id.* 198.

be such as cannot be explained consistently with any other contract than the one alleged, that is to say, they must refer to, result from, and be done in pursuance of such contract. If therefore possession is relied upon as an act of part performance, it must be possession under the contract sought to be enforced. The continuance of possession taken before the contract was made is accordingly not usually held to be sufficient.<sup>1</sup> This rule applies especially to cases where the previous holding is under a lease, for as the tenant may lawfully continue in possession until notice to quit, such continuance in possession is presumptively referable to the lease. It has therefore been sometimes questioned whether, as between landlord and tenant, part performance is possible. But the better doctrine would seem to be, that one continuing in possession is at liberty to prove, if he can, that his possession, after the termination of the former lease, is under the oral contract.

The expenditure of money by the tenant in making improvements on the premises, on the faith of the oral agreement for a lease, may be viewed, not only as constituting of itself an act of part performance, but as furnishing strong if not conclusive evidence that the possession is continued under the oral contract and not under the lease. On this subject it is said by Mr. Browne: "It is always regarded as strongly confirmatory of the right of a plaintiff seeking the specific performance of a verbal contract for an estate in land, that he has proceeded, upon the faith of the contract, and with the knowledge of the vendor, to expend money in improving the land. In cases of purchasers who were, before and at the time of the contract, tenants of the same land, it is often conclusive of the nature and animus of their continued possession; thus serving to explain and define one act of part performance by means of a superadded and corroboratory act. The propriety of admitting this expenditure of money in improvements as a reason for enforcing the contract is much more clear upon the equitable view of preventing fraud than is that of admitting the taking and delivery of possession. For in many cases such improvements are carried to that point that they are quite incapable of being compensated in damages."<sup>2</sup>

In *Mundy v. Joliffe*<sup>3</sup> a tenant who went into possession of premises under a former lease obtained from his landlord an oral contract for a renewal of his lease for a further term, said contract stipulating, among other things, for the making of certain improvements on the demised premises. The tenant continued in possession, and after the

<sup>1</sup> 2 Reed on Statute of Frauds § 585.

<sup>2</sup> Browne on Statute of Frauds § 487.

<sup>3</sup> 5 Mylne & Craig 167.

stipulated improvements were made, brought his bill for specific performance of the contract, and it was held, as a matter about which there could be no doubt, that a sufficient part performance was shown.

In *Pfiffner v. S. & St. P. R. R. Co.*<sup>1</sup> it was held, that the making of substantial improvements pursuant to an oral agreement to convey the land improved, by a vendee who was in possession prior to and at the time of the agreement, is such part performance as takes the agreement out of the Statute of Frauds.

In *Shillibeer v. Jarvis*<sup>2</sup> the lessee under an oral agreement for a lease was wrongfully and without the authority of the lessor let into possession, but being in possession, made certain repairs stipulated for in the agreement, and it was held that while the possession, being unauthorized, would not be deemed a part performance, the making of the repairs was sufficient to take the case out of the statute; that if the delivery of possession had been authorized by the lessor, there would have been two acts of part performance.

In *Jones v. Tate*<sup>3</sup> a tenant in possession under a lease entered into an oral agreement with his landlord for a purchase of the demised premises. After making the agreement, he continued in possession and made valuable improvements on the premises, and it was held that the improvements constituted a sufficient part performance.<sup>4</sup>

We are not disposed to depart from the rule to which this court has heretofore adhered, that to take an oral agreement for an estate in lands out of the Statute of Frauds, there must be both lasting and valuable improvements put upon the land and possession taken under the contract. The only rule we seek to derive from the authorities above cited is one of evidence. It is, that where a party claiming under an oral agreement was in possession under a prior agreement, and continues in possession without interruption, the fact that he has put lasting and valuable improvements upon the premises under and in part performance of the oral agreement may be resorted to as evidence showing or tending to show that his possession, after he became entitled thereto under the oral agreement, is held under that agreement.

Applying this rule to the present case, we are disposed to hold that, while, *prima facie*, the complainants, by remaining in possession after the expiration of the term to their former lease, assumed the position of tenants holding over, the presumption that they did so is not conclusive, but is subject to be rebutted by evidence tending

<sup>1</sup> 23 Minn. 343.

<sup>2</sup> 8 DeG., M. & G. 79.

<sup>3</sup> 16 Fla. 216.

<sup>4</sup> See also *Ewing v. Gordon*, 49 N. H. 344; *Wills v. Stradling*, 3 Ves., Jr., 381.

to a contrary conclusion. Of this character is the evidence of the expenditures made by them by way of improvements under and in performance of their oral agreement. Those expenditures serve to explain and characterize their subsequent holding over after the termination of their former lease. Presumptions are thereby raised which are sufficiently cogent to overcome the ordinary presumption that a tenant holding over does so under his former lease. It is against all ordinary probability that, after having expended \$6,000 or over in reliance upon and in performance of the agreement for a lease for five years, they were content to assume the attitude of mere tenants holding over, thus placing themselves in a position where their landlord would be at liberty to terminate their tenancy absolutely at the expiration of the first year, and thus deprive them, without the possibility of adequate recompense, of much the larger part of the benefit to be derived from their expenditures.

But we are not without other and direct evidence that their possession, after April 30, 1885, was held, so far at least as any election on their part could make it so, under the agreement for the five-year lease. On or shortly after May 1, 1885, when presented by Morrison with the draft of a lease for one year and requested to sign it, they refused to sign on the distinct ground that they were entitled to a lease for five years. This was an assertion of their right to possession under the oral contract, and a repudiation of any other tendency, and is evidence, that so far as their intention went, the possession was held by them after the expiration of the former lease, under the oral contract. Morrison, according to the testimony of the complainant to whom the draft of the one-year lease was presented, admitted that the lease was so drawn by mistake and promised to have it corrected. This admission and promise may be taken as a recognition of the position assumed by the complainants, and as evidence of an assent to their possession in the character in which they claimed to hold it.

But it is insisted that the doctrines above enunciated are not in harmony with the previous decisions of this court. We are referred to *Wood v. Thornly*,<sup>1</sup> where it is claimed a different rule is laid down. In that case a father entered into a verbal contract with his two sons, in which he agreed, in consideration of their past services, and for the further consideration, among other things, that they would furnish him a permanent home so long as he should live, to convey to them certain lands. The conveyances were drawn up, but before they were signed

<sup>1</sup> 57 Ill. 464.



some misunderstanding arose in consequence of which the father refused to execute them or to be bound by the contract. The sons had lived on and worked the land for several years after attaining their majority, and after the refusal of their father to make said conveyances, they continued as before in possession of the land, working it as their own, paying the taxes, and retaining the proceeds for their own benefit, until the death of their father. The evidence failed to show that they were induced by the contract to make any improvements on the land, over and above what were required by ordinary husbandry, and for which they were amply compensated by the rents and profits. In the course of the opinion it was said: "To constitute such performance as will avoid the statute, it must clearly and distinctly appear that the party entered into possession under the agreement itself, and was allowed and induced to make expenditures of money, and to make valuable and permanent improvements. The mere possession of land, under a parol agreement of sale, even with the super-added fact of valuable improvements, will not be deemed part performance, if the possession was obtained otherwise than under the contract." Specific performance was denied on the ground that the possession was not shown to have been taken under the oral contract. As no improvements appear to have been made, the question did not arise as to whether or how far the making of valuable permanent improvements in pursuance of the contract might have served to explain and give character to the possession, so as to prove that possession was in fact being held under the oral contract, though originally obtained in some other way.

Very much the same thing may be said of *Padfield v. Padfield*,<sup>1</sup> where the foregoing language of the opinion in *Wood v. Thornly* was cited with approval. That was also a case of a contract between father and son, and the evidence, both as to possession and improvements, was substantially the same as in *Wood v. Thornly*. No improvements being shown, the case was decided on the ground that possession was not shown to have been taken in pursuance of the contract. What was said in relation to improvements was in no way necessary to the decision of the case.

In *Pickerell v. Morss*<sup>2</sup> the sole question was whether possession was held under the oral contract, the legal effect of improvements put upon the land in pursuance of the contract not being presented. *Kaufman v. Cook*<sup>3</sup> was decided upon the ground that, at the time the possession was taken and the improvements made, the contract relied upon was one which would not have been binding even if it had been in writing.

<sup>1</sup> 92 Ill. 198.

<sup>2</sup> 97 Ill. 220.

<sup>3</sup> 114 Ill. 11.

In none of the foregoing cases was the question now before us presented for decision.<sup>1</sup>

Judgment affirmed.

<sup>1</sup> But if, upon further examination, it should be found we are mistaken in this regard, the further question arises, whether there was such performance of the contract as to take it out of the operation of the Statute of Frauds. The acts of performance relied on to take the case out of the statute must be done under the contract sought to be enforced. "It must appear that the acts relied on as part performance of a contract within the Statute of Frauds were done under the contract itself, and for the purpose of performing it, otherwise they will not operate to defeat the statute. Story lays down the rule, if they are acts which might have been done with other views they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance." (*Wood v. Thornly*, 58 Ill. 468; *Story's Eq. Jur.* § 752.) In the same case we further said: "To constitute such performance as will avoid the statute, it must clearly and distinctly appear that the party entered into the possession under the agreement itself, and was allowed and induced to make expenditures of money, and to make valuable and permanent improvements. The mere possession of land under a parol agreement of sale, with the superadded fact of valuable improvements, will not be deemed part performance, if the possession was obtained otherwise than under the agreement. The text writers all agree in laying down the rule, that in order to take a case out of the statute it is not only indispensable, but the acts done should be clear and definite, and referable exclusively to the contract, but the contract should so be established by competent proof to be clear, definite and unequivocal in all its terms." (*Story's Eq. Jur.* § 764.) So it has been repeatedly held, that it is not sufficient that the party is in possession, but must affirmatively appear that he got possession under the agreement relied on, and in part performance of the same, and it must also distinctly appear that the money was expended or the improvements made under the contract of sale, and not otherwise.

Pomeroy on Contracts (Specific Performance, § 108) says: "For a like reason the mere possession of premises by a tenant, continued after the expiration of his term, is not a sufficient part performance of a verbal contract to renew the lease or convey the land, because such possession may be as reasonably and naturally explained by his holding over as by an agreement to renew or convey." (See also *Wood on Landlord and Tenant*, 286; *Fry on Specific Performance*, 283-286, 561, and cases cited; *Cronk v. Trumble*, 66 Ill. 432; *Sutherland v. Parkins*, 75 *id.* 338; *Padfield v. Padfield*, *supra*; *Clark v. Clark*, 122 *id.* 393; *Cloud v. Greasley*, 125 *id.* 314.)

In the case under consideration the entry of appellant into possession of the premises may be referred to his contract with Brueggestad for the unexpired term, for it is evident that if there was no agreement for renewal he would have been entitled to possession under his purchase. Under the rule announced, his taking possession was not in part performance of the alleged contract with Gage, but in execution of his contract with Brueggestad. No expenditure of money was made in improvement of the leasehold estate on the faith of the agreement to renew. The only act of performance claimed, other than that he took possession, is that he kept an orderly house, which by law he was required to do.

## HATTIE POND v. DAVID SHEEAN ET AL.

IN THE SUPREME COURT OF ILLINOIS, MARCH 29, 1890.

[Reported in 132 Illinois Reports 312.]

APPEAL from the Circuit Court of Jo Daviess County; the Hon. John D. Crabtree, J., presiding.

*Messrs. Hopkins, Aldrich & Thatcher* and *Mr. E. L. Bedford* for the appellant.

*Mr. John J. Jones* for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court :

This was a bill in equity, brought by Hattie Pond, to set aside the last will of Bradner Smith, deceased, and to enforce the specific performance of a parol agreement alleged to have been made on or about the first day of December, 1857, between Marshal B. Pierce, father of complainant, and Bradner Smith, under which the complainant claims all the property, both real and personal, which the said Bradner Smith owned at the time of his death. The bill sets out the contract substantially as follows :

Bradner Smith, after consultation with his wife, Mary Smith, and with her full consent and approval, in order to induce oratrix' father to consent to the separation and permit her to become a member of the family of said Bradner Smith, made a proposition to your oratrix' father, that if he would permit them, the said Bradner and wife, to take your oratrix to their home, and would permit her to assume the name of Smith instead of Pierce, and allow her to live with them as their child, the said Bradner Smith, in consideration thereof, would give your oratrix, at their death, all his property, real, personal and mixed, that he might have in his name or under his control at the time of decease ; that in consideration of these promises, her father consented and agreed to said proposition, and then and there entered into a contract with said B. Smith, with the knowledge and consent of his wife, Mary

The case of *Morrison v. Herrick* (130 Ill. 631) is unlike the case at bar. There the tenant in possession, under a verbal agreement for the renewal of his lease for a term of five years, shortly before the expiration of the original lease made expensive improvements upon the leased property, which it might reasonably be presumed no one would have made under the original lease. It also appeared that on the day the new lease was to take effect, the landlord tendered a lease for a year only, which was refused, on the ground that it was not in accordance with the agreement to renew, and that the landlord apologized, saying it was a mistake of his clerk. The landlord allowed the tenant to remain in possession several months without repudiating the alleged oral agreement. It was there held that the facts showed a part performance under the contract for renewal.—*Shope, J., Koch v. Nat. Union Building Association*, 497, 500.—ED.

Smith, that oratrix should go and live with them as their child, assume the name of Smith instead of Pierce, take the place as their child, live with them as such, and in consideration thereof, at their death, all of his estate, real, personal and mixed, was to become and be the property of your oratrix; that in compliance with said contract, oratrix then and there, to wit, December 1, 1857, did leave her father's home and go to the home of B. Smith and wife, and became a member of their family, and assumed the name of Smith instead of Pierce, and was known as Smith from thence until oratrix' marriage; and oratrix faithfully carried out her part of said contract, and was a true and faithful child of said Mary and B. Smith during their lives, and performed her part of above contract.

It is also alleged that complainant lived with the Smiths, under said agreement, until she was twenty-nine years of age, when she was married to Dr. Frederick L. Pond. It is also alleged that Mary Smith died May 21, 1885, and that Bradner Smith died March 31, 1887. It is also alleged that, "in violation of said contract, etc., and in fraud of your oratrix' rights in the premises, Smith was induced, December 19, 1885, to execute a purported will, and on January 7, 1887, shortly before his death, executed a purported codicil thereto, by which will and codicil he deprived oratrix of any part of his property whatever"; that Bradner Smith, at the time of executing said purported will and codicil, was weak in mind, and in his dotage, and by reason of said condition was induced, in fraud of oratrix' rights, to execute the same. The complainant sets out in the bill a list of property, real, personal and mixed, owned by the deceased at the time of his death, valued at \$20,000. The bill then prays that the will and codicil may be declared null and void, that complainant be declared to be the owner and entitled to the possession of the personal property and notes, and that deeds may be executed conveying the lands to her.

The executor and devisees under the will put in answers to the bill, in which they deny the making of the alleged contract, and plead the Statutes of Frauds thereto. They also denied all the substantial allegations of the bill. A cross-bill was also filed by one of the legatees, Clara A. Smith; but as that has no bearing on the decision of the case, it is not necessary to set out its contents here.

Replication having been filed, the cause proceeded to a hearing on the pleadings and evidence, and the court entered a decree dismissing the bill for want of equity, and the complainant appealed.

The complainant's mother was a sister of Mary A. Smith, the wife of Bradner Smith. She died May 10, 1854, when complainant was about two years old. Bradner and Mary Smith had no children of their own, and soon after the death of complainant's mother they took complain-

ant to their home, and she there remained until the second marriage of her father, July 28, 1856, when she returned home to her father. It seems that during the two years' residence of complainant with the Smiths they became very much attached to her, and made an effort to arrange with complainant's father for her return to their home—Pierce, the father of complainant, residing at Savannah, and the Smiths at Galena.

The contract under which complainant was taken into the Smith family was claimed to be proven by one witness, who was present when the contract was made—Mrs. Pierce, now the widow of complainant's father. She stated that she was married July 28, 1856, to Marshal B. Pierce, who, at the time of their marriage, had six children,—Hattie, the youngest, being four years old at the time. "She continued to reside in our family six or eight months after our marriage. At the end of that period of eight months arrangements were made by my husband, Marshal B. Pierce, with Bradner Smith and Mary A. Smith, his wife, through Mary A. Smith, with respect to the future care, custody, nurture and services of the complainant, Hattie Pond (then Pierce), by which they were to keep her and raise her as their own child, giving her the advantage of a good education, and were to leave her their property, whatever it was, when they were done with it, in consideration of the future care, nurture and services of the complainant. This agreement was entered into at our house in Savannah. I was present when the arrangement was made. I think it was in 1857. I don't know that any one was present except Mr. Pierce, myself and family. Mrs. Smith made the contract on the part of Bradner Smith and herself. They resided at Galena at that time. Mrs. Smith, at that time, said, concerning when Hattie, the complainant, was to have the property of the Smiths, that she was to receive the property when they were done with it—she was to have all they had. She had always expected to take Hattie, but never had claimed her until Mr. Pierce was married, when she thought she ought to have her. Mary A. Smith meant by that expression, 'when they were done with it,' referring to their property at their death. Marshal Pierce, my husband, and I supposed them to refer to the death of Mr. and Mrs. Smith. After the arrangement was entered into as above, Mrs. Smith took complainant home with her to Galena."

The declarations of the Smiths, on different occasions during the time that Hattie resided with them, were proven by several witnesses, to the effect that what they had would be hers when they were through with it; that she would be an heir, etc., but no person now living heard the contract except Mrs. Pierce, whose evidence is given above. At the time the arrangement relied upon was made, Smith owned real and

personal property, and as heretofore shown, he owned real and personal property at the time of his death. Mary Smith, the wife of Bradner, died May 21, 1885, and the latter died March 31, 1887.

There is no controversy in regard to the fact that complainant, from the time she was four years of age, until she married, at the age of twenty-nine, on October 10, 1880, resided with the Smiths as a member of their family. She was boarded, clothed and educated by them, and at the same time she performed such services as are usual in a family occupying the position in society that the Smiths occupied. So far as appears, she was treated as a child, and no doubt performed the same services and received the same advantages in education, clothing, and other respects, that she would have received if she had been a child of the Smiths. Whether Bradner Smith, in raising complainant from infancy to womanhood, in clothing and educating her, in aiding her to consummate an advantageous marriage, in giving her property, did all that, in morals, he should have done, is not a question which we are called upon to determine. The complainant seeks, by her bill, the specific performance of a parol contract. Under the contract, she claims personal property, choses in action and real estate, but as she never was in possession of any of the property, under the contract, the Statute of Frauds being pleaded, is she entitled to a decree? While other questions are involved, this is the most important one.

The law may be regarded as well settled, that a parol contract for the sale of lands will be enforced where the purchase-money has been paid, possession taken under the contract, and lasting and valuable improvements made on the lands.<sup>1</sup> So, also, where the owner of real estate makes a parol promise to his child to convey lands to him, and, relying on such promise, the child goes into possession of the lands and makes valuable and lasting improvements, such a promise rests upon a valuable consideration, and may be enforced in equity.<sup>2</sup> In the case last cited, it was held that no important distinction exists between such a promise and a sale. But we are aware of no well-considered case holding that a court of equity will decree the specific performance of a parol agreement to convey lands where the purchaser has not entered into possession under the contract, but, on the other hand, this court has held in a number of cases that possession, under the contract, must be established in order to take the case out of the Statute of Frauds.<sup>3</sup> In the case cited it is said: "To constitute such performance as will avoid the statute, it must appear that the party entered into possession

<sup>1</sup> *Stevens v. Wheeler*, 25 Ill. 300; *McNamara v. Garrity*, 106 id. 387; *Fitzsimmons v. Allen*, 39 id. 440; *Laird v. Allen*, 82 id. 43.

<sup>2</sup> *Kurtz v. Hibner*, 55 Ill. 514.

<sup>3</sup> *Wood v. Thornly*, 58 Ill. 465.

under the agreement itself. . . . The mere possession of land under a parol agreement of sale, even with the superadded fact of valuable improvements, will not be deemed part performance if the possession was obtained otherwise than under the contract."

In *Temple v. Johnson*,<sup>1</sup> the question arose whether full payment of the purchase-money, without taking possession of the premises, was sufficient to take a case out of the Statute of Frauds, and in disposing of the question it is said: "In the case of *Fitzsimmons v. Allen*,<sup>2</sup> it was held that the payment in full of the purchase-money, and the possession of the property purchased, took the case out of the Statute of Frauds. This is the greatest relaxation of the requirements of the statute that has been made by this court. Nor do we incline to go any further in that direction. Whilst the decisions of the various courts are not entirely uniform, the general rule seems to be as stated by Story in his work on Equity Jurisprudence (sec. 761), that the general ground upon which courts proceed to execute parol contracts for part performance, as the governing rule, is, 'that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him unless the agreement is fully performed'; and he says, that although formerly a payment of the purchase-money was considered a sufficient part performance to take the case out of the statute, the rule is now otherwise settled, and in this he is fully sustained by the adjudged cases, both in the British and American courts."

In *Ferbrache v. Ferbrache*,<sup>3</sup> this court again held, "that by the Statute of Frauds all contracts for the transfer of title to land must be in writing, and to take a case out of the statute it is indispensable that the contract shall be established, by competent proofs, to be clear, definite and unequivocal in all its terms, and that possession shall have been taken of the land, under the contract, and payment of the purchase-money made."<sup>4</sup>

A case much in point is *Wallace v. Long*.<sup>5</sup> In that case a child seven years old was taken under an agreement, that if she would live with decedent and her husband until their death, they would make her their heir, and at their death they would will her their entire estate. Property, real and personal, was left, of the value of \$6,000, but no will was made, as per the contract. In deciding the case, it is said: "If the Statute of Frauds presents no obstacle to the enforcement of the contract, then, so far as the record discloses, none exists. It cannot, of course, be denied, that if the contract had been in writing, or if, in pur-

<sup>1</sup> 71 Ill. 14.

<sup>2</sup> 39 Ill. 440.

<sup>3</sup> 110 Ill. 210.

<sup>4</sup> See also *Kaufman v. Cook*, 114 Ill. 13; *Clark v. Clark*, 122 id. 388; *Gorham v. Dodge*, 122 id. 528.

<sup>5</sup> 105 Ind. 522.

suance of an oral contract, the plaintiff had been put in complete possession, and she had otherwise fully performed on her part, specific performance could have been enforced. It would then have presented a case analogous in principle to *Mauck v. Melton*.<sup>1</sup> This much has been said to show that the only impediment in the way of a specific enforcement of the contract involved in this case is the Statute of Frauds. When the title to property is to be acquired by purchase, the Statute of Frauds will operate upon and affect the contract in precisely the same manner, whether the consideration for the purchase is to be paid in services, money, or anything else. In either case, such a contract, being in parol and entirely executory, cannot be enforced by either party. That the evidence in this case tends to support the view that it was the purpose of the intestate to make provision for the plaintiff's ward by a will, may be conceded; but as the agreement to do so was never manifested in writing, signed by her, and as it involved an agreement for a sale of real estate and for the transfer of personal property, such agreement was subject to the operation of the Statute of Frauds, equally with all other agreements for like sales. Because the agreement was not withdrawn from the operation of the statute by part performance, it cannot be specifically enforced; neither can it be the foundation of an action for damages."

It will be observed that in the case cited, while the agreement was one of the same character as the agreement involved here, the same rule was held to apply as if it was a mere verbal sale of real estate, where no possession has been taken under the contract.

In view of the authorities, we are able to arrive at but one conclusion, and that is, that the contract relied upon, resting in parol, is within the Statute of Frauds, and void. Conceding that the complainant was taken into the family of the Smiths under an arrangement as testified to by Mrs. Pierce, and that they were to leave her their property when they were done with it, "in consideration of the future care, nurture and services of complainant," and treating the surrender of complainant by her father, and such services as she may have rendered, as a payment for the property agreed to be given her, still, as she never obtained possession of any of the property under the contract, under the authorities, the agreement, resting in parol, was void by the Statute of Frauds, and cannot be enforced in a court of equity. It is imposing no hardship upon parties, where the title to real property is involved, to require their contracts to be reduced to writing, and it is the safer rule. Where the terms and conditions of a contract depend upon the recollections of witnesses after the lapse of many years, as is the case here, there is always much uncertainty in regard to what the contract

<sup>1</sup> 64 Ind. 414.



really was; and where the title to real property is involved, no rule ought to be adopted which will encourage the making of such contracts.

There are cases cited in appellant's brief which seem to lay down a different rule, and which seem to support appellant's position, but we have not the time to review them here, nor do we think it would serve any useful purpose to do so. It is sufficient to say, that the cases referred to are not in harmony with the principle announced by the decisions of this court, and we are not inclined to follow them.

But it is contended in the argument, that the services rendered by complainant, and the facts, as they appear from the record, that the whole course of her subsequent life was changed in consequence of the agreement, prevent the Smiths from relying on the Statute of Frauds—in other words, by the acts of performance complainant would suffer an injury amounting to a fraud, unless relief is granted under the contract. The rule on this subject is laid down in *Wallace v. Rappleye*,<sup>1</sup> and the cases there cited. But we do not regard the acts of performance proven in this case, such as would authorize a court in holding that complainant has suffered an injury amounting to a fraud unless she is granted relief. When the father of complainant consented that she might enter the Smith family, he was a man in very moderate circumstances. He had a wife and six or seven children to support, and for several years relied upon a salary as clerk of a steamboat on the Mississippi River for the support of himself and family, while, on the other hand, Bradner Smith was in good circumstances—alleged to be worth \$40,000. He had no family but himself and wife. He was therefore in a condition to afford complainant many advantages in her rearing and education that she would not receive if she remained with her parents. So far, therefore, as being placed in a worse condition on account of the agreement, it is without foundation. Indeed, the manner in which complainant was reared and educated, and the marriage she subsequently contracted through the influence of the Smiths, seem to show that her condition in life was improved rather than injured by the arrangement.

It will, however, be observed, that complainant seeks by her bill to recover personal property as well as real estate, and it may be claimed that as to the personal property the agreement is not within the statute. The contract, however, must be regarded as an entirety, and if void as to real estate it must also be held void as to personal property. This is a rule of law well established.<sup>2</sup>

The decree of the circuit court will be affirmed.

Decree affirmed.

<sup>1</sup> 103 Ill. 231.

<sup>2</sup> *Meyers v. Schemp*, 67 Ill. 469.

## FRANCIS NIBERT v. GEORGE BAGHURST ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY, MAY TERM, 1890.

[Reported in 47 New Jersey Equity Reports 201.]

ON order to show cause why injunction should not issue.

*Mr. John W. Wescott* for the complainant.

*Mr. E. A. Armstrong* for the defendants.

GREEN, V.C. The bill of complaint in this action is filed by Francis Nibert against George Baghurst and wife and Francis Phillips, for the specific performance of a contract for the sale of lands and the conveyance of the same according to the alleged terms thereof.

The answer denied the contract as set up in the bill.

The complainant being in possession of the premises, an action of ejectment was brought against him in the Supreme Court by Baghurst and wife, in which judgment was rendered in their favor. Execution, issued on this judgment, being in the hands of the sheriff of Camden County for the dispossession of complainant, he has filed a petition in this suit to restrain the defendants from enforcing their judgment and writ.

The claim of the petitioner is, that on or about August 2, 1886, he purchased of George Baghurst certain lands in the county of Camden for the sum of \$830, and that Baghurst also, and as part of said contract, agreed to build a bridge and road for complainant's use across Timber Creek, a stream which runs through the land, with the right to raise a dam for water-power on said creek for the purpose of a factory; that part of the consideration money was paid, and that in pursuance of the agreement Baghurst and wife put him in possession of the property, and that he immediately erected a dwelling-house thereon, which he and his wife have since occupied; that after these acts in performance of the agreement, and after his making other payments, Baghurst refused to carry out his contract, but conveyed the property to the defendant Phillips, in fraud of complainant's rights. The action of ejectment was commenced in August, 1887. He says that his interest was neglected by his attorney, and that judgment was taken against him by default; that other counsel, on January 13, 1888, obtained a rule to show cause why the judgment should not be opened; that this rule was abandoned, and he then employed his present counsel, and that the sheriff of Camden County threatens to put him out of possession by virtue of the writ in his hands.

An order to show cause why an injunction should not issue, and

restraining further action in the ejectment suit in the meantime, having been allowed, the defendants have filed their answer to the petition, with the affidavits of the defendants and other witnesses.

The petitioner's equity rests on the allegations that he is in possession of the premises, under a valid contract of sale, by act and permission of the vendors; that he has paid part of the consideration money, and that while in such possession he has erected a dwelling-house upon the premises.

This shows an equitable interest of which he could not have availed himself as a defense in the action of ejectment,<sup>1</sup> and which would entitle him to the protection of a court of equity, if satisfactorily established.<sup>2</sup>

The testimony produced on this motion shows, that the property in question belonged, in August, 1886, to George Baghurst and wife; that "it was wild land, in the bush, except a small part of a meadow"; that George Baghurst was the agent of his wife, and managed and carried on all her business matters and affairs; that on or about August 2, 1886, George Baghurst and Francis Nibert came to a verbal agreement for the sale and purchase of the property in question for the consideration of \$830, \$200 to be paid in cash, and the balance in four equal yearly installments, with interest.

Whether there was an understanding on the part of Baghurst to build a bridge and road for Nibert's use is in dispute between the parties. The agreement was to be reduced to writing by a Mr. Turner, a real estate agent, and signed by the parties. Twenty-five dollars were paid on the day of the agreement by Nibert, and several small payments were also made during the summer, which, with some painting, amounted to \$155. Baghurst, under date of October 13, 1886, wrote to Nibert, suggesting the execution of an agreement in writing. In February, 1887, Baghurst prepared an agreement in writing, which was left with Turner, but which Nibert refused to sign, because, as alleged, nothing was said in it about a bridge or dam. After this, and on March 24, 1887, Nibert asked Baghurst whether, if he did not go on with the matter, he could have his money back; to which Baghurst replied, "Certainly; the money is yours, not mine; you can have it back at any time at call." On the 19th of May, 1887, the parties met by appointment at the office of Shivers & Moffit. Here Nibert claimed "there was not as much land, nor as great value in the land, as he thought when he had made the proposition, and, therefore, he was not willing to purchase for the sum named"; but he offered Baghurst to make an immediate pur-

<sup>1</sup> Commissioners *v.* Johnson, 9 Stew. Eq. 211.

<sup>2</sup> Story Eq. Jur. § 887.

chase and settlement for the sum of \$650. Baghurst, denying any liability on his part, consented that if Nibert would immediately purchase and settle for the land he would take that sum. Nibert had a deed prepared with consideration of \$655, which Baghurst, on June 3, 1887, discovered embraced a lot he had sold to one Rogers, as well as the land he had agreed to sell to Nibert, and he declined to execute it on that account, saying to Nibert he could not convey that tract, as it had been sold before he ever saw him; to which Nibert replied, "Then I will not accept it," and Baghurst then told Nibert, "I will give you your money back."

Soon after this Nibert took possession of the property, and commenced building his house, whereupon the suit in ejectment was brought, with the result stated.

After the recovery in this suit the property was sold and conveyed by the Baghursts to the defendant Phillips.

The defendants resist the application for an injunction, on the grounds that the alleged agreement was by parol, and is not enforceable under the Statute of Frauds, and that it was made on Sunday, and is void under the laws of this State.

The petitioner seeks to avoid the objection based on the provisions of the Statute of Frauds, first, on the ground that there had been such a part performance of the contract as to take the case out of the statute, under the rules which obtain in the courts of equity, and that there was a sufficient memorandum under the statute of this State.<sup>1</sup>

As part performance he introduces several documents, such as maps, surveys, draft of agreements, and similar evidence, and sets up part payment of consideration, possession, and the erection of a dwelling-house.

Acts ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title, giving orders for conveyances, going to view an estate, putting deed in solicitor's hands to prepare a conveyance, surveying, and similar acts, do not have the effect of taking the case out of the interdiction of the statute.<sup>2</sup>

Part payment will not of itself ordinarily take the case out of the operation of the statute.<sup>3</sup>

<sup>1</sup> Only so much of the opinion is given as relates to the question of part performance.—ED.

<sup>2</sup> 1 White & T. Lead. Cas. 1886, notes to *Lester v. Foxcroft*; Brett Lead. Cas. 101.

<sup>3</sup> *Clinan v. Cook*, 1 Sch. & L. 22, 40; *Campbell v. Campbell*, 3 Stock. 270; *Cole v. Potts*, 2 Stock. 67; *Story Eq. Jur.* § 760; *Pom. Cont.* § 112.

To make Nibert's possession effective as an element to take the case out of the statute, it must be ascertained if it was by the act or permission of Baghurst.

A parol contract to convey is not a license to enter.<sup>1</sup>

The petition alleges that in pursuance of the said agreement the defendant George Baghurst, and Mary, his wife, put the petitioner in possession of said premises. Nibert's affidavit, annexed to his petition, contains the same general averment. In his supplemental affidavit, in which he gives in detail and with particularity the specific acts connected with the transaction, he alleges that he went to work to clear the land, but states no circumstance connecting Baghurst with any acts of possession. The defendants in their answer and affidavits deny that they put him in possession, and, on the contrary, allege and prove that he forcibly and wrongfully, without permission of defendants, and in spite of the warnings of Baghurst and his wife, took possession of the property, and held and retained the same, and that, refusing to surrender, they immediately commenced their action of ejectment.

The evidence shows that in May, 1887, Nibert threatened to take possession and build a house, whereupon Baghurst forbade him doing so, and told him, if he did, he would bring an action against him; that this was several times repeated, until finally, in July, 1887, he commenced building, and Baghurst brought suit.

The clear weight of the testimony is, that the possession of Nibert, so far from its being by the act or consent of Baghurst and under the agreement, was forcible and against his positive and reiterated protest.

Possession taken and held under such circumstances cannot be construed to be a part performance of the contract.<sup>2</sup>

The equity arising from the expenditure of money in the building of a house is based on the rightful possession by Nibert of the property, and the knowledge of Baghurst and his acquiescence in such acts of assumed ownership.

Equity proceeds on the ground that it would be a fraud for the vendor to allow the vendee to continue in possession and expend his money in improvements, so as to render it impossible for the parties to be restored to their original situations, confessedly on the faith of

<sup>1</sup> *Suffern v. Townsend*, 9 Johns. 35.

<sup>2</sup> *C. & A. R. R. Co. v. Stewart*, 3 C. E. Gr. 489; *Cole v. White*, cited 1 Bro. Ch. 409; *Jervis v. Smith*, Hoffm. Ch. 470; *Story Eq. Jur.* § 768; *Lord v. Underdunk*, 1 Sandf. Ch. 46; 2 *White & T. Lead. Cas.* 887; *Brown St. of F.* § 483.

an agreement of sale, and then try to avail himself of the Statute of Frauds to avoid the contract.<sup>1</sup>

The bare statement of the principle presupposes acquiescence on the part of the vendor, and acquiescence assumes knowledge of the vendee's acts. "For, to constitute fraud, there must coincide, in one and the same person, knowledge of some fact and conduct inequitable having regard to such knowledge."<sup>2</sup>

We have seen that the possession of Nibert was against the wish and warning of Baghurst, and it clearly appears that the latter commenced proceedings in ejectment as soon as he heard the building was being erected. The erection of the house and the possession of the land are both of the same character. They fail as elements of part performance, because done without the knowledge or acquiescence of the vendor.

### SHAHAN, EXECUTOR, ET AL. v. SWAN.

IN THE SUPREME COURT OF OHIO, JANUARY 13, 1891.

[Reported in 48 Ohio State Reports 25.]

**ERROR** to the Circuit Court of Knox County.

The defendant in error, by an action brought by her in the Court of Common Pleas of Knox County, Ohio, sought to have herself adjudged to be "the owner and entitled to the possession of the property, real and personal, coming from, and belonging to, the estate of" James E. Woodbridge, deceased.

The record does not disclose the proceedings had in the Court of Common Pleas; the action, however, was appealed to the Circuit Court of Knox County, where it was tried at the October term, 1886, and a decree rendered for the defendant in error, substantially as prayed for in her petition.

The Circuit Court, at the request of the plaintiffs in error stated, separately, its findings of fact and its conclusions of law; and the cause is now before this court for review on those findings and conclusions.

*H. H. Greer* and *Dirlam & Leyman* for plaintiff in error.

*Theodore Hall*, for plaintiff in error, also filed a brief in the case.

*Critchfield & Graham* for defendant in error.

*Estep & Dickey*, for defendant in error, also filed an elaborate brief.

<sup>1</sup> *Young v. Young*, 18 Stew. Eq. 27, 34; *Eyre v. Eyre*, 4 C. E. Gr. 102; *Green v. Richards*, 8 C. E. Gr. 32; *Brewer v. Wilson*, 2 C. E. Gr. 180, 185; *Pom. Cont.* § 104; *Pom. Eq. Jur.* § 1409.

<sup>2</sup> *Fry Spec. Perf.* § 389.

*Selwyn N. Owen* and *W. W. Boynton* also argued the case orally for the defendant in error.

BRADBURY, J. The pleadings in the action, together with the findings of the court, show that Mary J. Swan, the defendant in error, in the year 1840, being then about two years old, and living with her mother, a woman in humble circumstances, near Worthington, Ohio, attracted the notice of James E. Woodbridge and his wife, who resided in Mt. Vernon, Ohio, were in prosperous circumstances, childless, and without expectation of children being born to them; that the Woodbridges, then visiting at Worthington, entered into negotiations with the mother respecting her said child, which resulted in the mother yielding to them the person of the child, and their carrying her home with them on their return; that they gave their name to the infant, and entered in their family Bible her birth, as their own offspring; that they reared her tenderly, taught her to believe that she was their child by birth, and carefully educated her; that when she reached a suitable age they introduced her into society as their own daughter; that she was an affectionate and dutiful child, and in all respects discharged the duties of a daughter, and continued to reside in the family until her marriage, at which ceremony she was given away by James E. Woodbridge as his daughter; that in August, 1874, James E. Woodbridge died intestate, having made no provision for the defendant in error, and his property, real and personal, passed to his wife, who survived him a few months, and who, by will, made some provision for defendant in error, but devised to others the bulk of the property that came to her from her husband, said James E. Woodbridge.

The questions made during the progress of the action in the Circuit Court are numerous, and many of them interesting, most of which have been elaborately and ably presented to this court, in the briefs of counsel. However, according to the view we have taken of the case, it has not been found necessary to discuss or determine all of them, and we have therefore confined ourselves to such of the questions as we deemed most material in deciding the cause.<sup>1</sup>

The Circuit Court also found "That such part performance was had of such contract, by the parties thereto, and by the plaintiff, in the rendition of such service and the performance of such duties as to take the case out of the operation of the Statute of Frauds." The acts found by that court, and held by it to constitute part performance of the contract, are as follows:

"That the mother of the plaintiff, in pursuance of said contract, surrendered the care, custody, control and education of the plaintiff to said James E. Woodbridge when she was about two years of age, and forever

<sup>1</sup> A portion of the opinion has been omitted.—ED.

concealed from the plaintiff the fact of her motherhood, and wholly gave up its society and custody ; and the said James E. Woodbridge continued the care, custody, control and education of the plaintiff until she became of age, and thereafter she continued to live in his family, continuously bestowing on said James E. Woodbridge and Lydia, his wife, all the affection, and performing all the services of a daughter until she was, by said James E. Woodbridge, given away as his daughter in marriage in the year 1870. The said James E. Woodbridge and Lydia, his wife, carefully concealed from said plaintiff the fact that she was not their daughter, the said Lydia breaking the news of that fact to her for the first time on the day after said James E. Woodbridge was buried.

“The court further finds that the plaintiff, during all those years, was kind, affectionate and obedient to both the said James E. Woodbridge and Lydia, his wife, and did perform about the house those domestic services, did render those domestic duties, and did perform those offices of kindness and affection which a daughter usually renders for parents to whom she is attached or bound by the ties of blood and affection ; that said James E. Woodbridge entered in the family Bible the name ‘Mary J. Woodbridge, born February 2, 1838,’ as the designation of parentage and date of birth of said plaintiff.”

A large proportion of the elaborate briefs of counsel is devoted to the discussion of the sufficiency of these acts to constitute such part performance of the contract as will take it out of the Statute of Frauds. The adjudications upon the subject are innumerable, and not always in harmony with each other, and they have been supplemented by the reasonings of a large number of able text writers. The authorities in the main, if not exclusively, support two rules upon the subject, the more strict of which requires the acts of part performance to be referable to the contract set up, and to no other one. *Lindsay v. Lynch*<sup>1</sup> is the leading case in support of the stricter rule.

The greater number of authorities, however, and, as we think, the better reason, is satisfied if the acts of part performance clearly refer to some contract in relation to the subject matter in dispute ; its terms may then be established by parol.

“First, then, it seems evident that all that can be gathered from acts of part performance is the existence of some contract in pursuance of which they are done, and the general character of the contract ; they cannot, unless possibly in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they cannot in themselves show all the terms of the contract from which they flow.”<sup>2</sup>

<sup>1</sup> 2 Sch. & Lef. 1.

<sup>2</sup> Fry on Specific Performance, § 558 ; see also *Brown* on the Statute of



Usually possession is the act of part performance relied on to take a case out of the operation of the Statute of Frauds ; that, of course, always discloses the subject-matter to which it refers, and courts in discussing its sufficiency have no occasion to expressly declare that an act of part performance must refer to the subject-matter of the contract in dispute, but it is apparent that such qualification is always understood. Surely, acts that refer to some contract between the parties, respecting a totally different subject-matter than the one in dispute, would not take the case out of the operation of the statute. The very object of admitting proof of part performance is to show, not that there is some contract between the parties about something, but that there is some contract between them about the subject-matter in dispute, in order that the contract set up respecting it may be established by parol. In *Madison v. Alderson*,<sup>1</sup> Lord Chancellor Selborne says that the statute does not apply where the right to relief grows out of “equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute”; and on page 491 Lord Fitzgerald says: “The Lord Chancellor has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their own nature referable to some such agreement as that alleged, and, I may add, must necessarily relate to and affect the land, the subject of that agreement.” This is an instructive case respecting the doctrine of part performance in cases of the character of that before us. A woman had been induced, by a promise to leave her an estate for life in land, to serve the intestate as his housekeeper, without wages, for many years, and to give up other prospects of an establishment in life. The denial to her of a specific performance of the contract, she set up, was a great hardship to her ; but little, if any, less than it is claimed defendant in error will sustain if relief is denied her in the case before us.

The mother of the defendant in error was a servant girl, burdened with the support of an illegitimate child of the age of about two years. The Woodbridges were prosperous people without children, or the hope of any. The mother gave them the child, and never afterwards revealed her motherhood. The Woodbridges received the infant, reared

Frauds, § 455 ; *Foster v. Hale*, 3 Ves. 712 ; *Pomeroy on Specific Performance*, § 107 ; *Anderson v. Chick*, 1 Bailly Eq., S. C., 118 ; *Rathbun v. Rathbun*, 6 Barb. 98 ; *Stoddard v. Tuck*, 4 Maryland Ch. 475 ; *Semmes v. Worthington*, 38 Maryland 298 ; *Carlisle v. Fleming*, 1 Harrington 421.

<sup>1</sup> 8 L. R. App. Cases 467, on page 476.

her tenderly in all respects as if she were their own daughter, used great diligence in guarding from her any knowledge that she was not of their blood, and she in turn repaid this kindness by giving them the affection and performing the duties of a daughter. Acts of this character are not usually the offspring of contractual relations. Would the ordinary observer infer from them any contract whatever? Would they not, rather, be attributed to higher motives? Even if we acquit the mother of any desire to conceal the evidence of her shame, or to escape the burden of supporting her infant, yet might we not expect at her hands, from motives of maternal affection alone, just what she did? If she kept the child, the stigma of its birth would cling to it through life, and it would face a life of poverty, if not of actual want; to give it to the Woodbridges and conceal its birth, would be to remove that stigma for which she was responsible, and open up to it a useful and honorable future. Whether these acts of alleged part performance be taken singly or collectively, they do not indicate that they were done in performance of any contract or agreement respecting property rights of any kind, but rather were the manifestations of a benevolent and affectionate disposition on the part of a childless couple towards a gentle and affectionate child whose fate was placed in their keeping by a mother who was in destitute circumstances and homeless herself.

The case of *Van Duyne v. Vreeland* (11 N. J. Eq. 370; same case, 12 N. J. Eq. 143),<sup>1</sup> is in many respects like the one before us. And the

<sup>1</sup> In this case, part performance is set up in avoidance of the statute. I think the answer admits, and the evidence shows, a substantial performance of the agreement on the complainant's part, as well as such part performance on the part of the defendant himself as will take the case out of the operation of the statute. There has been such a performance on both sides as puts the complainant in a situation which is a fraud upon him, unless the agreement is fully performed.

In pursuance of the agreement, the defendant and his wife took the complainant, when but a few weeks old, and had him baptized, calling him by the defendant's own name, and standing for him; when he was a year old, they took him from the care and protection of his parents to their own home. They adopted him, and brought him up in ignorance of his true parents. They claimed from him, and received the submission of a son. He never renounced his obligations to them as standing in the place of his parents. He resided under their roof until he was nearly twenty-one, obedient and exemplary in all respects. His own parents abandoned all control over him. His father, at his death, left a will, and relying upon the agreement that had been made with the defendant to provide for the complainant, he left all his property to his other children. It is perfectly manifest, from reading the defendant's answer, that he carefully sifted this complainant's whole life, his boyhood, his youth, and his manhood, in order that he might array against him all his delinquencies, as his own justification for refusing to fulfill this agreement. There are but few sons that could present a testimonial from a father's hand of filial obedience as creditable as this

reasoning of the court in that case would entitle the defendant in error to the relief demanded. In that case, however, the learned Chancellor gave but slight attention to the principles that underlie and support the doctrine of part performance of parol contracts; he simply recited the mutual acts of the parties, and assumed that they constituted such part performance as would take the case out of the operation of the statute. The doctrine of that case, *Van Dyne v. Vreeland*, finds support in

answer bears to that of the complainant. Taking his whole life, the defendant has been able to specify but two or three acts of disobedience, neither of which he has been able to prove, and all of which, as he shows in his answer, were trivial in the extreme. He says, when the complainant was only nineteen years old, without his consent, and against his express remonstrance, he married his present wife, to which alliance the defendant had special objection, and which he made known to the complainant. And yet he goes on, and admits that he received them immediately into his family, where they remained six months, and demeaned themselves with propriety; and that the complainant, then desiring to have a house of his own, the defendant purchased one for him. The defendant complains, that just after the complainant became of age, he caused himself to be elected constable, and that he then only worked for the defendant occasionally, and when he was particularly requested. There certainly is nothing in the agreement incompatible with the complainant's accepting such an office. But it turns out, by the evidence, that he accepted the office with the full approbation of the defendant; that the defendant was his bondsman; that he went to a neighbor and procured him, after much solicitation, to join with him as security in the bond; and there is not a suggestion in the answer that the defendant ever made the slightest objection to the complainant's accepting the office. There are two other specific charges, but they are trivial in their character, and there is no proof of them. There are also general charges of neglect and want of energy and industry. The answer admits the fidelity of the complainant up to about the year 1850, and the defendant's assurances to him, up to that time, that he should have his property, and that he expressed to him his approbation of his conduct and his appreciation of his services. It alleges, that the complainant, after that period, grew negligent and inattentive, and that finally, in the spring of 1854, he sold his place, and moved from the neighborhood. These are the reasons, which the defendant alleges, why he considers himself released from all moral as well as legal obligations to fulfill the agreement. And yet the answer admits that no dispute or quarrel ever occurred between the complainant and defendant; that he never disobeyed him, except in the instances referred to; that he never refused to work for him whenever requested, and that the defendant always felt kindly disposed towards him. There is not really the slightest excuse for the defendant's refusing to fulfill the agreement. That the complainant did not pay him the proper attention after the year 1850; that he did not take charge of the defendant's affairs as formerly; and that he moved away and abandoned him, were consequences flowing from causes for which the complainant is not responsible. The change which had taken place in the defendant's household brought all these things about without imputing any fault to the complainant. The fact that he left the neighborhood without the defendant's asking him why or where he was going and without any regrets expressed by the defendant, in connection

*Rhodes v. Rhodes*,<sup>1</sup> *Sutton v. Hayden*,<sup>2</sup> and some other cases in that State. But it is repudiated in *Wallace v. Rappleye*,<sup>3</sup> *Wallace v. Long*.<sup>4</sup> Much stress, in some of the cases relied on by defendant in error, is laid on the circumstances that the services rendered by the party seeking specific performance were not capable of being measured, nor intended to be measured, by any pecuniary standard, and, therefore, as the party had no adequate remedy at law, an exception should be grafted on the general rule, that the payment of the consideration will not take a case out of the statute.

This general rule is well established in Ohio—*Sites v. Keller*,<sup>5</sup> *Polard v. Kinner*.<sup>6</sup> And the rule in this State is not affected by the circumstance, that consideration was paid by personal services—*Howard v. Brower*,<sup>7</sup> *Crabill v. Marsh*.<sup>8</sup>

Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal services of the party seeking relief, does not ordinarily constitute such part performance as will take a case out of the operation of the Statute of Frauds, we do not wish to be understood to hold that cases may not arise wherein specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services, not intended to be, and not susceptible of being measured by a pecuniary standard.

What we hold in the case before us is, that although the services rendered by the defendant in error may have been of such character, yet, the circumstances under which they were rendered, when considered in connection with the other alleged acts of part performance, do not indicate that they were done pursuant to any contract or agreement whatever relating to property; and that this class of cases does not call for any further relaxation of the rule requiring proof of acts of part performance to take a case out of the operation of the Statute of Frauds. This, too, is an extreme case of its class. The contest is over an estate valued at about forty thousand dollars. The defendant in error claims to succeed to it all, by virtue of the terms of a parol contract made

with other facts stated in the answer and the evidence, show that it was not in the complainant's power to maintain between the defendant and himself the same relationship that had theretofore existed. I do not think that any one can read the proofs and pleadings in this cause without being perfectly satisfied that the complainant had fulfilled all the duties and obligations which rested upon him, so as to entitle him to the performance of this agreement on the part of the defendant, and that the defendant has given no satisfactory or reasonable excuse why he is morally or legally released from its obligations.—*Williamson, C., Van Duyne v. Vreeland*, 12 N. J. Eq. 142, 150.—ED.

<sup>1</sup> 3 Sanford Ch. 279.

<sup>2</sup> 62 Mo. 101.

<sup>3</sup> 103 Ill. 229.

<sup>4</sup> 105 Ind. 522.

<sup>5</sup> 6 Ohio 483.

<sup>6</sup> 6 Ohio 528.

<sup>7</sup> 37 Ohio St. 402.

<sup>8</sup> 38 Ohio St. 331.

when she was a small infant, forty-six years before the trial in the Circuit Court. The only persons to whom the terms of the alleged contract were confided were her own mother, who at the time of the trial had not been heard from for over forty years, and her foster parents, James E. Woodbridge and wife, both of whom were dead; and the only proof of its terms was the declarations of Mr. Woodbridge, casually made to persons having no pecuniary interest in the matter, over forty years ago.

The judgment of the Circuit Court is reversed, and the petition dismissed at the costs of the defendant in error.

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PETERS v. DICKINSON.

IN THE SUPREME COURT OF NEW HAMPSHIRE, MARCH 17, 1893.

[*Reported in 32 Atlantic Reporter 154.*]

BILL in equity to enforce a parol agreement for the conveyance of land, made between William R. Bullock and one Ansel Dickinson, now deceased, brought by a creditor of Bullock's who has recovered judgment against him, and levied upon the premises. In 1880 the premises described in the bill were owned by one Rachel Cook, but were in the occupation of Bullock. Dickinson purchased them of Cook without any understanding or arrangement with Bullock, and subsequently made with Bullock the parol agreement sought to be enforced by the bill. Prior to bringing the bill, the plaintiff tendered the defendants \$754.50, the amount due from Bullock to Dickinson, to entitle him to a conveyance under the parol agreement. The facts were found by a referee. Bill dismissed.

*H. W. Brigham and Waterman, Martin & Hitt* for plaintiff.

*Batchelder & Faulkner and D. H. Woodward* for defendant.

CLARK, J. Bullock was living on the farm when Dickinson bought it. It was agreed between them that he might remain on the place without paying rent; that he and his boys might cut the lumber upon the farm, Dickinson furnishing what additional help was needed, and paying bills incident to cutting and marketing the lumber, so far as the work was done by others than the Bullock family; and that Dickinson would use or sell the lumber, and give Bullock the privilege of buying the place, by paying an amount that would make Dickinson whole. It was an arrangement to enable Bullock to purchase the farm for what it cost Dickinson, and pay for it by the labor of himself and his boys in cutting and marketing the lumber. Bullock and his sons proceeded to cut, and Dickinson furnished money, as it was needed, for supplies, and

sold the lumber, keeping an account of the receipts and expenditures on account of the farm and lumber transactions, until his death. The amount due on the price of the farm December 20, 1890, was \$754.50. Bullock made no improvements on the farm, and did nothing to change his position, except furnishing labor and a team to cut and draw a part of the lumber, which was done as payment towards the purchase-money of the farm. He simply paid a part of the price of the land, and mere part payment of the price did not entitle him to a specific performance of the parol agreement for the sale of the farm. It is no answer to the Statute of Frauds pleaded by the defendant.<sup>1</sup> It is immaterial that the payment was made in labor. Bullock had no attachable interest in the land, and the plaintiff took nothing by his attachment and levy. If anything is due Bullock for labor, it can be recovered in an action at law.<sup>2</sup>

Bill dismissed.

Allen, J., did not sit. The others concurred.

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EMMA DUNCKEL, RESPONDENT, v. WILLIAM DUNCKEL,  
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 27, 1894.

[*Reported in 141 New York Reports 427.*]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was commenced by the plaintiff to compel specific performance of an oral agreement made with her by the defendant to execute to her a life lease of certain land owned by him.

The facts, as alleged in the complaint, are as follows: The plaintiff married the defendant's son, John A. Dunkel, in 1862. In 1866 he was engaged in business in Fort Plain, and, with the approval of the defendant, he negotiated for the purchase of a dwelling-house for the price of \$2,500, which the defendant agreed to pay for him. To protect the house against any misfortune in his son's business, he agreed to take the deed in his own name and hold the title for him and his family. The son was to improve the house at his own expense, and whenever it was deemed safe and proper, or desirable by his son, he was to deed the house to his son or his family, as the situation and circumstances at the time might require. In pursuance of this agreement the house was

<sup>1</sup> Ham v. Goodrich, 33 N. H. 32.

<sup>2</sup> Howe v. Day, 58 N. H. 516.

deeded to the defendant; his son took possession thereof, made improvements thereon to the extent of \$3,000, and continued with the plaintiff to occupy the same and to reside therein until his death in February, 1883. During the life of his son the defendant frequently promised to convey the house to his son or his family, but finally refused to do so, although he did not deny his promise. At the time of his son's death he was indebted to various persons upon promissory notes upon which the defendant was indorser. He was anxious about such indorsements and apprehensive that he might be required to pay the notes. The plaintiff was the sole beneficiary under the will of her husband, and the executrix named therein. Soon after the death of his son, and before the probate of the will, the defendant requested the plaintiff to pay the notes, and agreed with her that if she would pay and satisfy all the notes she would not be disturbed in the possession and use of the house during her life, and that he would execute to her a lease thereof for and during her life; and she thereupon promised him that she would pay the notes as soon as possible within her means. Thereafter from time to time she paid the notes, paying the last of them on the 26th day of January, 1884, the whole amount paid being \$7,122.12, and she delivered all the notes properly discharged to the defendant, who retained the same. Thereafter he refused to execute the lease to her or to recognize her right in the house, and denied the agreement he had made with her, and threatened to remove her from the house. Since the purchase of the house it had largely increased in value, and was worth between \$6,000 and \$7,000. She prayed for relief that the defendant be compelled to execute to her a deed of the house, or a lease thereof for her life, or that he pay to her the sum of \$3,000, expended by her husband in improvements upon the house. The defendant denied all the promises and agreements alleged in the complaint, and claimed judgment for the possession of the house.

This case has been twice tried. Upon the first trial the following questions were submitted to the jury:

"1. Did defendant buy the premises with the promise and agreement that he would convey the same to John or any of John's family, at some time, without the payment of anything therefor by John or any of his family?

"2. Did John make and pay for permanent improvements upon said premises out of his own means, with defendant's knowledge, relying upon such agreement?

"3. Did the defendant, after the death of John, agree that, if the plaintiff would pay and save the defendant from paying the notes of John on which the defendant was liable, he would give the plaintiff a lease of the property for life?

"4. Did the plaintiff pay the notes, relying upon the agreement to give a lease for life or to give her the money John had expended for repairs?"

The jury answered the first two questions in the negative, and the last two in the affirmative, and the court thereafter made findings of fact and law, adopting the verdict of the jury in answer to the questions submitted to them, and gave the plaintiff judgment directing the defendant to execute to her a life lease of the premises. The defendant then appealed from the judgment to the General Term, so far as the same was based upon the findings of the jury in answer to the last two questions. The General Term reversed the judgment and granted a new trial.<sup>1</sup> Upon the new trial the court submitted to the jury the following questions:

"1. Did the defendant buy the premises with the promise and agreement that he would convey the same to John or any of John's family, at some time, without the payment of anything therefor by John or any of his family?"

"2. Did John make and pay for permanent improvements upon said premises out of his own means, with defendant's knowledge, relying upon such agreement?"

"3. If so, what amount?"

"4. Did the defendant, after the death of John, agree that if the plaintiff would pay and save the defendant from paying the notes of John on which the defendant was liable, he would give the plaintiff a lease of the property for life or that he would pay her what John put in the place?"

"5. Did the plaintiff pay the notes relying upon the agreement to give a lease for life, or to give her the money John had expended for improvements?"

"6. Did plaintiff pay any other or further sum on the notes executed on which defendant was liable as indorser on the faith of such agreement than she was legally bound to pay as executrix of the estate, and if so, what sum or about what sum?"

The jury answered all the questions in the affirmative, and found in answer to the third question \$2,800, and in answer to the sixth question, "Yes, about \$375."

The court subsequently made findings of fact and law, adopting the verdict of the jury in answer to the questions submitted to them, and ordered judgment against the defendant requiring him to give the plaintiff a lease of the premises for life. The defendant appealed from the judgment to the General Term and then to this court.

EARL, J. We are concluded by the finding of the court below that the defendant made the agreement to give the life lease alleged by the

<sup>1</sup> 56 Hun. 25.



plaintiff. Whatever doubt existed as to that agreement has been cleared up by the verdict of the jury and the findings of the trial court.

One of the prerequisites to the specific performance of a parol agreement for the purchase and sale of land is that the agreement should be clearly proved and certain as to its terms. But that is a rule to be observed and enforced in the equity courts which deal with the facts. When the agreement has there been found upon conflicting evidence, and is certain in its terms as found, it must be taken here as clearly established within the rule, and what was before uncertain has become certain.

There is a further rule that the specific performance of contracts rests largely in the discretion of the equity courts—not wholly, but in a discretion to be governed by rules which have become established for the guidance of such courts. That, again, is a rule to be generally administered in the equity courts. So far as they exercise their discretion, violating no fixed rules of equity, such discretion is not reviewable here.

We have, therefore, only to determine now whether there was such part performance of the agreement found below as to take it out of the Statute of Frauds, and whether any errors were committed upon the trial affecting the judgment rendered.

We think there was such an agreement partly performed as ought to be enforced. We must look at the situation as it existed when the agreement was made. At that time both parties supposed the estate of John A. Dunckel would prove insufficient to pay his debts. The defendant was fearful of his responsibility on account of his indorsements upon his son's notes, and wished to be relieved from all anxiety about them, and he proposed to the plaintiff that if she would pay those notes and save him harmless from his indorsements thereon he would give her the life lease, and she accepted the proposal and promised to pay the notes. It was then uncertain how much she would have to pay, and she took the risk as to the amount. The will of her husband had not then been proved, and she was under no obligation to take upon herself the burden of administering upon an estate then supposed to be insolvent. Now, what did she do in pursuance of the agreement? She had the will probated, and qualified as executrix thereof. She administered upon the estate and converted the assets into money. She speedily paid all the notes, using for that purpose some of her own means. She fully protected the defendant against any liability on account of his indorsements, and she surrendered the notes discharged to him, and she remained in possession of the house under the agreement. It is thus seen that the amount of her own money paid upon the notes was not the only consideration moving from her for the lease to be given. There was also the risk and labor and the protection

given to the defendant. If she should now fail to obtain the lease from the defendant she could not recover back from them any of the money paid to the holders of the notes. The defendant has not offered to pay back any of it, and if she should attempt to enforce payment from him she would have the burden of establishing the disputed agreement, while he held the discharged notes, the most conclusive proof of the payments by her and the amounts thereof. To all this must be super-added the fact that for nearly three years she had the undisputed possession of the premises under the agreement. We think these facts are sufficient to authorize the specific performance of the agreement, and we know of no authorities holding that under such circumstances specific performance should be refused. The authorities upon this subject are very numerous, and it would not be useful now to cite or comment upon them. Many of them will be found in the learned briefs submitted to us upon the argument of this case. We think it is a general rule to be gathered from the authorities that mere payment of the purchase price of land is not sufficient to authorize the specific performance of the contract of sale unless the peculiar circumstances of the case be such that an action at law to recover back the money paid would not give the purchaser an adequate remedy. But it is also a general rule that when the consideration has been paid and possession under the contract of sale has been taken, the contract will be specifically enforced, and to take the case out of this rule the circumstances must be peculiar and exceptional. This general rule is applicable to this case.

Upon the first trial of this action the jury answered in the negative the first two questions submitted to them in reference to the promise of the defendant that he would convey the premises to his son or his family, and in reference to the improvements to be made on the premises by his son. The findings of the jury in answer to those questions were adopted by the court and were not disturbed by the decision upon the first appeal. The defendant objected to the submission of those questions again to the jury upon the second trial, and to all evidence in reference to them, and his counsel now claims that there was error in overruling those objections. The verdict of the jury answering those questions in the affirmative upon the second trial, and the findings of the court based thereon, were, as findings, entirely harmless, because no relief whatever was based upon them, and they in no way entered into or affected the judgment. But upon the first appeal to the General Term the judgment was reversed as to the agreement made by the defendant with the plaintiff subsequently to the death of her husband that he would give her the life lease, and the whole case was thrown open for the trial of the issue as to that agreement, and the introduction of any evidence bearing thereon. Hence, the situation and value of the premises, the

circumstances attending their purchase and subsequent possession, the improvements made thereon by the son, and the circumstances under which they were made, and the relation of all the parties to the premises were properly put in evidence as bearing upon the issue upon trial and the general equities of the case, and particularly to show that it would not be inequitable to compel the defendant to perform his agreement with the plaintiff. A careful scrutiny of all the evidence satisfies us that no harmful or embarrassing evidence was erroneously received against the defendant.

Our conclusion, therefore, is that the judgment should be affirmed, with costs.<sup>1</sup>

All concur.

Judgment affirmed.

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### HALE v. HALE.

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, JUNE 14, 1894.

[*Reported in 90 Virginia Reports 728.*]

APPEAL from decree of Circuit Court of Franklin County, rendered October 8, 1891, in a cause wherein the appellant, Mary D. Hale, was complainant, and the appellees, John S. Hale, and others, were defendants. By the decree the demurrer to her bill was sustained and her suit dismissed, and she appealed. Opinion states the case.

*E. C. Burks* for appellant.

*P. H. Dillard* and *R. G. H. Kean* for appellees.

LEWIS, P., delivered the opinion of the court.<sup>2</sup>

The appellant, Mary D. Hale, filed her bill for the specific performance of an alleged parol contract. The bill states that the plaintiff and her sister, Janie Hale, agreed, in 1885, to make mutual wills, so that the survivor would get the whole estate, real and personal, of the one who should die first; and that each thereupon made a will in the other's favor, in conformity with the agreement; that in October, 1888, the said Janie intermarried with Dr. Carter Berkeley, and soon afterwards died without issue born alive; that some time prior to her marriage she was advised, upon consultation with an attorney, that her marriage would have no effect on her will, and that with this desire and belief, in which the plaintiff shared, she died, and for that reason never repub-

<sup>1</sup> A portion of the opinion relating to a question of practice has been omitted.—ED.

<sup>2</sup> A portion of the opinion not relating to the question of part performance has been omitted.—ED.

lished the will after her marriage ; that for the same reason the plaintiff has allowed her own will to remain in full force as originally written, so as to carry out the agreement ; that from the date of the wills until the death of Mrs. Berkeley they were kept together in a trunk, used jointly by the plaintiff and Mrs. Berkeley, from which they were taken after the death of the latter. The bill also states that the execution of one will was the consideration for the other, and that the two read together show the contract between the parties, and the consideration for the same ; that the plaintiff has fully performed the contract on her part, and that both she and Mrs. Berkeley always believed that the latter had performed it on her part. And the prayer of the bill was that the contract be specifically enforced, by requiring the heirs at law of Mrs. Berkeley, or some one for them, to convey to the plaintiff the real estate that descended to them at her death. There was no contest as to the personalty. The bill was dismissed on demurrer.

1. The appellant properly admits that by force of the statute, now carried into section 2517 of the Code, the will of Mrs. Berkeley was revoked by her marriage, regardless of her intention or wishes in the matter. But it is contended that the antecedent contract remains, and ought to be enforced.

There is no doubt, notwithstanding a will is in its nature ambulatory until the testator's death, and cannot be made irrevocable, that a person may by a certain and definite contract bind himself to dispose of his estate by will in a particular way, and that such a contract, in a proper case, will be specifically enforced in equity ; that is to say, the property will be held charged with a trust in the hands of the heir-at-law, devisee, personal representative, or purchaser with notice of the agreement, as the case may be, and a conveyance or accounting directed in accordance with the terms of the agreement.<sup>1</sup>

In a note to the last mentioned case in 66 American Decisions, where the cases are collected, the annotator (at p. 784) says : " It is not only in harmony with sound principle that a person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, but it is supported by an almost unbroken current of authorities, both English and American " ; and substantially the same principle was recognized in *Rice v. Hartman*.<sup>2</sup>

2. But a parol agreement to devise real estate is within the Statute of Frauds, which in Virginia, so far as it is pertinent to the present case, enacts that " no action shall be brought . . . upon any contract for

<sup>1</sup> 3 Pas. Cont. 406; Schouler, Wills, sec. 454; *Izard v. Middleton*, 1 Desaus. 116; *Rivers v. Rivers*, 3 Id. 190; *Parcell v. Stryker*, 41 N. Y. 480; *Mundorf v. Kilburn*, 4 Md. 459; *Johnson v. Hubbell*, 10 N. J. Eq. 332.

<sup>2</sup> 84 Va. 251.

the sale of real estate, or for the lease thereof for more than a year, . . . unless the contract, . . . or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence.”<sup>1</sup>

In the case at bar the agreement sought to be enforced was a verbal one, and the defense of the statute is set up as one of the grounds of demurrer. It is not contended, in support of the demurrer, that the alleged agreement is void, but only that, if there was any such agreement, it is not enforceable, consistently with the statute, in a court of justice.

3. The equitable doctrine of part performance is also invoked; but as to this, we may say, as was said in a similar case in Massachusetts, that “there has been no part performance which amounts to anything.”<sup>2</sup> In that case there was, as here, an alleged oral agreement between two sisters to make mutual or reciprocal wills, and each made a will accordingly. Afterwards one of the sisters made a different will, and died. The survivor then filed a bill for the specific execution of the agreement, but a demurrer to the bill was sustained, on the ground that the case was within the Statute of Frauds.

Notwithstanding the criticism upon that case in the argument at the bar, we are of opinion that it was decided upon correct principles. Not only is it a cardinal feature of a will that it is ambulatory until the testator's death, but acts of part performance by the party seeking specific execution, to take a case out of the statute, must be of such an unequivocal nature as of themselves to be evidence of the existence of an agreement; as, for example, where, under a parol agreement to sell land, the purchaser is put into possession, and proceeds to make improvements.<sup>3</sup> In the language of Lord Hardwicke, the act of part performance “must be such as could be done with no other view or design than to perform the agreement.”<sup>4</sup> “The principle of the cases,” said Sir William Grant in *Frome v. Dawson*,<sup>5</sup> “is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is.”

In *Phillips v. Thompson* Chancellor Kent said: “It is well settled that if a party sets up part performance, to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, that agreement; such as a party would not have done, unless

<sup>1</sup> Code, § 2840.

<sup>2</sup> *Gould v. Mansfield*, 103 Mass. 408.

<sup>3</sup> 2 Min. Insts. (4th ed.) 853; 3 Pom. Eq. § 1409.

<sup>4</sup> *Gunter v. Halsey*, Amb. 586.

<sup>5</sup> 14 Ves. 387.

<sup>6</sup> 1 Johns. Ch. 131.

on account of that very agreement, and with a direct view to its performance ; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case." To the same effect is *Wright v Puckett*.<sup>1</sup>

This whole subject was very fully considered, both upon principle and authority, in *Maddison v. Alderson*, a recent and instructive case in the House of Lords.<sup>2</sup> In that case the appellant was induced to serve the intestate as his housekeeper without wages until his death by an oral promise on his part to leave her an interest in certain real estate ; and he made a will for that purpose, which he signed, but which failed for want of due attestation. Mr. Justice Stephen, before whom the case was tried in the first instance, held that there was a contract which had been partly performed ; but on appeal, first to the Court of Appeal, and afterwards to the House of Lords, this ruling was held to be erroneous ; and the principle was laid down that an act of part performance, to take a case out of the statute, must be sufficient of itself, without any other information or evidence, to satisfy the court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

This is so, because, as was said in the same case, the defendant in a suit founded on such part performance is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. Hence, until such acts are shown as of themselves imply the existence of some contract, parol evidence to show the terms of the contract relied on is inadmissible.<sup>3</sup>

Now the alleged acts of part performance in the present case, taken singly or collectively, do not bring the case within these principles. The making and preserving the wills, under the circumstances stated in the bill, while they are acts consistent with, are yet not demonstrative of, the existence of any contract between the parties, or, in other words, they do not unequivocally show that there was a contract. *Non constat*, the wills were not made from motives of love and affection, and independently of any contract or agreement ; and this being so, parol evidence to establish the alleged contract would not be admissible.

This sufficiently disposes of the case, and requires an affirmance of the decree complained of.

Decree affirmed.

<sup>1</sup> 22 Gratt 370.

<sup>2</sup> 8 App. Cas. 467.

<sup>3</sup> Browne, Stat. Frauds, § 455 ; *Dale v. Hamilton*, 5 Hare 381 ; *Maddison v. Alderson*, *supra*.

## HORACE G. YOUNG AS TRUSTEE, ETC., APPELLANT, v. SARAH B. OVERBAUGH, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 26, 1895.

[*Reported in 145 New York Reports 158.*]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made January 13, 1894, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*A. T. Clearwater* for appellant.

*J. Newton Fiero* for respondent.

GRAY, J. The plaintiff brought ejectment to recover the possession of land and a dwelling thereon, occupied by the defendant and her husband. It was conceded that the legal title was in plaintiff's testator, at the time of his death; but the defendant claimed that she was the owner of the equitable title to the premises, by reason of promises made by the plaintiff's testator to her and of acts done by her in reliance upon those promises.

The facts do not seem to be disputed; but, upon the findings made at the trial term with respect to the facts, the learned judge presiding thereat and the learned justices at the General Term have differed in their conclusions. I will state the facts as they were found. In 1872, Thomas Cornell, the plaintiff's testator, was the owner of the premises in question. He was the half-brother of the defendant and upon his request she and her husband had settled in the city of Kingston. In the year mentioned, Mr. Cornell asked the defendant's husband to build a house for the defendant on a certain piece of his property, at the cost of \$4,500, and to bring the bills to him for payment. The house was built at a cost which exceeded, by about \$1,200, the sum named by Mr. Cornell, and the defendant, subsequently, made valuable permanent improvements upon the property; such as building a barn, planting of fruit-tress, putting in a heating apparatus, etc.; of all which Mr. Cornell had knowledge. Other facts found were that, after the defendant had contracted to erect a house upon the property, Mr. Cornell had stated that the house was built for the defendant and was hers; and so spoke of it to different persons at different times. Upon one occasion, in the year 1876, upon the defendant's husband informing Mr. Cornell that he had found a business at Yonkers, which he thought it would be

a good thing to go into, the latter replied to the effect, that if they moved away from the property where they then resided the defendant should not have it and that they would lose it. There was this specific finding: "That such improvements, as well as the payment of \$1,200, were made and expended on the faith of the promises by Cornell, to give the property to Mrs. Overbaugh (this defendant), and all such moneys were expended, and improvements made, for and on behalf of the defendant and at her request, and under her promise to repay her husband thereafter." There was a finding that the total amount of money expended by the defendant for permanent improvements, repairs, taxes, insurance, etc., and including, also, repairs and expenses, which are incidental to the ordinary care of a house, from the beginning of the erection of the house down to the date of the trial, was the sum of \$4,734.26, and that the fair rental value of the property of the defendant during her occupancy, for a period of about twenty years, was \$250 per year; amounting in the aggregate to \$5,000.

The learned trial justice conceded the existence of the exception to the general rule, that a parol gift of real estate is void, in a case where the donee enters into possession of and improves the property, upon the strength of the promise that it would be given to her; but he did not think that the present case fell within the exception. He was influenced in that view by a consideration of the nature of the acts done by the defendant, in reliance upon the promise of Mr. Cornell. Regarding the equitable rule to be founded in the idea of preventing an injustice being done to a promisee, if the promisor be permitted to avail himself of the statute, and that the application of the rule is in a case where financial injury will be sustained; he, in the first place, considered that as the defendant's acts were only such as an ordinary householder would be expected to make and, in the second place, as the fair rental value of the premises during the twenty years of the defendant's occupation was worth to her, altogether, a sum which exceeded the aggregate of the sum found to have been expended by her, or at her request, during that time, that if the defendant was compelled to surrender possession of the premises, she would not, in fact, be a loser as the result of the entire transaction with Mr. Cornell, but the gainer. Hence he concluded that there was absent here that element of injustice to the donee; which is essential to exist, in order to entitle him to an enforcement of the donor's promise.

We find ourselves unable to agree with the trial justice in his judgment upon this question, and we prefer the view taken at the General Term; that where there has been a parol promise to convey, a taking of possession under such promise and the making of permanent improvements upon the property upon the faith thereof, the mere value of



the occupation during the time is not to be set off against the expenditures made. I think it would not be within the spirit of the rule in equity, that its application should be made to depend, not upon the fact of a consideration for the promise being shown to have existed and to have been performed, but upon the question whether, when specific performance by the donor is claimed, the use has not compensated the donee and relieved the donor's obligation. In *Freeman v. Freeman*,<sup>1</sup> which was an action of ejectment and where the defense was a parol promise to give the land to the defendant, accompanied by an actual delivery and possession by him, Grover, J., said: "The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession and, with the knowledge of the promisor, make comparatively large expenditures in permanent improvements upon the land. . . . In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession, no part of the purchase-money having been paid, and yet the cases are numerous where performance of such contracts has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made." Again he says: "Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise." It was said by Parker, J., in *Lobdell v. Lobdell*:<sup>2</sup> "If the promisee, on the faith of the promise, does some act, or enters into some engagement, which the promise justified, and which a breach of the promise would make very injurious to him, this equity might regard as confirming and establishing the promise, in much the same way as a consideration for it would."

In such a case as this, to constitute a good consideration in equity, it is, of course, essential that it be substantial: in the sense that the promise shall rest upon a performance by the promisee, which evidences acceptance of and reliance upon the promise and consists in expending moneys in permanent improvements upon the land. In this case it may well have been, as found, that some of the expenditures made by the defendant upon the property were such as a householder would ordinarily make, or were trivial in their nature; but they do not influence the character of the others. We have the fact that the house was contracted for upon the promise of Mr. Cornell; that its cost exceeded the sum, which he agreed to be responsible for, by \$1,200, and that there were the other improvements of a permanent character, to which I have adverted as being found. There was, in fact, such a con-

<sup>1</sup> 43 N. Y. 34.

<sup>2</sup> 36 N. Y. 330.

sideration for the promise of Mr. Cornell as to have made it obligatory upon him to perform it, in order that the defendant should not be defrauded and injured. It would be very inequitable to deprive the agreement of its obligatory character, merely because, during the time of the occupation of the defendant under the parol promise, the fair rental value of the premises would amount, in the aggregate, to a sum in excess of the amount altogether expended. If there was the promise to give the property, accompanied by the delivery of possession, to the defendant and expenditures in permanent improvements made, in reliance upon the promise, injury will be presumed to follow by a failure to perform it. In enforcing such a promise, equity aims at preventing a fraud upon the donee and regards the case as taken out of the operation of the statute by the part performance.

The case supposed by the learned trial justice, of trivial repairs or improvements by a tenant entering into possession of real estate under a promise that it will be given to him, was not the case before him under his own findings.

I think that the defendant fully made out her claim to be the holder of the equitable title and that she could not be ejected from the premises at the suit of the plaintiff.

The judgment appealed from should be affirmed and judgment absolute ordered against the appellant upon the stipulation, with costs to the respondent in all the courts.

All concur.

Judgment accordingly.

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LEAK v. MORRICE.

IN CHANCERY, BEFORE SIR FRANCIS NORTH, L.K., FEBRUARY 24,  
1682.

[*Reported in 2 Cases in Chancery* 135.]

THE bill is to have an agreement performed by the defendant, which was in effect, that the defendant should assign a term for years in his house, and plate, and certain vessels of beer for 200 guineas, whereof he paid one in hand as earnest of the bargain, and three days after 19 guineas more; and part of the bargain was that it should be executed by writings by a certain time.

The defendant pleaded the Statute for Prevention of Frauds and Perjuries, and that it was a parol agreement, and none of the goods delivered by the defendant, so there ought to be no relief in law or equity, but confessed the receipt of the 20 guineas, and offered to repay them.

*Keck pro def.* at the bar enforced the plea, because it was to take away the defendant's trade, and alleged the money was only paid for the lease.

LORD KEEPER. It is clear the defendant ought to repay the money ; it is charged that the agreement was to be put in writing.

It was answered, Yea.

Whereupon the LORD KEEPER overruled the plea.

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HOLLIS *v.* WHITEING.

IN CHANCERY, BEFORE SIR FRANCIS NORTH, L.K., MARCH 2, 1682.

[*Reported in 1 Vernon 151.*]

THE bill was to have the execution of a parol agreement for a lease of a house, setting forth that in confidence of this agreement the plaintiff had laid out and expended very considerable sums of money, etc.

The defendant pleaded the Statute of Frauds and Perjuries, and the plea was allowed. But the LORD KEEPER was of opinion, that if the plaintiff had laid in his bill, that it was part of the agreement, that the agreement should be put into writing, it would alter the case, and possibly require an answer.<sup>1</sup>

<sup>1</sup> I take that to be a single case, and to have been overruled. If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, I agree to it, otherwise I take Lord North's doctrine, "That if it had been laid in the bill, that it was part of the agreement that it should be put into writing, it would have done," to be a single decision, and contradicted, though not expressly, yet by the current of opinions.—Lord Thurlow, C., *Whitchurch v. Bevis*, 2 Br. Ch. Cas. 559, 565.

So where a parol agreement was concerning the lending of money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee ; and after the mortgagee had got the deed of conveyance, he refused to execute the defeasance ; yet it was decreed against him on the fraud, by Lord Nottingham, soon after the making the statute, a case quoted and agreed to in Sir George Maxwell's case, Mich., 1719, 1 Equity Cases Abridged 20.—ED.

## COOKES &amp; UX. v. MASCALL &amp; COOKES.

IN CHANCERY, BEFORE HENRY POWLE, JANUARY 19, 1690.

[*Reported in 2 Vernon 200.*]

IN eighty-two a marriage was treated to be had between the plaintiff Cookes and the defendant Mascall's daughter, it being pretended Sir Thomas Cookes would make a considerable settlement on the plaintiff his kinsman, and proposals being made in order to mutual settlements, Mascall to settle forty pounds per ann. in present, and Edward Cookes the father to settle the reversion of his estate at Wick, after the death of him and his wife, and to allow his son twenty pounds per ann. for maintenance in the meantime, and Mascall to settle reversions of copyholds, part after the death of himself and wife, of the value of eighty pounds per ann.

In 1684 a meeting was appointed and held at Worcester, in order to a full agreement; there the proposals were discoursed on, and all parties seemed to allow and approve thereof. In October, 1684, Cookes the father, with one Baker an attorney, came over to Mascall's house at Tadebigg, in order to make a full agreement touching the settlement to be made on the intended marriage. Mr. Baker, having discoursed with both parties, proceeded to draw the agreement into articles in writing, to be mutually signed by the parties; but before the same were ready for execution, upon discourse between Mascall and Cookes they disagree. And Mascall by his answer swore positively, that he then reflecting that Sir Thomas Cookes had refused to make any settlement on his kinsman as it was pretended he would, and Cookes the father also refusing to settle a further estate upon the plaintiff to answer the reversion, that Mascall settled expectant on the death of his mother Wallis, he therefore refused to proceed any further in order to perfect the agreement, and never signed it. But Cookes put up what Baker had wrote into his pocket, and so they parted, and had no further meeting nor treaty; but old Cookes swore that after the articles were drawn, they were read over and agreed to, and that Mascall promised to meet at another time to execute; that young Cookes was afterwards permitted to come to Mascall's house, and in December, 1684, married his daughter, Mascall being privy to it, helping to set them forward in the morning, and entertaining them, and seemed well pleased with the marriage, upon their return to his house at night.

Upon this case Cookes the father, having by his answer offered to perform the agreement on his part, the court thought fit to decree Mascall also to perform the agreement, according to what was contained in

the writing drawn by Baker, though that was not signed by Mascall, as was intended it should have been, nor any other agreement reduced into writing.

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## HALFPENNY v. BALLET.

IN CHANCERY, BEFORE SIR JOHN TREVOR, M.R., FEBRUARY 9, 1699.

[*Reported in 2 Vernon 373.*]

ON marriage treated to be had between the plaintiff and the defendant's daughter, an agreement was reduced into writing and signed by the plaintiff, and delivered to Ballet to be signed by him, but he by answer denied he ever signed it, but tore it, being dissatisfied with it, in some particulars ; but his objections not being to any material parts of the agreement, and he having permitted the plaintiff to court his daughter, and the marriage being afterwards had, and he not declaring his dislike until asked for payment of the portion, and permitting the young couple to live with him, the MASTER OF THE ROLLS decreed the agreement and payment of the portion.<sup>1</sup>

<sup>1</sup> But it was argued on the other side, and decreed to be no such agreement as this court could carry into execution ; and my Lord Chancellor said, he had been always tender in laying open that wise and just provision the parliament had made ; that the act had not only directed such agreements to be in writing, as if that alone were sufficient, but went further, and directed them to be signed by the parties themselves, or some other lawfully authorized by them for that purpose ; that to obviate the pretence of such and such cases being out of the mischief of the statute, the parliament had in general words comprehended all, and directed that all agreements should be in writing, and signed by the party ; that he knew no case where an agreement, though it were all written with the party's own hand, had been held sufficient, unless it had been likewise signed by the party, and said, that the party's not signing it was an evidence that he did not think it complete ; that he had left it to an after consideration, and might afterwards make alterations or additions in it ; and therefore, unless it were either signed by him, or something equivalent done, to show that he looked upon it as completed and perfected, he thought such writing by the party himself was not sufficient to bind him within that statute, and cited the case of Halfpenny & Ballet, where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing, comprising the terms of the agreement, and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humor, and get the plaintiff to deliver up that writing, and then to marry him, which she accordingly did, and the defendant stood at the corner of a street to see them go to be married, and afterwards forced the plaintiff to bring his bill in this court to be relieved ; and my Lord Chancellor said, he remembered very well, that this cause was heard before the Master of the Rolls, and the plaintiff had a decree ; but he said, this was on the point of fraud, which was proved in the cause, and Half-

## WOOD v. MIDGLEY.

IN THE COURT OF APPEAL IN CHANCERY, FEBRUARY 28, 1854.

[Reported in 5 *De Gex, Macnaghten and Gordon* 41.]

THIS was an appeal from the decision of Vice-Chancellor Stuart overruling the demurrer of the defendant to a bill for specific performance filed by vendors of leasehold property. The ground of the demurrer was that the bill alleged no sufficient agreement in writing within the Statute of Frauds. The substance of the material statements of the bill are set out in the report of the case below, in the second volume of Messrs. Smale and Giffard's Reports, page 115.

The case made by them was, that the premises were put up for sale by the directions of the plaintiffs, subject to certain printed particulars and conditions; that the defendant called upon the auctioneer, and went with him to the plaintiffs' solicitor, and that the conditions of sale were then altered and turned into an agreement for sale by private contract by the direction of the defendant, who approved of the draft so prepared, and agreed to sign it. That the auctioneer then signed the following memorandum:

"Memorandum: Mr. Thomas Midgley has paid to me the sum of £50, as a deposit, and in part payment of £1,000, for the purchase of the Ship and Camel Public-house, at Dockhead; the terms to be expressed in an agreement to be signed as soon as prepared.

WILLIAM LOVEJOY.

"5th of July, 1853."

The bill alleged that the above-mentioned draft was the agreement referred to in the memorandum. It also stated that the defendant's solicitors, by letter to the auctioneers, stated that the defendant declined to enter into the agreement, and demanded back the deposit.

The demurrer was as follows: "The defendant demurs in law to the said bill, and for cause of demurrer shows that it appears by the bill that neither the agreement which is alleged by the bill, and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant, or any person thereunto by the defendant lawfully authorized within the meaning of the Statute of Frauds."

penny walked backwards and forwards in the court, and bid the Master of the Rolls observe the statute, which he humorously said, I do, I do. And in the principal case it was decreed to be no agreement, which this court could carry into execution, being only preparatory heads, which were afterwards to be drawn into form, and might then receive several alterations or additions. or the agreement entirely broken off, upon some further inquiry or information of the parties' circumstances.—*Bawdes v. Amhurst*, Prec. in Ch. 402, 404.—ED.

*Mr. Malins* and *Mr. Cairns* in support of the demurrer.

*Mr. W. D. Lewis* for the plaintiffs.

THE LORD JUSTICE TURNER. The Vice-Chancellor in his judgment says that this is a case on which different minds may arrive at different conclusions, and it is one on which my conclusion differs from his Honor's.

Upon the merits the argument is threefold. First, it is said that the defendant has so acted as to avoid signing the agreement, holding the other party bound by the agreement, and *Maxwell v. Mountacute*<sup>1</sup> is referred to on this head. But the principle of that and similar cases is fraud. If a party has been guilty of fraud, beyond all doubt the court will not let him take advantage of the Statute of Frauds.<sup>2</sup> All the cases referred to, including *Hammersley v. De Biel*,<sup>3</sup> *Walker v. Walker*,<sup>4</sup> and *Muckleston v. Brown*,<sup>5</sup> rest on this principle. Is there, then, a case alleged by this bill of this nature, that the defendant did by his fraudulent act prevent the agreement from being reduced to writing. I think that there is no allegation on the bill bringing forward a case of fraud. The case alleged is simply this, that there was an agreement for a sale by the plaintiffs to the defendant for £1,000, and the defendant said that he would not sign any agreement. The law has said that the defendant is not to be sued unless upon an agreement signed by him. Is it a fraud<sup>6</sup> on that law for him to say, I have agreed, but I will not sign an agreement?

The demurrer must be allowed.

The LORD JUSTICE KNIGHT BRUCE concurred.

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OLIVER GREEN v. HARRIET F. GREEN ET AL.

IN THE SUPREME COURT OF KANSAS, JANUARY TERM, 1886.

[*Reported in 34 Kansas 740.*]

ACTION brought by Oliver Green against Harriet F. Green and five others, to set aside certain deeds which plaintiff alleged to be fraudulent as to him. The defendant, James H. Easterday, demurred to plaintiff's petition, on the ground that it does not state facts sufficient to constitute a cause of action. January 25, 1885, the court sustained the demurrer. This ruling plaintiff brings to this court for review. The material facts are stated in the opinion.

<sup>1</sup> Prec. in Ch. 526.

<sup>2</sup> 12 Cl. & Fin. 45.

<sup>4</sup> 2 Atk. 98.

<sup>2</sup> See *ante*, 41 note (4).

<sup>5</sup> 6 Ves. 52.

<sup>6</sup> Only so much of the opinion is given as relates to this question —ED.

*Welch, Lawrence & Welch* for plaintiff in error.

*Stumbaugh, Arnold & Hilton* for defendant in error Easterday.

The opinion of the court was delivered by HORTON, C.J. : Harriet F. Wilcox, being the owner of certain real estate, and about to be married to Oliver Green, signed and executed deeds of all of her real estate to her children the day before her marriage. The deeds were made without the knowledge or consent of her intended husband, and for no other consideration than love and affection. The grantees of Harriet F. Wilcox, now Harriet F. Green, executed deeds of the property to James H. Easterday, who at the time had knowledge of all the circumstances attending the execution of the deeds to them. Oliver Green, the husband, attempts to set aside these deeds, alleging that the same are fraudulent as to him. The defendant, James H. Easterday, demurred to the petition of plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer being sustained by the court, the plaintiff now brings the case here for review.

On the part of the defendants it is claimed that the sole question for our consideration is, whether a voluntary conveyance of all her real estate executed by a woman on the eve of marriage, without the knowledge or consent of her intended husband, is fraudulent as to his marital rights. If this were the only question in the case we might, perhaps, repeat what is said in *Butler v. Butler*, 21 Kas. 525, that "it may be doubted whether it is the law in Kansas to-day that such a conveyance is fraudulent." Under the allegations of the petition, however, a very different question is presented. The petition, among other things, alleges that in August, 1882, Oliver Green and Harriet F. Wilcox were engaged to be married; that at the time of the engagement, Harriet F. was the owner of a farm of 160 acres, in Shawnee County, in this State; that the farm was all the property belonging to her; that Oliver Green was possessed of only a few hundred dollars in cash; that Harriet F. Wilcox induced Oliver Green to make the matrimonial engagement with her and to marry her, representing to him at the time of the engagement that the farm belonged to her, and that its proceeds should go to their support after they were married so long as they lived, and then to her children; that the proceeds of the farm were ample to keep both parties; that Green was loth to make any marriage engagement or to marry Harriet F. without some assurance of support, as he was a cripple, having lost his right forearm; that on account of these promises and other similar representations of Harriet F., and relying thereon, Green married her August 31, 1882; that the parties then proceeded to live together as husband and wife, in the city of Topeka; that plaintiff furnished rooms and bought food and clothing for his family, also for a single daughter of his wife, and for her widowed daughter and two little



children ; that the plaintiff received none of the proceeds of the farm, although his wife controlled and rented the same in her own name ; that at the time of the marriage there was a mortgage of one hundred dollars upon the farm, and with money belonging to the plaintiff his wife paid off the mortgage February 14, 1883 ; that subsequently, without any reason or provocation, she deserted her home and husband ; that on August 30, 1882, on the eve of her marriage, Harriet F. Wilcox, without the knowledge or consent of plaintiff, signed and executed deeds purporting to convey her farm—being all of her own means of support—to her daughters by a former marriage, without other consideration than love and affection ; that these deeds were not delivered until March 5, 1884—long after the marriage. They were then recorded in the office of the register of deeds of Shawnee County.

For the purposes of this case, all the allegations of the petitioner must be taken as true. Therefore we must assume there was a verbal ante-nuptial contract existing between Oliver Green and Harriet F. Wilcox at the time of their marriage ; that the marriage was consummated by Green on account of his reliance upon the ante-nuptial contract ; and that Harriet F. Wilcox, now Green, has been guilty of misrepresentation, deception and actual fraud toward Oliver Green before and after her marriage. The question is, whether, under all these circumstances, the deeds delivered subsequent to the marriage can be set aside as fraudulent to the husband. We decided in *Hafer v. Hafer*, 33 Kas. 499, that—

“The statutes of this State recognize the right of parties contemplating marriage to make settlements and contracts relating to and based upon the consideration of marriage, and that an ante-nuptial contract providing a different rule than the one prescribed by law for settling their property rights, entered into by persons competent to contract, and which, considering the circumstances of the parties at the time of making the same, is reasonable and just in its provisions, should be upheld and enforced.”

And we further decided that “Marriage is a good and sufficient consideration to sustain an ante-nuptial contract.” Sec. 6, of chapter 43, Comp. Laws of 1879, of the Statute for the Prevention of Frauds and Perjuries, provides :

“No action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.”

But for this statute, we suppose it would be considered that the ante-

nuptial contract might be enforced, or at least that the deeds of Harriet F. Green, late Wilcox, attempting to convey, without consideration, all of her real estate, so as to deprive herself of the power of carrying out her promises and contract, would be invalid as a fraud upon her husband.

"It is generally true that representations on which a marriage is had are upheld in equity on the ground of fraud; and where there is no fraud the rule does not apply. . . . Actual fraud will in equity break through any law that is not penal or political in character, through any law written or unwritten which goes only to the rights of the parties, and has no public object to serve apart from doing justice between man and man."<sup>1</sup>

In *Glass v. Hulbert*, 102 Mass. 24, it was said :

"The marriage, although not regarded as a part performance of the agreement for marriage settlements, is such an ir retrievable change of situation that if procured by artifice upon the faith that the settlement had been, or the assurance that it would be executed, the other parties are held to make good the agreement and not permitted to defeat it by pleading the statute."

In *Petty v. Petty*, 4 B. Mon. 215, the wife, in her petition, charged that her husband, being much the elder and in good circumstances, as an inducement to the contract of marriage and as a means of providing for her support in the event of his death, before their marriage promised her that if she would marry him he would immediately after the marriage make a deed of settlement, etc. A few days after the marriage, her husband disclosed to her for the first time that he had been induced by certain persons to make over his property before he married. The court said, in passing upon the case, that "the wife has been fraudulently deprived of the right of dower by the deeds in question; to that extent at least of this interest, if no further, their execution was a fraud upon her and ought not to stand."

In *Southerland v. Adm'r*, 5 Bush 591, it is held that :

"As between parties, an oral ante-nuptial contract that neither party should claim or interfere with the property of the other any more than if they had not married, is unquestionable, and also as to all claiming as volunteers under them."

In this case, in addition to the oral ante-nuptial contract between the parties, the deed, although executed just upon the eve of marriage, was not delivered until long after; and as a deed takes effect only from

<sup>1</sup> 1 Reed on Statute of Frauds, § 175. See also *Jenkins v. Eldredge*, 3 Story 181; *Durham v. Taylor*, 29 Ga. 166.

the time of its delivery, therefore it had no force until after the marriage.<sup>1</sup>

In *Busenbark v. Busenbark*, 33 Kas. 572, we held that :

"While the wife's right and interest in the real estate of her husband not occupied by the family as a homestead is inchoate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband to prevent its wrongful alienation or disposition under fraudulent judgments procured and consented to by the husband with the object and for the purpose of defeating the wife's right."

Upon the well-established doctrine that fraud takes any case out of the Statute of Frauds, and the principle declared in *Busenbark v. Busenbark*, we conclude that the deeds in controversy are in fraud of the rights of plaintiff, and that he is entitled to have them set aside.<sup>2</sup>

The defendant, James H. Easterday, having purchased his title with full knowledge of plaintiff's rights, can have no better title than his grantors.

The judgment of the district court will be reversed, and the cause remanded with directions to overrule the demurrer.<sup>3</sup>

All the Justices concurring.

<sup>1</sup> *Railroad Co. v. Owen*, 8 Kas. 410; id. 419; *Babbitt v. Johnson*, 15 id. 252; *Mitchell v. Skinner*, 17 id. 565; *Harrison v. Andrews*, 18 id. 535.

<sup>2</sup> See also *Youngs v. Carter*, 10 Hun 194; *Petty v. Petty*, *supra*; *Kelly v. McGrath*, 70 Ala. 75; *Freeman v. Hartman*, 45 Ill. 57.

<sup>3</sup> It seems to be thought by counsel for plaintiff that the desired feature capable of taking this case out of the ordinary routine is furnished by what took place between the parties in the presence of Mr. Boyd. It is to the last degree doubtful whether the language itself will bear the construction placed upon it by counsel. Mr. Boyd says: "Both parties admitted that the note due from Francis M. Wooldridge was given for a tract of land sold by Jane Chambers to Francis M. Wooldridge; that a lien was to be held on the land until the purchase-money was paid." The admission with regard to the lien would apply as well to what took place between Jane Chambers and her vendee, as to what occurred between the latter and the plaintiff. But conceding that the language imports all that plaintiff's counsel claims, that the vendee was to give a lien upon the land until the purchase-money was paid, still we are met by the formidable objection presented by the Statute of Frauds. Giving the language this very favorable construction, it is quite evident that plaintiff relied on the word of the vendee to make him secure in accordance with what had been promised. If the vendee had made this with a fraudulent purpose of obtaining an advantage, and then breaking faith with plaintiff, we might be disposed to afford relief, notwithstanding the statute "on the foot of the fraud." *Halfpenny v. Ballet*, 2 Vernon 373. But there is no indication in this record of a fraudulent purpose on the part of the vendee, and unless this is the case the statute forms an absolute bar. *Chambers v. Lecompte*, 9 Mo. 566, and cases cited; 2 Story on Contracts, § 1466, and cases cited. And it is said that even

LEE PEEK, BY JERRY MCNEW, HIS GUARDIAN, RESPONDENT, v.  
NETTIE A. PEEK, APPELLANT.

IN THE SUPREME COURT OF CALIFORNIA, SEPTEMBER 22, 1888.

[Reported in 77 California Reports 106.]

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The facts are stated in the opinion.

*Rowell & Rowell, Harris & Allen, and Wells, Van Dyke & Lee* for appellant.

*H. C. Rolfe* for respondent.

HAYNE, C. Ejectment, with a cross-complaint by defendant praying for a conveyance of the legal title. The facts are as follows :

One L. R. Peek orally promised the defendant that if she would marry him he would, on or before the marriage, convey to her the property in controversy. She relied upon this promise, and married him "for no other reason or consideration." The conveyance was not made. He put it off by excuses and protestations, and on the morning of the marriage, without the knowledge of defendant, conveyed the property to his son by a former marriage, who was then a boy about ten years old. The marriage with defendant did not prove a happy one, and after a year's residence upon the property, Peek deserted the defendant, and the son, Lee Peek, brought the present action to recover possession of the property. The court below gave judgment for the plaintiff, and the defendant appeals.

The foundation of the defendant's claim being the promise of L. R. Peek, the first question to be considered is whether such promise was of any validity. It is clear that it was within the Statute of Frauds. But it is contended that there was such part performance and fraud as would induce a court of equity to give relief, notwithstanding the statute.<sup>1</sup>

We think that if the actual fraud of L. R. Peek be left out of view, there was no such part performance as would take the case out of the statute. There may undoubtedly be cases of a part performance of

in case of fraudulent non-performance, where a writing was to evidence the contract, there must be an express promise to reduce the contract to writing, and not a mere parol promise to do the act agreed on. not looking to such reduction. If, as above seen, there was in the present instance neither fraud of the character spoken of, nor any contract respecting the land to be reduced to writing, the whole matter thus rested in parol and under the ban of the statute.—Sherwood, C.J., *Wooldridge v. Scott*, 69 Mo. 669, 673.—ED.

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

oral antenuptial agreements sufficient to warrant their enforcement in equity.<sup>1</sup> But it seems to be generally agreed that the marriage alone does not amount to such part performance.<sup>2</sup> With reference to this subject, Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own grounds."<sup>3</sup> Nor does the fact that the defendant resided with her husband upon the property make any difference. The reason assigned for holding possession to be part performance is, that unless validity be given to the agreement the vendee would be a trespasser. But it is manifest that this reason would not apply where the vendor was the husband and the vendee the wife, living with him upon the property. The possession which is referred to by the cases which hold it to be sufficient part performance is a possession exclusive of the vendor.<sup>4</sup>

But the fact that the marriage was brought about by the actual fraud of L. R. Peek seems to us to make a difference. There can be little doubt upon the record that there was actual fraud on his part. He denies that he made any promise to convey the property in controversy. But the court finds that he did make it, and taking this to be the fact, we think that the defendant's account, as to the time of the promise and of the reason she married him without the conveyance, must be accepted as the true one. According to her testimony, the promise was repeated up to the time of the marriage, and she was induced to have the ceremony performed before the conveyance was executed by means of excuses and protestations which must have been made for the purposes of deceiving her. On the day before the marriage he pretended that he was going to have the deed executed at once. He said to the defendant: "The officers are in town that are required to draw up the papers. Come to-night and I will have the place deeded to you, and the fifteen thousand dollars put in your name. He left me in the hotel, and in a few minutes he came and told me that Mr. Frank McKenny was out of town, and it could not be attended to that evening." The next day, "he said he would have the deeds drawn, and he went up and said that they were all busy at the court-house, and he couldn't have it done at that time, and he called on me again with the same story—that the gentlemen at the court-house were busy, and that he could not have the deeds fixed, and that I could rest contented." He, however, succeeded

<sup>1</sup> See *Neale v. Neales*, 9 Wall. 1.

<sup>2</sup> See *Atherly on Marriage*, 90; *Browne on Statute of Frauds*, 4th ed., § 459; *Henry v. Henry*, 27 Ohio St. 121.

<sup>3</sup> 1 Story's Eq. Jur. § 768.

<sup>4</sup> *Browne on Statute of Frauds*, 4th ed., § 474.

in inducing the defendant to marry him that evening, by protesting that the papers should be executed as soon as practicable. After the marriage he kept up for a short time the pretense that he was going to fulfill his promise, but never did so.

It seems clear that he never intended to have the deed executed. The story that he could not have it done because the officers at the court-house were busy is ridiculous. On the very day that he was making this excuse, he got a deed executed, conveying the property to his son. And the fact that he induced the defendant to marry him by promising to convey the property to her, when at that very time he was conveying it to somebody else, seems conclusive as to his fraudulent intent. We think, therefore, that the conclusion of the court below that the deed was not made "with any fraudulent intent whatever" is not sustained by the facts.

This fraud on the part of L. R. Peek, by which he induced the defendant to irretrievably change her condition, seems to us to be ground for relief in equity. It has been laid down that if the agreement was intended to be reduced to writing, but was prevented from being so by the fraudulent contrivance of the party to be bound by it, equity will compel its specific performance.<sup>1</sup> And the recent case of *Green v. Green*<sup>2</sup> is exactly in point. In that case a widow, owning 160 acres of land, orally promised a man that if he would marry her she would devote the proceeds of the land to their joint support. Relying upon this promise he married her, but subsequently ascertained that on the eve of the marriage she had conveyed the property to her children by former marriage, "in consideration of love and affection." The court held that he could maintain an action to have the deed set aside on the ground of fraud.<sup>3</sup>

We do not say that the mere fraudulent omission to have an agreement reduced to writing would of itself be ground for specifically enforcing the agreement. But where the fraudulent contrivance induces an irretrievable change of position, equity will enforce the agreement. And the marriage brought about by the fraudulent contrivance is a change of position within the meaning of the rule. In *Glass v. Hulbert*,<sup>4</sup> in reasoning upon somewhat different facts, to the conclusion that, in order to be ground for the enforcement of the oral contract, the fraudulent contrivance must have induced some irretrievable change of position, the court said: "The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases

<sup>1</sup> 1 Story's Eq. Jur. § 768; *Atherly on Marriage* 85.

<sup>2</sup> 34 Kan. 740; 55 Am. Rep. 256.

<sup>3</sup> Compare also *Petty v. Petty*, 4 B. Mon. 215; 39 Am. Dec. 501.

<sup>4</sup> 102 Mass. 24; 3 Am. Rep. 418.

the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation, that if procured by artifice, upon the faith that the settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute." This, we think, is a correct statement of the law.

We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

BELCHER, C.C., and FOOTE, C., concurred.

#### SECTION IV.—DEFENSES (CONTINUED).

##### *(b) Want of, or Inadequacy of Consideration.*

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#### JEFFERYS *v.* JEFFERYS.

IN CHANCERY, BEFORE LORD COTTENHAM, C., JANUARY 26, FEBRUARY 1, 1841.

[*Reported in Craig & Phillips* 138.]

By articles of agreement, dated the 25th of July, 1834, and made between John Jefferys of the one part, and Bowden and Thorn of the other part, John Jefferys, after reciting that he was desirous of making some certain and irrevocable provision for the support and maintenance of his daughters Martha, Charlotte, and Sarah Jefferys, covenanted with Bowden and Thorn, as trustees, forthwith to settle all his real estate to the same uses, ends, intents, and purposes as were expressed in his will, dated the 25th of May, 1834; and, accordingly, he executed certain indentures of lease and release of the 16th and 17th of September, 1834, whereby, in consideration of the natural love and affection which he had for his three daughters, and for divers other good causes and considerations, he conveyed certain freehold hereditaments, subject to the incumbrances affecting the same, and covenanted to surrender certain copyhold hereditaments, to Bowden and Thorn, upon trust, out of the rents and profits thereof to pay to him an annuity of £80 for his life; and after his death to sell the freehold and copyhold hereditaments, and out of the moneys arising therefrom to pay off certain incumbrances, and to stand possessed of the residue of such moneys, upon certain trusts, for the benefit of his three daughters.

By the will of Sarah Jefferys, who died in April, 1835, all her interest under the settlement became vested in her two sisters. John Jefferys never surrendered the copyholds, pursuant to the covenant. In September, 1836, he died, having, by a will, dated the 18th of August, 1836, given part of the before-mentioned freehold and copy-



hold estates to his wife Isabella, who was, shortly after his death, admitted to part of the copyhold estates.

In July, 1837, this bill was filed by Martha and Charlotte Jefferys against Isabella Jefferys and Bowden and Thorn, praying that the trusts of the indenture of the 17th of September, 1834, might be carried into execution; and that Isabella Jefferys might be decreed to surrender the copyholds, to which she had been admitted, to Bowden and Thorn, as trustees of that indenture.

By the will of Martha Jeffereys, who died in April, 1838, all her interest under the settlement became vested in her sister Charlotte Jefferys, the surviving plaintiff; and Isabella Jefferys having, since the filing of the bill, married one Abraham Peacock, a bill of revivor and supplement was filed by the surviving plaintiff.

The cause now came on to be heard before the Lord Chancellor *Mr. Stuart* and *Mr. Koe* for the plaintiffs.

*Mr. Girdlestone* and *Mr. O. Anderdon* for the defendants Peacock and his wife.

*Mr. Wray* and *Mr. S. Miller* appeared for the other parties.

*Mr. Stuart* in reply.

THE LORD CHANCELLOR. The title of the plaintiffs to the freehold is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the copyholds, I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement. As, however, the decision in *Ellis v. Nimmo* is entitled to the highest consideration, I will not dispose of this case absolutely, without looking at a former case,<sup>1</sup> in which I had occasion to refer to that decision. Unless I alter the opinion I have expressed, the bill must be dismissed with costs, so far as the copyholds are concerned.

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Feb. 1. On this day his Lordship said he had looked at the case alluded to, and that he saw no reason for altering the opinion he had before expressed.

<sup>1</sup> *Dillon v. Coppin*.

CYRENA FERRY, RESPONDENT, v. DELEVAN STEPHENS  
ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 6, 1876.

[*Reported in 66 New York Reports 321.*]

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, reversing a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.<sup>1</sup>

This action was brought to enforce the specific performance of a contract between one Vincent Stephens and plaintiff for the sale and conveyance by the former to the latter of certain premises in the village of Hornellsville, Steuben County. By the contract, which was in writing, dated March 10, 1862, Stephens agreed to sell the premises for the sum of \$1,100, payable in annual installments, which plaintiff agreed to pay, and, upon payment being completed, Stephens agreed to convey. Plaintiff was the sister of Stephens. The court found the following facts, among others :

“That at the time of making said contract, it was the object and intention of Vincent Stephens to make a gift of the said premises to the plaintiff, and the same was so understood by the plaintiff. That it was not intended by either of the parties to said contract that any consideration should be paid for said premises, and that the consideration was inserted in said contract to conceal the fact that it was a gift from other brothers and sisters of the said Vincent Stephens, who were interested in the disposition of his estate.

“That on the 18th day of April, 1862, the said Vincent Stephens indorsed upon the said contract a receipt in full of the purchase-price of said premises, but no payment was ever in fact made to him thereon, nor was it ever intended that any payment should be made ; and, in fact, the said plaintiff has never paid any part of the consideration of said contract.

“That in the month of June, 1862, Vincent Stephens died, having made a will of real and personal estate, which was duly proved before the surrogate of the proper county, in and by which he devised the said premises to the defendant, Delevan Stephens.”

The court found, as conclusion of law, “that the said contract being a mere voluntary executory promise to give lands to the plaintiff, the specific performance cannot be enforced in equity,” and thereupon directed judgment, dismissing the complaint.

<sup>1</sup> Reported below, 5 Hun 109.

*William Rumsey* for the appellants.

*Harlo Hakes* for the respondent.

ANDREWS, J. The judgment of the Special Term cannot be sustained on the ground upon which it was placed, that the action is brought to enforce the specific performance of a voluntary agreement for the conveyance of land. There was no want of consideration for the promise of Vincent Stephens to convey the land. The promise of the plaintiff to pay the purchase-price was a valid consideration for the promise of the other party. The agreement was in writing, signed by both parties, and was mutually obligatory. It is quite immaterial, in the absence of fraud or mistake, neither of which is claimed, what object or intention the parties may have had at variance with the terms of the agreement, or that both understood that the vendor would not exact the payment of the purchase-money, or that he intended to give the land to his sister. The contract did not operate as a gift of the land, and the intention to give the land could only be consummated by an actual conveyance, and the intention to make a present gift is conclusively rebutted by the covenant which the vendor took for the payment of the consideration. The parol understanding between the parties would be no answer to a suit brought by the vendor to enforce the performance of the plaintiff's promise to pay the purchase-money. The suit was not, therefore, as the learned judge of the Special Term seemed to suppose, brought to enforce a voluntary executory promise to give the land to the plaintiff. The payment of the purchase-money by the plaintiff was made by the agreement a condition precedent to the obligation of the vendor to convey the land, and the plaintiff, in order to entitle herself to a specific performance of the contract, was bound to show that payment, in fact, had been made, or that her promise to pay the purchase-money had, in some way, been satisfied. It is conceded that there was no actual payment of any part of the consideration. The plaintiff, to maintain her right of action, relies upon the fact that her brother, about a month after the contract was made, indorsed upon it a receipt in full of the purchase-price. The judge also found that the plaintiff's brother, when the contract was made, intended to give her the land, and that the consideration was inserted to conceal this intention from other relatives, and in connection with the finding that the receipt was subsequently indorsed on the contract, he finds that it was never intended that any payment should be made thereon. These findings, taken together, are equivalent to finding that the vendor, to accomplish his purpose to give the land to his sister, gave her the debt which represented his interest in the land. He became, on the execution of the contract of sale, a trustee for the plaintiff of the land, having a lien for the purchase-money, and she became his debtor for the consideration.

That the receipt was intended as a gift of the debt is clearly inferably from the facts found. His primary intention was to give her the land. The gift of the debt would not give her the legal title, but it gave her the whole beneficial interest, provided it operated as a legal satisfaction of her promise. The position of the General Term, that when the lien of the vendor, under a contract for the sale of land, for the purchase-money, is extinguished by payment or by what, as respects the vendor, was equivalent to payment, he becomes a naked trustee, and is bound to convey to the vendee the legal title, admits of no controversy. There was no intention in giving the receipt that the vendor should be discharged from his promise. It states that the money expressed therein was received to apply on the contract. Whether the giving of a receipt for the debt was effectual to confer the benefit intended, is a question of law, but it is clear, from the facts found, that the receipt was intended to operate as a forgiving and satisfaction of the plaintiff's obligation under the contract, so as to leave the right of the plaintiff to a conveyance in force as if the debt had been paid. The case, therefore, comes to this single question, viz., was there a valid gift of the debt to the plaintiff by her brother. The case of *Gray v. Barton*<sup>1</sup> is a decisive authority for the plaintiff on this question. The plaintiff does not, in this case, seek the aid of the court to perfect an incomplete gift. The gift of the debt was complete upon the execution of the receipt. The vendor's purpose of giving the land has never been executed, only so far as it results from his giving the plaintiff the debt for the purchase-money. The plaintiff's obligation under the contract having been satisfied, the only unperformed stipulation remaining, is that of the vendor to convey the land, and this action is brought to enforce that stipulation.

The language of Grover, J., in *Gray v. Barton*, answers the objection founded on want of consideration. He says, "the proof of want of consideration for the receipt was annulled and avoided by the proof that it was given to consummate a gift of the debt."

The judgment of the General Term should be affirmed, and judgment absolute for the plaintiff ordered on the stipulation.

All concur.

Order affirmed and judgment accordingly.

<sup>1</sup> 55 N. Y. 68.

NATHANIEL B. MANSFIELD v. BENJAMIN E. HODGDON  
AND OTHERS.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 21,  
1888.*[Reported in 147 Massachusetts Reports 304.]*

HOLMES, J. This is a bill specifically to enforce a covenant to sell to the plaintiff "the farm situated in that part of Mount Desert Island called Pretty Marsh, and consisting of between two hundred and sixty and two hundred and seventy acres, and standing in the name of Benjamin Hodgdon, for the sum of fifteen hundred dollars cash, at any time within thirty days from the date hereof." The instrument is dated January 15, 1887, and is signed by the defendant Hodgdon, but not by his wife. The defendant Clara E. Allen is a subsequent grantee of the premises, and the remaining defendant, William H. Allen, is her husband. The judge who heard the witnesses made a decree for the plaintiff, and, the evidence having been reported, the defendants appealed.

Giving to the finding of the judge the weight which it must have, we think the evidence must be taken to establish the following facts. The instrument was sealed by Hodgdon, and has not been altered. The plaintiff expressed his election to purchase within the thirty days allowed. There was evidence of a message to that effect having been left at Hodgdon's house within ten days. It appears that a blank deed to the plaintiff and another was left there about the same time, and there was evidence that a message was sent to Hodgdon to execute it if he found it correct. There was also evidence that the deed was returned unexecuted, with the message that Mrs. Hodgdon refused to sign it, and with no other objection in the first instance. These facts warranted a finding that sending the deed implied, and was understood to imply, notice that the plaintiff intended to buy, at least if the deed corresponded to the contract,<sup>1</sup> and perhaps whether it corresponded or not, as the message even as testified to by Hodgdon imported a willingness to correct mistakes.

The plaintiff, although he signified his election to take the land within thirty days, did not pay or tender the money within that time. But there is evidence that Hodgdon was responsible for this. At or soon after the time when word was sent that Mrs. Hodgdon refused to sign, a demand or request was made that Mrs. Hodgdon should have three acres out of one of the other lots as a consideration for her signing the deed. Of course, under the contract the plaintiff had a right to call

<sup>1</sup> See *Warner v. Willington*, 3 Drew. 523, 533.

upon Mr. Hodgdon to give a good title to the whole, but he was disposed to yield something. A discussion ensued, of course on the footing that the plaintiff was desirous of making the purchase, which of itself was evidence that the defendant Hodgdon had notice of the fact, and this was prolonged beyond the thirty days. When the parties came to terms, a new deed was prepared and tendered, was executed by the Hodgdon, and was handed to a Mr. Chapin, who had acted as a go-between. But later in the same day Chapin was ordered not to deliver the deed, and the bargain with the plaintiff was repudiated. There is no dispute that the plaintiff was ready to pay for the land at any time when he could get a conveyance.

Afterwards Hodgdon conveyed to Mrs. Allen, Mrs. Hodgdon releasing dower. But Mrs. Allen had full notice of the agreement with the plaintiff before the conveyance to her, and before any agreement was made with her and her husband, and, although informed that the thirty days had gone by, she had notice that the plaintiff was expecting a conveyance, and that Hodgdon might have trouble by reason of his refusal to convey to the plaintiff.<sup>1</sup> Mr. Allen was asked whether he knew that the plaintiff had sued Hodgdon for damages before the purchase. This must have meant before the final conveyance to Mrs. Allen, as Mrs. Allen was party to getting the deed back from Mr. Chapin, and had notice of the plaintiff's rights at that time, before any suit was begun. But the evidence was excluded, and Mr. Allen's answer is not properly before us. He did not suggest that he was led by his knowledge to assume that the plaintiff would not seek specific performance, and must be taken to have known that the plaintiff still had the right to do so.<sup>2</sup>

The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within thirty day. The usual doctrine as to conditions applies to such a covenant, and as the covenantor by his own conduct caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender when the new terms had been agreed upon, by wholly repudiating the contract.<sup>3</sup> If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay.\*

<sup>1</sup> *Connihan v. Thompson*, 111 Mass. 270; *Hansard v. Hardy*, 18 Ves. 455, 462.

<sup>2</sup> *Connihan v. Thompson*, *ubi supra*.

<sup>3</sup> *Carpenter v. Holcomb*, 105 Mass. 280, 282; *Ballou v. Billings*, 136 Mass. 307; *Gormley v. Kyle*, 137 Mass. 189; *Lowe v. Harwood*, 139 Mass. 133, 136.

<sup>4</sup> *Galvin v. Collins*, 128 Mass. 525, 527.

A covenant to sell is not voluntary in such a sense that equity will refuse specific performance. If the defendant conveys, he will get *quid pro quo*.<sup>1</sup> The description in the contract embracing all the land owned by the defendant at Mount Desert was sufficient.<sup>2</sup>

It is objected, that the decree gives the plaintiff a title free from Mrs. Hodgdon's right of dower, and that, as Mrs. Hodgdon was not bound to release her dower to him, he ought not to profit by her release to Mrs. Allen. But who suffers injustice, or has a right to complain? Not Mrs. Hodgdon, who it not a party to or interested in these proceedings. She has released and extinguished her dower, and she retains the consideration which she received for it, as the three acres demanded by her are excepted from the conveyance ordered by the decree. Mr. Hodgdon cannot complain, as he contracted to convey a clear title. And the defendant Mrs. Allen, having taken Hodgdon's title with notice of the plaintiff's rights, and therefore charged with a trust in his favor, of course is bound to convey that title. The release of dower extinguished Mrs. Hodgdon's inchoate right, and did not convey a distinct interest to Mrs. Allen.<sup>3</sup>

Without considering whether, if justice required it, the defendant Allen might not be protected by treating the incumbrance as if it still existed, there is no ground for doing so in this case. Mrs. Allen, through her husband, actively promoted Hodgdon's breach of agreement. If she receives back from him the consideration which she paid in excess of that ordered to be paid to her by the plaintiff, she will be *in statu quo*, and the loss will fall on Hodgdon, as it ought to do, unless there was some arrangement by which the Allens were to indemnify him. In any event, no wrong will be suffered by any one, and the plaintiff gets what he contracted for.<sup>4</sup>

Decree affirmed.

*F. S. Hessel tine* for the defendants.

*G. Putnam & J. Fox* for the plaintiff.

<sup>1</sup> *Western Railroad v. Babcock*, 6 Met. 346; *Irwin v. Gregory*, 13 Gray 215; *Eastman v. Simpson*, 139 Mass. 348, 349.

<sup>2</sup> *Bacon v. Leonard*, 4 Pick. 277; *Hurley v. Brown*, 98 Mass. 545; *Rankin v. Wood*, 12 Gray 34; *Mead v. Parker*, 115 Mass. 413; *Doherty v. Hill*, 144 Mass. 465.

<sup>3</sup> *Learned v. Cutler*, 18 Pick. 9, 11; *Tirrel v. Kenney*, 137 Mass. 30, 32.

<sup>4</sup> A portion of the opinion has been omitted.—ED.

## COLES v. TRECOTHICK.

IN CHANCERY, BEFORE LORD ELDON, C., JANUARY 24, 26, 27, 1804.

[*Reported in 9 Vesey 235.*]

THE object of the bill was to obtain a specific performance of an agreement for the sale of a mansion-house, park, and other premises, at Addington, in the county of Surrey, by the defendant Trecothick, to the plaintiff, for the sum of £20,000 under the following circumstances :

The defendant Trecothick, being seised of very considerable estates at Addington, proposed to convey all his estates at Addington to the other defendants, William Coles and Westgarth Snaith, in trust to sell for payment of debts ; and accordingly an agreement in writing was endorsed, by way of defeasance, upon a warrant of attorney, to confess judgment in an action brought by Francis Thwaites and Charles Apthorpe Wheelwright against Mr. Trecothick, upon bonds for the sum of £17,780 2s. 8d. ; by which it was declared, that execution should not issue for two months, upon condition that Trecothick should, within a month, make out his title to the Addington estate, and within the remaining month convey to William Coles and Westgarth Snaith, in trust to sell, and pay off the incumbrances affecting the estate, and the bonds, for which the action was brought, and pay the remainder to Trecothick ; the judgment to stand as a security, not only for the bonds, if the said acts should not be done at the end of one or two months, but also for the due performance of the covenants, and so much of the principal and interest, secured by the judgment, as shall not within ten months be realized by the sale. William Coles and his father Thomas Coles, in partnership as sugar brokers, and Snaith & Co., bankers, were holders of some of the bonds by assignment. No conveyance was executed ; but preparations were made for the sale, and the estates were surveyed and valued by Smith, a surveyor and auctioneer, under the sole direction of Mr. Trecothick, with the approbation of the trustees ; and Mr. Trecothick gave a written authority by letter, dated the 26th of June, 1802, to the trustees, for proceeding in the sale notwithstanding the conveyance was not prepared, desiring that if a purchaser should not offer at £110,000 the estate should be bought in, and disposed of in lots. On the 7th of July, the day before the estate was put up, he by letter directed Smith not to sell the estate for less than £109,500, but to sell to the highest bidder above that sum. There being no bidder at the sale, it was determined to sell the estate in lots, and



Mr. Trecothick, with the consent of the trustees, took the whole management; the estate was divided into twenty-two lots, and the particulars prepared by Smith, under his sole direction and authority, and were settled and approved by his solicitors; Mr. Trecothick also, with the auctioneer, fixing the prices of the lots; and he appointed several persons to bid for him, to prevent any sale under those prices. The trustees in no respect interfered.

The sale took place at Garraway's, on the 22d of October, 1802, and several lots were sold; but Lot 1, comprising the manor of Addington, and the advowson, mansion-house, and park, was bought in for £19,350; the price fixed by Mr. Trecothick being £19,500. Several of the lots bought in were afterwards sold by private contract, the authority to Smith being generally to sell by auction or private contract; and Mr. Trecothick appeared very anxious to find purchasers, and when Smith was leaving town inquired what was to be done in his absence, if purchasers should offer. Smith answered that he transacted a great part of his business through two confidential clerks, Phillips and Glover, who in his absence would enter into contracts, with which Trecothick expressed himself satisfied.

The evidence for the plaintiff stated that on the 22d of October, at a meeting for the purpose of considering what should be done with the lots unsold, the solicitor declared that Mr. Trecothick had desired him to offer Lot 1 to William Coles or his father, the plaintiff, for £20,000, and was very desirous that one of them should be the purchaser. The trustees not being present, their solicitor replied that William Coles could not, as standing in the character of trustee, and would not become the purchaser, whatever his father, as an indifferent person, might do; observing also, that the price proposed was more by £500 than it would have been sold for; to which Mr. Trecothick's solicitor said that was true; but Mr. Trecothick thought it was worth more; but that he had a real wish that the plaintiff should have it, and desired him to signify such wish. Early in November William Coles informed Smith and Trecothick's solicitor that his father agreed to take the lot at £20,000; when the solicitor expressed Trecothick's wish to reserve the advowson and some other things, and abate £4,000, William Coles said he was sure his father would not purchase anything short of the whole; and Trecothick must make up his mind whether to part with it or not; and said he would call again for his final answer. Soon afterwards Smith was offered £20,000 by Mr. Young, an auctioneer. Trecothick being informed that neither Young nor the plaintiff would buy if the lot was divided, gave up that intention, and agreed it should be sold entire for £20,000; and Smith asking whether the plaintiff or Young was to have it, Trecothick desired him do as he pleased. Smith

said, "Then, sir, it is Mr. Coles's"; and Trecothick replied, "Then let Mr. Coles have it." The same afternoon, the 6th of November, William Coles called on Smith, and being informed of what had passed, and asked if the plaintiff was to be considered the purchaser, answered, "certainly," and that he should send the plaintiff's solicitor immediately, who accordingly called that evening; and Smith having left town, an agreement was written on one of the particulars, and signed for the plaintiff by his solicitor, and by Smith's clerk in this manner:

"Witness Evan Phillips for Mr. Smith, agent for the seller."

A deposit of £2,000 was at the same time paid to Phillips by the plaintiff's solicitor. On the 8th and 9th of November, Trecothick applied to William Coles, expressing his wish that the plaintiff would give up his purchase, on the ground that Young had offered £25,000 for the lot. The plaintiff refused to relinquish his purchase.

The defendant, Trecothick, by his answer stated, that William Coles was not authorized by his father to offer £20,000, and relied upon the Statute of Frauds; insisting that Smith and Phillips were not authorized to tell, and that the payment of £2,000 could not be considered a part performance. The answer also stated some circumstances, as instances of oppression, with a view to impose harsher terms upon him.

Phillips, by his deposition as to the execution of the contract, stated that "he signed or witnessed such contract" for Smith, as the agent for the seller in the absence of Smith; which he represented to be in the usual course of business. Mr. Trecothick's solicitor, by his depositions stated that the solicitor for the Coles first intimated to him that William Coles had some thoughts of purchasing part of the estate; but had declined bidding at the sale, as improper, being a trustee; but, as the sale was over, and the trust deed not executed, there would be no impropriety; and in consequence of that communication, the deponent by the direction of Mr. Trecothick made the offer at the meeting, to which the plaintiff's solicitor answered, that he had no authority, but hoped the plaintiff would be prevailed on to purchase it; but he certainly would not give more than £19,500. Upon the morning of the 6th of November, Mr. Trecothick directed the deponent not to let it be sold for £20,000 at all events, till he was seen again upon the subject; which the deponent communicated to Smith, and the proposed alteration in the lot, and also to William Coles, who said he could not make any alteration in the lot, as it would interfere with his father's arrangements; and expressed considerable objection to make any offer, unless he was certain it would be accepted; but, being urged by Smith, he said he was not authorized to give more than £19,500; but being further pressed by Smith, who said Young would certainly offer £20,000,

he said, rather than any other person should have it, he would give £20,000.

The deponent, William Coles, being examined as a witness for the plaintiff, by his deposition stated that he was authorized by his father to offer £20,000.

The receipt for the £2,000 was stamped as an agreement during the hearing of the cause; the objection for want of the stamp having been taken.

*Mr. Mansfield, Mr. Richards, and Mr. Trower* for the plaintiff.

*Mr. Romilly, Mr. Stanley, and Sir Thomas Turton* for the defendant Trecothick.

THE LORD CHANCELLOR. Inadequacy of price is quite out of the question. The cases of reversions, and interests of that sort, go upon very different principles. In some, the whole duty of making good the bargain, upon the principles of this court, is upon the vendee; as in the instance of heirs expectant. Inadequacy of price does not depend upon a person giving *pretium affectionis*, from any peculiar motive, beyond what any other man would give, the reasonable price. But, further, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance. How, upon these circumstances, is there such inadequacy of price, as to cut down the bargain, or authorize the court not to complete it? Accidental subsequent advantage made of a bargain is nothing. It has been held, upon true principles, that, if a man contracts to sell an estate for a life-annuity, if the contract is signed, and the party to have the annuity died before the end of the first half-year, the court must execute the contract.<sup>1</sup> I am therefore clearly of opinion, that the court must execute this contract, if duly signed; unless there is infused into it some other character belonging to one of the parties, in respect of the principles, duties, and obligations, arising out of which, I am bound to withhold that equitable relief.<sup>2</sup>

Decree an execution of the agreement. But this is by no means a case for costs.<sup>3</sup>

<sup>1</sup> Jackson *v.* Lever, 3 Bro. C. C. 605.

<sup>2</sup> Only so much of the opinion is given as relates to the question.—ED.

<sup>3</sup> As to the merits, I do not know, if fraud is out of the case, that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price. (See Mortlock *v.* Buller, ante, 292; Livingston *v.* Byrne, 11 Johns. Rep. 566.) But it is not quite so inadequate as it has been represented. The difference is not to be taken to be merely between the two sums. But after all the allowances that can be made, I have no difficulty in believing, this was an inadequate bargain as to the price; that the defendant did not get the price the property assigned was fairly worth. But, taking that to be so, the contract can-

WILLIAM SEYMOUR, APPELLANT, v. THOMAS J. DELANCY  
AND OTHERS, RESPONDENTS.

IN THE COURT OF ERRORS OF NEW YORK, APRIL, 1824.

[*Reported in 3 Cowen 445.*]

ON appeal from the Court of Chancery. On the 14th March, 1821, the appellant filed his bill in the Court of Chancery against the respondents, the real and personal representatives of Thomas Ellison, deceased, to compel the specific performance of articles of agreement made between the appellant and Thomas Ellison, in his lifetime, dated January 14, 1820, by which Ellison covenanted that he would, on or before the 1st day of June, 1820, convey to the appellant, in fee, a certain lot, situate in the town of Montgomery, and another lot situate in the town of Walkill, both in the county of Orange, with covenants for quiet enjoyment, and against incumbrances; also, with covenants of seisin and warranty, and for further assurance, in consideration of which premises, the appellant covenanted that he would, on or before the 1st day of June, 1820, convey to Ellison, in fee, the one equal undivided third part of two lots in the village of Newburg, in Orange County, with a stipulation that each might enter into immediate possession of the premises so to be conveyed to him, and have and receive the profits to his own use. The parties, shortly after, took possession accordingly, which had continued to the time of filing the bill.

The bill stated that the appellant had always been ready to execute a conveyance, according to his covenant; but set up, as an excuse for not having done it in Ellison's lifetime, that he was, for several months previous to his death, which happened August 3, 1820, incapable of business; that some of his heirs were infants, and, therefore, incapable of executing the contract.

The grounds of defense insisted upon by the answer were :

2. That the bargain, or agreement, as contained in the articles, was a most unconscionable one, on the part of the appellant, inasmuch as the lots in Montgomery and Walkill exceeded the value of the Newburg lots several thousand dollars.<sup>1</sup>

To this answer the appellant filed a general replication, and testimony was taken in the cause, to the above points stated in the answer.

The inadequacy of price insisted on by the answer was established;

not be set aside within any principle this court has ever acted upon; not even within the principle of the Roman law, requiring that the price should exceed half the value. Sir William Grant, M.R., *Burrowes v. Lock*, 10 Ves. 471, 474.—ED.

<sup>1</sup> Only so much of the case is given as relates to this question.—ED.

to what degree the judges who passed upon the evidence differed, as will be seen by their opinions.

August 7, 1822, the Court of Chancery declared, that from the great inadequacy in value of the Newburg lots, compared with the two farms in Montgomery and Walkill; also from the habits of intoxication in which Ellison had indulged in the last years of his life, and the mental debility produced thereby; also from the want of readiness and ability in the complainant, to convey a good and unencumbered title, at the time fixed for the performance of the contract, or at any time after, during the life of Ellison; the articles ought not, in equity and good conscience, to be decreed to be carried into effect; and dismissed the bill, with costs.

The late Chancellor Kent assigned the reasons for this decree, as in 6 John. Ch. Rep. 223 to 235 S. C.

*J. Duer* and *J. V. Henry* for the appellant.

*Talcott* (Attorney-General) and *S. Jones* for the respondents.

SAVAGE, Ch. J. On the 14th day of January, 1820, William Seymour and Thomas Ellison entered into an agreement under seal, by which Ellison agreed to convey to Seymour two farms in the towns of Montgomery and Walkill, in the county of Orange, containing by estimation 799 acres of land; and Seymour agreed to convey to Ellison an equal undivided third part of certain lots in the village of Newburg; the conveyances to be executed on or before the 1st of June then next. It was further agreed that the parties might respectively take possession of the premises so to be conveyed to them. The parties did take possession accordingly, and on the 3d of August, 1820, Ellison died without the conveyances being executed. The bill was filed against the respondents, as the heirs of Thomas Ellison, to compel the performance of the above contract. It was resisted in the Court of Chancery on three grounds:

1. Inadequacy of price.
2. Debility of Ellison's mind produced by habitual intoxication.
3. The inability of the appellant to fulfill on his part.

The Chancellor dismissed the bill on all these grounds, and expressed an opinion that inadequacy of price may of itself, and without fraud or other ingredient, be sufficient to authorize the court to refuse its aid in enforcing the performance of a contract for the sale of land; though it might not be sufficient to set aside the contract.

These are the principal points in the case, on which the defense rests. The testimony is very voluminous, and I shall not now enter into a detailed statement of it. The weight of evidence, in my judgment, establishes the difference in value, between the farms and the lots, at \$5,000 and upwards; and that Ellison was, in the month of January,

1820, and before and after, of intemperate habits. Some of the witnesses represented him as incapable of doing business; and others thought him capable, except when intoxicated. It also appears that both in January and June, 1820, the village lots were encumbered by a mortgage to the amount of \$5,000, and so continued till shortly before filing the bill.

It is asserted by elementary writers that the power of enforcing agreements specifically will not be exercised but to subserve the cause of justice; and that whenever the bargain is a hard one, bordering on oppression; where there has not been perfect fairness; where any facts have been concealed which should have been disclosed; or where any unfair advantage has been taken; in those cases equity will not decree a specific performance, but leave the party to his remedy at law.<sup>1</sup>

The cases in which a court of equity decrees specific performance of contracts are those where damages recovered at law would not answer the intention of the parties in making the contract.<sup>2</sup>

In my judgment, His Honor the Chancellor is correct in saying that it is not a matter of course, in all cases, to decree specific performance of contracts.<sup>3</sup> It requires the exercise of a sound discretion upon a view of all the circumstances. That discretion must, indeed, not be arbitrary and capricious. It must be regulated upon grounds that will make it judicial.<sup>4</sup> If the contract has been entered into by a competent party, and is, in its nature and circumstances, unobjectionable, it is as much a matter of course to decree specific performance as it is to give damages at law.<sup>5</sup>

The appellant's counsel maintain that inadequacy of price alone is no ground for refusing to enforce a specific performance, unless it amounts to evidence of fraud. The case of *Thompson v. Harcourt* <sup>6</sup> is claimed as an authority by both parties. As I understand it, it supports the proposition advanced by the appellant's counsel. The case was substantially this, so far as it is applicable here: During the infatuation which prevailed on the subject of the South Sea scheme, and on the 18th June, 1720, Thompson agreed with Harcourt, that he would, on the next opening of the books of the company, transfer to him £1,000 South Sea stock, and Harcourt agreed to pay Thompson £9,200 for it, which is 920 per cent. The books were opened on the 5th October. Thompson represented to Harcourt that he had the £1,000 ready to transfer (though, in fact, he had but £290). And Harcourt, not being prepared to pay the £9,200, another agreement was entered into by which the time was extended to the next transfer day after Christmas,

<sup>1</sup> Reeve's Dom. Rel. 386; Newland on Contr. 223-4.    <sup>2</sup> 2 Sch. & Lef. 347.

<sup>3</sup> Cas. Temp. Talb. 236; 12 Ves. 331; 1 Ves. Jun. 566.    <sup>4</sup> 7 Ves. 35.

<sup>5</sup> 9 Ves. 608.

<sup>6</sup> 2 Br. P. C. 415, A. D. 1722.

upon certain terms. That day was the 1st May, 1721, and Thompson, not having the stock, procured it of another, to be returned on certain conditions. On that day the stock was tendered to Harcourt, but refused by him, and then re-transferred to the person from whom it had been procured for the purpose of the tender. Thompson then prosecuted at law upon the contract, and Harcourt filed his bill to be relieved against it. In the meantime the bubble had burst, and it was enacted by Parliament that all contracts for the sale and purchase of the stock, unperformed on the 29th September, 1721, where the seller had not the stock on the day of the contract, or within six days after, should be void as to so much as the seller was not possessed of. Thompson then filed a cross bill, praying a specific performance. Both causes were heard at the same time, and the court decreed that Harcourt should pay Thompson 920 per cent. for the £290 stock which he actually held of his own. This decree was on the bill for relief, and the cross bill, which was for specific performance, was dismissed without costs. Thompson appealed because he was not allowed the 920 per cent. on the whole £1,000; but the appeal was dismissed and the decree affirmed. The only reason why the 920 per cent. was not allowed, on the whole, must have been because he was the owner of stock to £290 only. The decree proceeded upon the act of Parliament. So far as the court acted on the contract, they must be understood as decreeing a specific performance. In that case there was no pretense of fraud or circumvention. It seemed to rest on inadequacy only, and that arising from subsequent circumstances, the stock being worth 920 per cent. at the time of the contract. There were other facts and points in the case to which I have not referred, as they have no bearing on the present question.

In *Barnardiston v. Lingwood*,<sup>1</sup> Barnardiston, being distressed for money, conveyed to Lingwood his (B's) interest, being a remainder in tail after the death of his uncle, worth £300 per annum, for the sum of £300. A bill for relief was filed, and a cross bill for a specific performance. Lord Hardwicke dismissed the cross bill, and says that in the case of a hard bargain, when it is not absolutely executed, but executory only, the constant rule of the court is not to carry it into execution.

In *Buxton v. Lister*<sup>2</sup> the bill was to enforce a contract for timber sold at £3,050, when it was worth no more than £2,500. Lord Hardwicke objected at first, on the ground that the thing in controversy was a chattel, but finally decided on the merits, and dismissed the bill upon the ground of hardship, without costs, on Buxton giving up the agreement, saying that if he was to dismiss it upon the misrepresentation (which was fully shown) he would dismiss it with costs. In the course of his remarks, he uses the language quoted by His Honor the Chancellor,

<sup>1</sup> 2 Atk. 133.

<sup>2</sup> 3 Atk. 383.

“that nothing is better established than that the court will not decree a performance of an agreement, unless it is fair and just in all its parts; and that it is in the discretion of the court whether they will decree a performance.”

In the same year (1746) the cause of *Joynes v. Statham* came before him, on a bill for a specific performance of an agreement for a lease of a house, which was signed by the defendant only, and contained a stipulation to pay £9 rent, yearly. The defendant insisted, and offered to prove, that the agreement should have been to pay the rent clear of taxes; but the plaintiff, who wrote it, omitted that clause. Lord Hardwicke admitted the evidence, observing, “that the constant doctrine of this court is, that it is in their discretion whether, in such a bill, they will decree a specific performance, or leave the plaintiff to his remedy at law.”

In the *City of London v. Nash*,<sup>1</sup> Lord Hardwicke refused to decree specific performance, on the ground that the court is not obliged to do this, where it will be attended with great loss and hardship to one of the parties. The bill, in that case, claimed a performance of an agreement to new build certain houses, which the defendant had agreed to do, but, instead of building, had thoroughly repaired them. It is also observed that, even if the defendant intended to evade his contract, still a specific performance would be hard, and all that the city wanted was to be compensated in damages. The Chancellor, therefore, directed an issue.

In *Underwood v. Hitchcox*,<sup>2</sup> Lord Hardwicke says, the rule of equity in carrying agreements into a specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration in strictness of law, it depending on the circumstances. And, undoubtedly, every agreement, of which there should be a specific performance, ought to be in writing, certain and fair in all its parts, and for adequate consideration. And he refused, in that case, to decree performance, because it was too hard to decree the defendant to make a surrender of the copy-hold estate (which was the thing in controversy) for so inadequate a consideration. He referred to the rule laid down in *Attorney-General v. Day*,<sup>3</sup> where he says that decreeing performance is discretionary, when the party has his election of two remedies, in equity, or at law; and, even if there is no other remedy, it should not be done, if there are strong and material objections against it. Lord Hardwicke's rule was recognized by Lord Erskine, in *Mason v. Armitage*.<sup>4</sup>

The case of *Faine v. Brown*, cited by counsel in *Ramsden v. Hylton*,<sup>5</sup> was admitted to be an authority supporting the Chancellor's decree, if it

<sup>1</sup> 1 Ves. 12; more fully reported 3 Atk. 512.

<sup>2</sup> 2 Ves. 279.

<sup>3</sup> 1 Ves. 220.

<sup>4</sup> 13 Ves. 37.

<sup>5</sup> 2 Ves. 307.



was correctly stated. Lord Hardwicke, in that case, said that, independent of the circumstance of intoxication when the contract was entered into, the hardship, alone, of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the court, not to interfere, but leave the parties to law.

In *Day v. Newman*, at the Rolls,<sup>1</sup> performance was refused, on the ground of inadequacy alone; but in *Collier v. Brown*,<sup>2</sup> decided the same year (1788) in the Court of Exchequer, though there was some inadequacy of price, a performance was decreed. An estate, worth £400 or more, was sold for £275. The price first asked was £300; but the owner was not much acquainted with the estate, and supposed she was selling to the tenant, till after the contract was executed. She was, also, very old; yet the court was of opinion that the parties bargained with their eyes open, and, as there was no imposition or surprise in the case, mere inadequacy of price (when it could not be used as evidence of fraud) was not, of itself, sufficient to prevent the court from administering its usual equity.

Three years afterward, the same court, in *Tilly v. Peers* (cited by Sir Samuel Romilly, from his own note, in *Mortlock v. Buller*, 10 Ves. 301), declared, that laying out of consideration all circumstances of fraud, the court would not enforce a hard bargain. We have not the facts upon which the decision was founded; but it seems, from the remarks of Baron Thompson, that it was a clear case of fraud.

*White v. Damon*<sup>3</sup> was the case of property sold at auction, for £1,120—worth £2,200. A bill was filed for a specific performance; and though Lord Rosslyn first dismissed the bill on the ground of inadequacy, it was not finally decided on that ground. It was before Lord Rosslyn, and afterwards, on a petition for a re-hearing, before Lord Eldon. They both, however, agreed in the general proposition, that it is not a matter of course to carry an agreement into execution, but rests in discretion.

In *Coles v. Trecothick*,<sup>4</sup> Lord Eldon declared, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive evidence of fraud in the transaction, it is not sufficient ground for refusing a specific performance. He had just been recapitulating the facts. It was a case of sale of real estate, by an auctioneer, and Trecothick had surveyed the premises, and valued them at £23,000—had told the auctioneer not to sell for less than £19,500—and had agreed they should go for £20,000; but he refused compliance with the contract, because another offer of £25,000 had been subse-

<sup>1</sup> 2 Cox 77.

<sup>2</sup> 7 Ves. 30.

<sup>3</sup> 1 Cox 428.

<sup>4</sup> 9 Ves. 246.

quently made ; and if the declaration of His Lordship was made in allusion to those facts, it certainly cannot be questioned.

The case of *Mortlock v. Buller*<sup>1</sup> was also the case of a sale, by an auctioneer, of an estate for £26,000, worth £34,900. The question of inadequacy was noticed by the counsel, and much discussed. Lord Eldon did not decide upon it, but refused the specific performance upon other grounds. He, however, seems to adopt the doctrine of Lord Alvanley, that the court is not bound to execute every contract ; that if there was any sort of surprise that made it not fair nor honest to call for an execution, he would not give the extraordinary relief of a specific performance ; neither would he order the contract to be delivered up ; but would let the purchaser go to law.

So in *Willan v. Willan*,<sup>2</sup> the point of inadequacy was not raised. Lord Eldon remarked that there are many cases where equity will not disturb an agreement which has been executed, though it would have refused to carry it into execution.

In *Western v. Russell*<sup>3</sup> there was great inadequacy. The purchase was stated by counsel to be at one-tenth of the value. The Master of the Rolls does not, indeed, decide on that point ; but he argues strongly against its sufficiency as a ground to refuse specific performance. There was, in that case, no pretense of incapacity. The vendor set his own price, and obtained it ; and, though he lived a year and a half afterwards, expressed no dissatisfaction. Yet it was proved that in 1809, when the purchase was made, the estate was worth double the price. The Master of the Rolls, after noticing these facts, remarks, that the court would treat men's contracts with great levity, if, on such a state of circumstances, it should refuse to carry them into execution.

In *Griffith v. Spratley*<sup>4</sup> it was decided that inadequacy alone was not sufficient to set aside a transaction.

Having thus noticed most of the cases cited by His Honor the Chancellor, I shall proceed to state some of those cited by the counsel.

In *City of London v. Richmond*,<sup>5</sup> the bill was filed to compel the performance of a lease. One objection was, that the rent reserved was £700 per annum, and the real value not £300 ; and that it was against the rules of equity to decree in specie such a hard and unreasonable bargain. But the Lord Keeper Wright said, as a beneficial bargain will be decreed in equity, so if it happens to be a losing bargain, for the same reason, it ought to be decreed.

*Adams v. Weare*,<sup>6</sup> on appeal from the Rolls, was a bill for the specific performance of an agreement to purchase a mill seat. The pur-

<sup>1</sup> 10 Ves. 292.

<sup>2</sup> 16 Ves. 83.

<sup>3</sup> 3 Ves. & Beames 193.

<sup>4</sup> 2 Br. Ch. Cas. 179, n.

<sup>5</sup> 2 Vern. 423.

<sup>6</sup> 1 Br. Ch. Cas. 567.

chaser had agreed to give a large price, in the view of building a mill, which depended on the consent of the corporation of Bristol. The contract was absolute in its terms, and the vendor had refused to annex any condition. The vendee could not obtain the consent of the corporation, and refused compliance with his contract. The Master of the Rolls had decreed performance, and Lord Chancellor Thurlow said he thought he had done right; for no case could be cited where parties have made a bargain with their eyes perfectly open, and no surprise whatever, as in that case, in which the court had refused to decree a specific performance. He added, "here is no mistake of the object; and as to the greatness of the price, Adams (the vendor) had a right to ask a large sum, and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill."

In *Mortimer v. Capper*<sup>1</sup> the question was, whether equity would enforce the performance of an agreement, for a piece of land, against the heirs of the vendor, where part of the consideration was an annuity of £50, for the vendor's life, and he had died two days after making the agreement. The whole consideration was £200, and the annuity £50. The ground was worth £1,300, and it was contended that the agreement was too hard, and ought not to be carried into execution. The Lord Chancellor said: "I remember a case of a contract for a piece of ground, which was to be enclosed, for £20, and, upon a bill for specific performance, the defense was that it was worth £200; and although the contract was to be performed *in futuro*, yet neither party knowing the value, the Master of the Rolls decreed performance." In relation to the case before him, however, he said: "I think, if the price be fair, the contract ought not to be cut down merely because the annuity, which is a contingent payment, never became payable," and he ordered a reference to a Master, to inquire into the real value of the estate and of the annuity.

In *Emery v. Wase*<sup>2</sup> the question was, whether a husband should be compelled to procure his wife to execute his contract; and Lord Eldon, *arguendo*, says: "I do not deny that mere difference in value, though considerable, is not of itself a sufficient ground for refusing a specific performance of a contract; but very considerable difference in value is not inconsiderable evidence that it was not made with great care and attention."

In *Burrowes v. Lock*,<sup>3</sup> Edward Cartwright was entitled to £288, and assigned it to the plaintiff, to whom he was indebted £132, and by whom he was pressed for satisfaction of the debt. The costs of the transaction were £10 paid by the plaintiff, and Cartwright had pre-

<sup>1</sup> 1 Br. Ch.Cas. 156.

<sup>2</sup> 8 Ves. 518.

<sup>3</sup> 10 Ves. 470.

vously conveyed away one-tenth, so that £142 were given for what was worth £260. The Master of the Rolls decreed performance, saying: "If fraud is out of the case, I do not know that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price."

In *Cadman v. Horner*,<sup>1</sup> the plaintiff prayed a specific performance of a contract, which was resisted on the ground of inadequacy and misrepresentation; and on those two grounds it was denied. But the Master of the Rolls expressed no opinion upon the question of inadequacy alone.

The case of *Poole v. Shergold*<sup>2</sup> decides that the difference arising from the calamities of the times ought not to rescind a contract; and *Jackson v. Lever*,<sup>3</sup> that a contract for the sale of land, for an annuity for the life of the vendor, shall be performed by the vendor's heirs, though he died without receiving any part of it.

The object of the two last cases, I presume, was to show that, although the navy yard was not established at Newburg, and although Ellison died before the application to enforce the contract, yet neither of these circumstances can constitute a defense to the present action.

Many cases have also been cited by the counsel for the respondents, some of which I shall examine. I will first, however, consider a little further some of the above cases.

The case of *Thompson v. Harcourt* I have considered an authority for the appellant. As I before remarked, it was claimed by the counsel on both sides. It was considered by the Chancellor as a case in favor of the respondents. Perhaps, therefore, I am mistaken in my reading of it, but I think not. It was in the House of Lords. The Reporter has not given the opinion of the judges, and we must infer the ground of decision, from the case, the decree, and the points argued by counsel. The case was decided 13th February, 1722. On the 9th November, in the same year, the case of *Kien v. Stukely* was decided (which I shall hereafter refer to on another point), in which a specific performance was refused. But these cases grew out of the South Sea speculation, or were connected with it. In the first, where 920 per cent. was decreed to be paid, it appeared that when the contract was made, it was fair and equal; that stock, at one time, was 1,000 per cent. above par. The inadequacy arose, therefore, from subsequent circumstances, and did not exist at the time of the contract. In the latter case, lands were sold for 40 years purchase, which, at the time, were worth only 15 years purchase; and the vendee expected to pay in South Sea stock. The inadequacy here existed at the time of the contract, and must have been

<sup>1</sup> 18 Ves. 10.<sup>2</sup> 2 Br. C. Cas. 118.<sup>3</sup> 3 Br. Ch. Cas. 605.

one ground, at least, of the decree. Both cases were decided by the same court, and within nine months of each other, and, in my opinion, are perfectly reconcilable upon the relative difference of time at which the inadequacy arose. So in *London v. Richmond*, the rent was agreed upon, on a calculation of the quantity of water which certain pipes would discharge. This was greatly overrated; yet the court compelled performance. The lessee should have calculated better; though, I confess, I am not satisfied with that case.

In *Adams v. Weare*, the seller was explicit, and when the purchaser said he would give the price if the consent of the city of Bristol could be obtained, the seller told him, "Sir, I will have no *if* in the case. You must purchase absolutely or not at all." In that case, it was admitted that the inadequacy existed at the time of the contract, and was known to both parties, and the court would not permit the purchaser afterwards to be off from his contract, because he did not succeed in his speculation.

Not so in this case. The appellant avers that the lots were worth the consideration given, or very near it, long before anything was ever said about a navy yard at Newburg; and, on the other hand, the inadequacy is shown to have existed at the time of the contract, and not to have arisen from subsequent circumstances. It does not appear that the expectation of a navy yard was the sole inducement to the purchase. It is stated, by one witness, that Ellison intended to build stores and sloops, and go extensively into commerce.

*Johnson, executor of Hill, v. Nott*,<sup>1</sup> In this case, Hill bought of the defendant a contingent estate, at an under value. Nott had previously brought his bill, to be relieved, and was relieved, by Lord Nottingham; but, upon a rehearing before Lord Keeper Guilford, that decree was reversed. Johnson then brought his bill for a specific performance, and the Lord Keeper said that a contract which carries an equity to have it decreed in specie, ought to be without all objection.

In *Vaughan v. Thomas*,<sup>2</sup> the plaintiff agreed with the defendant for an annuity worth nine years purchase, for the consideration of five years purchase, and brought his bill to compel a specific performance; but the court said that if they assisted the plaintiff, they should give sanction to a very unconscientious bargain, and that, under this view of the case, he was by no means entitled to their aid.

In *Collett v. Wollaston*,<sup>3</sup> the plaintiff had purchased, at auction, the reversionary interest of £2,000 South Sea stock, subject to the life of a man forty-five years of age, and £1,200 South Sea annuities for £215, and filed his bill for an assignment and transfer. The Master of the

<sup>1</sup> 1 Vern. 271-2.

<sup>2</sup> 1 Br. Ch. Cas. 556.

<sup>3</sup> 3 Br. Ch. Cas. 228.

Rolls said the reversionary interests seeming to be sold for a very low price, he would direct an inquiry into their value before he decreed a specific performance of the purchase.<sup>1</sup>

In *Clitherall v. Ogilvie*,<sup>2</sup> the defendant entered into a written contract to sell the plaintiff certain lands for £3,500, which were worth three times that amount. On further inquiry as to the value of the property, he declined executing the conveyances, and the bill was brought for a specific performance. The court, after a full discussion and examination of the cases on the subject, took notice of the distinction between setting aside an unreasonable contract, after it is executed, and compelling a specific performance; and, recognizing Lord Hardwicke's rule in *Underwood v. Hitchcox*, declared, that on full consideration of the case, and all the circumstances (although there was no proof of fraud or imposition), the sum for which the land was agreed to be sold was grossly inadequate to its real value, and that, being an unreasonable contract, and a very hard bargain, it would be unreasonable and unjustifiable to decree a specific performance, and left the plaintiff to his remedy at law.

In *Ward v. Webber*,<sup>3</sup> President Pendleton, delivering the opinion of the court, says: "It is true that the court will never decree iniquity, and there are instances where they have refused to decree hard bargains, though fair; but these are rare, and are generally cases of glaring hardships. For, in general, the court will not undertake to estimate the speculations of parties in a contract, but will deem them the best judges of their own views, and will compel a performance, though they may be eventually disappointed in their expectations."

In the case of *Campbell v. Spencer*,<sup>4</sup> there was no fraud or imposition, nor does it appear that there was inadequacy to any great degree; but it was a foolish bargain, whereby a farmer agreed to sell his farm for the remnant of a store of goods; and Chief Justice Tilghman and Judge Breckenridge both say they would not enforce the contract, nor declare it void, but leave the plaintiff to his action upon it. Judge Breckenridge placed reliance upon its being a hard bargain, attended with suspicious circumstances.

In the case of *Osgood v. Franklin*,<sup>5</sup> the Chancellor remarks: "There is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an

<sup>1</sup> Vid. also, several cases, 5 Vin. 539 to 549, adhering to the rule in *Normanby v. Beckley*, that the contract must be fair and reasonable in every particular.

<sup>2</sup> 1 Dess. 257—63.

<sup>4</sup> 2 Bin. 133.

<sup>3</sup> 1 Wash. Rep. 279.

<sup>5</sup> 2 John. Ch. Rep. 23.

agreement to be delivered up, or a sale rescinded (unless its grossness amounts to fraud), yet it may be sufficient for the court to refuse to enforce performance. It is not uncommon for the court to refuse to enforce for inadequacy, and at the same time to refuse to rescind."

Chancellor Dessausure, who was not on the bench when the cause of *Clitherall v. Ogilvie* was decided, has added a valuable and learned note to the report of that case, which he concludes by observing: "It is agreed, on all hands, that the court is not bound to decree a specific performance in every case where it will not set aside the contract, nor bound to set aside every contract of which it will not decree the specific performance. The court will not decree specific performance where there is any surprise, making it not fair and honest to proceed and call for specific performance."

Having thus taken a cursory view of some of the principal cases on the point under consideration, and having also noticed the *dicta* of some learned jurists, I shall be justified in the remark, that the question is one upon which very great men have differed, and have administered the equity of the court upon diametrically opposite principles. The one class maintain that the court will not lend its aid to enforce the performance of contracts unless they are fair, just and reasonable, and founded on adequate consideration. The other class maintain that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to decisive and conclusive evidence of fraud in the transaction, it is not of itself a sufficient ground for refusing a specific performance.

The most distinguished of those who support the latter doctrine is Lord Eldon. To him may be added Sir William Grant, Lord Keeper Wright, and probably some others. The former doctrine was declared or acted upon by the Lord Somers, Macclesfield, Northington, Guilford, Talbot, Harcourt, Hardwicke, Alvanley, Erskine, Rosslyn, and Chief Baron Eyre, in England; and in this country it has been adopted by the Court of Chancery of South Carolina, the Court of Appeals of Virginia, and the Court of Chancery of this State; and I believe there is no American decision to the contrary. Among American jurists, of distinguished celebrity, who have maintained this doctrine, are Chancellor Dessausure, of South Carolina; President Pendleton, of Virginia; the late Chief Justice Reeve, of Connecticut, and last, though not least, the late Chancellor Kent, *justum et tenacem propositi virum*; a man whose stern integrity, superior talents, and extensive erudition have rendered him an ornament to the courts over which he has presided in his native State; and who may, without arrogance, but with the most perfect complacency, look back upon his twenty-six years of judicial labors, and say:

Exegi monumentum cœre perennius ;  
 Regalique situ pyramidum altius :  
 Non omnis moriar ; multaue pars mei  
 Vitabit libitinam.

If we determine this question by the prevailing practice of courts of equity (it has not, indeed, been uniform) we must decide in favor of the rule as laid down by Lord Hardwicke. If we determine it by the reason and propriety of the two propositions, there is certainly great weight in the consideration that, in enforcing contracts, the court, if it acts at all, must act *ex rigore*, and cannot weigh the equities of the parties ; whereas a jury, in a court of law, can mitigate the damages according to equity and good conscience. It seems, indeed, paradoxical, to send parties from a court of equity to a court of law, to obtain equity, but it arises from the peculiar construction and practice of the courts.

Again, if we call to our aid the opinions of men among the most celebrated for their learning and talents of the times in which they respectively lived, we find a great preponderance in favor of sending hard and inequitable bargains to a court of law.

Upon authority, therefore, as well as upon principle, I am clearly of opinion that a court of equity ought not to lend its aid in enforcing an executory contract unless it is fair, just, reasonable and equal in all its parts, and founded upon adequate consideration.

It is undoubtedly well settled that inadequacy of price alone is not a sufficient reason for setting aside a contract executed, unless its grossness amounts to fraud ; but there is a wide difference between enforcing an executory contract and setting aside a contract deliberately executed, and the two subjects admit of very different views and considerations.

On the whole case, therefore, I am of opinion :

1. That on the question of decreeing specific performance of executory contracts, the Court of Chancery must exercise its discretion ; not an arbitrary, but a sound judicial discretion. If the contract be free from objection, it is the duty of the court to decree performance. But if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, on either ground the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a court of law.

If it is asked what degree of inadequacy is necessary to constitute the bargain a hard one, it might be asked, in answer, what degree of inadequacy is necessary to constitute fraud—to shock the conscience and produce an exclamation ?

The truth is, that neither the one nor the other admits of a definite answer. It must be determined by the judgment of the court ; and as



there is certainly a difficulty in ascertaining the precise point, there is much less danger in stopping short of it than in going beyond it. To me it seems a solecism in language to say that a party, who has obtained an inequitable bargain, shall be received, in a court of equity, to demand its performance.

I concur, therefore, with His Honor the Chancellor, and am of opinion that his decree should be affirmed.

WOODWORTH, J., not having heard the argument, gave no opinion.

CLARK, EARLL, GARDINER, GREEN, MALLORY, MCCALL, MORGAN, WARD, and WRIGHT, Senators, concurred in the opinion of the Chief Justice.

The first point made by the respondents, that this contract for exchange of lands was hard, disproportionate and unequal in its terms, is the main point in the cause, and has been so treated by the Chancellor in his opinion. He assumes it as a fact, that "at the date of the agreement the village lots were not worth half the value of the country farms," and says, "we may make an ample advance of the one and an ample diminution of the other, in value, if we were to fix the one-third of the Newburg lots at \$6,000 and the farms at \$12,000."

The decision, upon the evidence given as to the difference in value between the property to be conveyed by the appellant to the father of the respondents, may decide the cause without entering into the consideration of the other points; but I think our decision must depend mainly on other evidence, for it cannot be sustained, in my opinion, that mere inequality in value, which is not so gross as to strike the moral feeling of an indifferent man, would be sufficient to warrant the Chancellor in withholding a decree for specific performance. I admit that the exercise of the power, in a court of chancery, to enforce the specific performance of contracts for the sale or the exchange of land, rests in the sound discretion of the court; but this is a sound legal discretion, and not the exercise of an arbitrary power, interfering with the contracts of individuals, and sporting with their vested rights. I also admit that the party claiming the specific performance must present a case fair, just and reasonable; that the contract must be founded on adequate consideration, and that it must be free from fraud, misrepresentation, deceit or surprise.

To determine whether, in fact, the agreement for exchange was hard, unequal, and disproportionate, and whether it was free from fraud, surprise, etc., it will be necessary to examine, with as much brevity as possible, the history of this transaction.

On the 3d of January, 1818, Drake Seymour, the brother of the appellant, sold to Ellison, the father of the respondents, the one equal undivided third part of the lot first described in the articles of agreement,

lying on the east side of Water Street, for the sum of \$12,500 cash. This bargain was made verbally, in the year 1817, and completed, by the delivery of the deed, in January, 1818; and the negotiation concerning it was kept up from April, 1817, to January, 1818, when it was consummated. In March, 1818, Ellison agreed to purchase of Samuel Sands Seymour his undivided third part in the same lots, lying east and west of Water Street, for \$13,825, he taking, in part payment, a mortgage which Ellison held against one Tallman, and Ellison agreeing to guarantee that, on foreclosure, the mortgaged premises should produce the principal and interest due. This contract was signed and sealed by the parties.

In March, 1818, Ellison informed Drake Seymour "that he had only to purchase the part of the lot belonging to the appellant to own the whole," and made propositions to the witness (Drake Seymour) to be submitted to his brother. Both in the years 1818 and 1819 Drake Seymour frequently saw Ellison in relation to the purchase of the appellant's one-third of the lots, and from the time Ellison first proposed to purchase from the appellant, to the time when a verbal contract was concluded for the exchange, more than eighteen months had elapsed, and about one year and ten months had elapsed before it was reduced to writing and signed by Ellison and the appellant. On the conclusion of the verbal agreement, Ellison authorized appellant to take possession of the farms, and possession was taken accordingly. In January, 1820, the appellant sent by Drake Seymour to Ellison, at New York, the articles of agreement in question, already executed on his part. They were handed to Ellison, to be executed by him. He requested that they might be left with him for examination, to see if they were in conformity with the verbal agreement. He examined them, found them correct and executed them the day after.

By the evidence of Samuel McCoun, who was employed by Ellison to estimate the value of the farms, it distinctly appears that he understood from Ellison that he and the appellant were negotiating for the exchange. In various conversations he told McCoun "that he was negotiating an exchange with the appellant, and that he wished McCoun to make up his mind upon the value of the two farms (to be exchanged for the Newburg lots). That he (Ellison) did not wish McCoun to appraise the appellant's lots in the village of Newburg, but that he would do that himself." It is also in evidence that Ellison, during the summer, resided in New Windsor, in the county of Orange, adjoining the village of Newburg, and that he was well acquainted with the property of the appellant, proposed to be exchanged for his two farms. It also appears that Ellison had a favorable opinion of Newburg as a business place, and he may have been influenced by the consideration that prop-

erty there would rise in value, in consequence of the expected establishment of a navy yard.

That the contract was deliberately made there can be no doubt. McCoun says, expressly, that Ellison told him "he would not conclude the bargain between him and the appellant until he had seen him" (McCoun), and ascertained his opinion of the value of the farms.

We here find a purchase by Ellison in January, 1818, of one-third of the Newburg lots east of Water Street, for the sum of \$12,500, on a negotiation commenced in April preceding, and at a time when, according to the pleadings and proofs, there is no pretense of incompetency. About March, 1818, Ellison purchased from S. S. Seymour his undivided third in the Newburg lots, lying east and west of Water Street, for the sum of \$13,825. About the same time he informed Drake Seymour that he had purchased one-third of S. S. Seymour, and talked of exchanging the farms for the like share of the appellant. In addition, he informed Benjamin Case and John Anderson that he had purchased the shares of Drake and S. S. Seymour, and that he also intended to purchase the share of the appellant, and he told Anderson how he intended to render the property valuable to himself.

The whole presents a very strong case, and one in which the contract should be carried into effect unless some controlling rule of decision in our equity courts shall require the contrary.

There can be no doubt, from a review of the evidence, that Ellison made his bargain, well knowing all the facts in relation to the Newburg lots, as well as his farms proposed to be exchanged for them. His own agent (McCoun) ascertained the value of the farms. He said he would himself appraise the value of the lots in Newburg. It could not be pretended, that after a purchase of two-thirds of the whole property, he had never examined the premises, or that he had not ascertained the situation and comparative value of the Newburg lots; for it is admitted by all parties that at the time of his purchase from Drake Seymour, and his agreeing to purchase of S. S. Seymour, he was not incompetent to transact business of any kind. Immediately after this the negotiation for the one-third of the appellant's lots commenced, and that negotiation continued for eighteen months before it was verbally concluded, and for one year and ten months before it was reduced to writing. There is, therefore, no pretense, in my opinion, that Ellison was not fully acquainted with the premises, proposed to be exchanged with him, by the appellant. Besides having before become the purchaser of two-thirds of the lot on the east side of Water Street, and the one-third of the lot of S. S. Seymour on the west side of the same street, and having paid, in each instance, a sum exceeding the price he had agreed to pay the appellant, we have the positive testimony of Drake Seymour

that throughout the whole of the negotiation he was perfectly competent to transact business. He was in a situation deliberately to form his opinion, and unquestionably he did do so, as to the value of the Newburg lots; and from his previous purchases he must have ascertained their value to his own satisfaction. Under the advice of his agent he knew the value of the property to be conveyed by him to the appellant. We must take it, then, that Ellison deliberately, and with his eyes open, entered into the contract which the appellant now seeks to enforce by a decree of a court of equity.

I am, therefore, of opinion, from a review of the whole evidence, that this contract was, at the time the negotiation was first entered into, and at the time the articles were executed by Seymour and Ellison, certain, fair, and just in all its parts.

The next question which presents itself to the consideration of the court is, whether the contract between the appellant and Ellison is so hard, unreasonable, or unequal that this court will not aid to enforce it.

In reviewing this part of the case it will be the duty of the court to investigate the evidence as to the value of the Newburg lots, and the farms to be exchanged for them. Should they arrive at the conclusion that mere inadequacy in value, where there is no fraud, misrepresentation, imposition, or concealment of facts, is of itself sufficient to avoid the contract, it will save a great deal of the labor and investigation which might otherwise be required. I admit, however, that where the inadequacy of price in a contract is so flagrant and palpable as to convince a man at the first blush that one of the contracting parties had been imposed on by some false pretense, such a contract ought not to be enforced by this or any other court of equity. It is not to be denied that it is the settled doctrine of the Court of Chancery that it will not carry into effect, specifically, a contract where the inadequacy of price amounts to conclusive evidence of fraud. In this view of the case, therefore, as well as in reference to the objection of mere inadequacy, I shall briefly examine the evidence of value.

It may be proper to premise, that there is a distinction between a court of chancery, refusing to decree the specific performance of a contract, and setting it aside.<sup>1</sup> It is also well settled that a court of equity will not disturb an agreement that has been executed, although they would not have decreed a specific performance.<sup>2</sup> In the first case, the court would leave the party to his remedy at law. In the second, they would refuse to interfere by directing the agreement to be cancelled, the party having consummated his own act. But if there should be fraud, circumvention, deceit, or misrepresentation, a court of chancery would

<sup>1</sup> *Mortlock v. Buller*, 10 Ves. 292.

<sup>2</sup> *Willan v. Willan*, 16 Ves. 83.

order the contract to be delivered up to be cancelled. This case, then, being free from fraud, concealment, and misrepresentation, and from the charge of a hasty and unadvised contract, one important question appears to be, can a court of equity interfere, under such circumstances, to avoid the contract? For, in my opinion, not to carry this contract into effect is to avoid it wholly. It would be well to consider whether this is a case coming within the rule. For if it be true that the respondents must rest the decree of the Chancellor, principally on the inadequacy in value of the property to be exchanged; and, if it be true that, in order to avoid such a contract, the inadequacy of price must amount to conclusive evidence of fraud,<sup>1</sup> I do not see in what manner the opinion of His Honor the Chancellor can be supported.

There is no question so well calculated to generate a variety of opinion as that which regards the value of a village lot or a farm in the country, and, unless the disproportion should be gross and palpable, it would be very difficult to estimate how much more had been given by A for a lot than the price at which B would value it.

This, by the proofs, is the precise case before us. The average value of the appellant's interest in the lots at Newburg, as sworn to by six witnesses, is \$10,856, and this is corroborated by the fact that the father of the appellant estimated the lot east of Water Street, several years since, at \$30,000. The average of the farms, as sworn to by witnesses, is \$12,686, and the difference about \$2,186, according to the highest estimate made by the witnesses of the respondents. The lowest estimate of the Newburg lots, by the respondents' witnesses, is between \$5,000 and \$6,000. That a difference of opinion should exist among the witnesses, both as to the value of the lots in Newburg and the farms of Ellison, is very natural. Every person at all acquainted with the price set upon real property, and that which is paid when sales do take place in the country and in country villages, must be aware to what extent an honest difference of opinion does and always will exist. One will venture his fortune in the purchase of property which, in his judgment, will lay the foundation for a comfortable settlement of his family, while his immediate neighbor, with the same knowledge of all the circumstances, pronounces the purchase rash and injudicious. There is scarcely an instance in which a great difference of opinion does not exist upon the point whether the purchaser has a good bargain or not. In the country, and in country villages, there is no settled criterion by which property can be estimated. It is not an uncommon circumstance for men to hold on upon real estate in the hope of getting

<sup>1</sup> *Western v. Russell*, 3 Ves. & Bea. 187; *Willan v. Willan*, 16 Ves. 83; *Coles v. Trecothick*, 9 Ves. 246, per Lord Eldon.

their price until the law interferes, and the sheriff is compelled to solve all scruples on the subject. In the present case, Ellison, a man of fortune, and competent to carry into effect his plans for the improvement of the two Newburg lots, impressed with the idea of the growing importance of that village, and influenced, in all probability, by the expectation of the establishment of a navy yard in its vicinity, and being the owner of two-thirds of the premises in question, exchanges certain farms in the country for the lots in Newburg. He does this deliberately, freely, and with a full knowledge of the situation of his own property and that which he agreed to take in exchange. There is no ground for saying that there was, in this case, either fraud, surprise, misrepresentation, or deceit. The bargain was conducted by him throughout with great deliberation, and he consummated it with his eyes open. Under such circumstances we are called on to say that mere inadequacy of price, and where there is much contradictory evidence, is of itself sufficient to prevent the Court of Chancery from decreeing the specific performance of the contract.

In the case of *Coles v. Trecothick*,<sup>1</sup> Lord Eldon observed that inadequacy of price, unless it amounted to conclusive evidence of fraud, was not itself a sufficient ground for refusing a specific performance; and, although this was the case of an auction sale, the opinion was pronounced on the general question. In *Mortlock v. Buller*,<sup>2</sup> the Lord Chancellor declined giving an opinion on the doctrine of inadequacy. In *Western v. Russell*,<sup>3</sup> the defense was gross inadequacy of consideration. The Master of the Rolls said that it was not necessary to determine the general question whether inadequacy of price might not be a ground for refusing performance, and he decided the case upon its special circumstances, and held that, as the vendor was not alleged to be under any incapacity or deficiency of judgment, and set his own price and obtained it, and never expressed any dissatisfaction, but accused the purchaser of delay, the agreement should be carried into execution. Chancellor Kent admits that Lord Eldon and the Master of the Rolls had thrown doubt and distrust on this doctrine that inadequacy of price is of itself sufficient to prevent a specific execution.

In *Collier v. Brown*,<sup>4</sup> it was expressly held, on a bill for specific performance, that if the parties bargained with their eyes open, and without imposition or surprise, mere inadequacy of price was not of itself sufficient to prevent the court from administering its usual equity. This is the doctrine of common sense and common honesty; for it may be asked, with great propriety, what right have we to sport with the con-

<sup>1</sup> 9 Ves. 246.

<sup>3</sup> 3 Ves. & Bea. 187.

<sup>2</sup> 10 Ves. 292.

<sup>4</sup> 1 Cox 428.

tracts of parties fairly and deliberately entered into, and prevent them from being carried into effect?

I cannot assent to the doctrine that inadequacy of price may, of itself and without fraud or other ingredient, be sufficient to stay the application of the power of a Court of Chancery to enforce a specific performance of a private contract to sell land.

To establish this doctrine in the State of New York, would, to my mind, be sanctioning a principle which would lead to very injurious results. Every member of this court must be well aware how much property is held by contract; that purchases are constantly made upon speculation; that the value of real estate is fluctuating; and that there, most generally, exists an honest difference of opinion in regard to any bargain as to its being a beneficial one or not. To say, when all is fair, and the parties deal on equal terms, that a court of equity will not interfere, does not appear to me to be supported by authority,<sup>1</sup> and unless I am bound down by some rigid rule of law, I, for one, cannot consent to its introduction into our equity code.

I have not had time to analyze all the cases which have been cited, so as to bring them in review before the court. The earlier cases are very loosely reported, and we cannot, either from the decisions made or from the opinions of the court, form a satisfactory judgment on the particular facts, and from the doubts and disapprobation of Sir William Grant, the Master of the Rolls, and of Lord Eldon, I feel myself warranted in saying that the point is unsettled in England. Nor can I perceive why a contract for the sale of land, which is fair in all its parts, should not be carried into effect, as much as any other contract. In principle there is not, and there ought not to be a difference.

There may be such inadequacy of price as, of itself, to be an evidence of fraud. But wherever this does not exist, and resort is had to the testimony of witnesses, and they differ in their valuation, as in the present case, the contract should be executed. In the case before the court the average value of the farms, by six of the respondents' witnesses, is \$12,686. Six witnesses on the part of the appellant (and men, too, of great respectability) value the Newburg lots at \$10,856. The difference is \$1,830. How is it possible for any Chancellor to decide upon the relative weight of such evidence? What can clearly be extracted from such a state of the case is, that it is much better to carry the contract into effect than that the rule of equity should depend on the judgment of a single individual. It is impossible for any court to appreciate all the considerations which influence men who enter into speculations of this

<sup>1</sup> Day v. Newman, 2 Cox 77; Willan v. Willan, 16 Ves. 83; Western v. Russell, 3 Ves. & Bea. 187; Mortlock v. Buller, 10 Ves. 292.

kind. I admit that the case might present a different aspect if all the witnesses agreed in opinion. But here is a difference of opinion among some of the most respectable people in Newburg as to the value of the lots, and the witnesses for the appellant are supported by the former purchases made by Ellison when he was as sane as he ever was.

There is another circumstance which has considerable weight with me, and it is that this contract is for the exchange of real property. It cannot be denied that, in such cases, each party is anxious to put a high nominal value on his own land. It is a transaction wholly different, in this respect, from that of a cash sale. Although the Newburg lots did not produce an income proportionate to the value put upon them by the appellant, yet the same objection existed as to the farms, for it appears by the evidence of Colden that they were very much out of repair.

Upon the whole, I am of opinion that there is not in the present case such an inadequacy of price as, of itself, amounts to conclusive evidence of fraud;<sup>1</sup> that the contract between the appellant and Ellison, in his lifetime, was entered into with a full knowledge of all the circumstances by Ellison, and after much deliberation, and that it is

<sup>1</sup> The formula, that the inadequacy "must be so great as to be of itself conclusive evidence of fraud," was first used at a time when courts were in the habit of regarding fraud as a conclusion of law, established by means of legal presumptions, and it has been, like so many other expressions, unthinkingly and carelessly repeated by case after case, without any notice of the complete revolution which has taken place in the theory of fraud. As fraud is now regarded as a fact, and its existence is ascertained, like that of any other fact, by comparing and weighing the evidentiary matter, it is plain that the phrase "conclusive evidence of fraud" is, from the very nature of the case, an absurdity and impossibility; what would be abundantly conclusive to one judge or jury will come far short of convincing another judge or jury. The phrase, and the thought which it contains, belongs alone to a system in which fraud is always the result of legal presumptions. Inadequacy is evidence, and the only rule which can possibly be laid down is, that it must be, to the judgment of the triers, satisfactory evidence of the fraud. The rule, thus finally settled by the cases, is plainly founded upon motives of convenience and not upon the analogies of principle. Theoretically considered, inadequacy in the price, or of subject-matter, is a species of inequality and unfairness, and may be an instance of hardship and oppression. That it is not governed by the general rules applicable to these incidents of a contract is due entirely to the great difficulty of deciding, in each particular controversy, upon the numerous and different considerations and motives which enter into and affect the question. Rather than meet this difficulty, which necessarily arises from the treatment of inadequacy merely as a hardship, the courts have preferred to regard it as evidence of fraud. It may well be doubted, however, whether the difficulty has been at all lessened by the adoption of this method.—Pomeroy, *Sp. Per. Con.* 27-4.—ED.



fair in all its parts, and that the respondents ought to be compelled specifically to carry it into effect.<sup>1</sup>

BOWMAN, BRONSON, BURROWS, BURT, CRAMER, DUDLEY, HAIGHT, LYNDE, MCINTYRE, REDFIELD, THORN, WHEELER, and WOOSTER, Senators, concurred.

A majority of the court being for a reversal, it was thereupon ordered, adjudged and decreed, that one of the masters of the Court of Chancery be directed to inquire whether the said appellant has and can give a good title to certain lands in the town of Newburg, in the county of Orange, which, by certain articles of agreement set forth in the appellant's bill of complaint, and proved in the said cause, the said appellant had agreed to convey to the said Thomas Ellison, deceased, in his lifetime; and if His Honor the Chancellor, upon the coming in of the report of the said Master, shall be of opinion that such title can be given, that a proper decree be made for the specific performance, by the appellant and the respondents, of the said articles of agreement, and for the execution, by the proper parties, of all necessary conveyances, with suitable covenants for assuring the title, and requiring the appellant and respondents to procure all proper persons to join in such conveyance, and that the respondents, in that case, pay to the appellant his costs in the Court of Chancery, to be taxed; and it was further ordered that the record be remitted, etc.

N. B.—SUTHERLAND, J., was absent, through indisposition, and took no part in deciding this or any of the causes during this session.

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ABBOTT v. SWORDER.

IN CHANCERY, BEFORE SIR J. L. KNIGHT BRUCE, V.C., APRIL  
28, 1852.

[*Reported in 4 De Gex and Smale 448.*]

THIS was a suit for a specific performance of a contract for the purchase of a farm in the parish of Llandilo.

In July, 1847, the plaintiff caused to be inserted in the public newspapers the following advertisement:

“TO FARMERS.—The immediate occupation of a good farm, with security for outlay and improvements. A gentleman between fifty and sixty, being desirous of increasing his income for life, would give immediate possession of a freehold farm of 205 acres of good arable and pasture land for an annuity for his life. The value of the estate to be

<sup>1</sup> *Coles v. Trecothick*, 9 Ves. 246.

calculated at twenty-eight years purchase upon the present annual value, and the annuity at 4 per cent."

The advertisement then stated to whom applications were to be addressed.

The defendant, who was a solicitor, made application accordingly, and received from the plaintiff printed particulars of the estate, as follows :

"The farm is in the parish of Llandilo, Carmarthenshire, South Wales, is freehold, intersected by good roads, lies between two streams of water, both tributary to the river Towey, and contains 120 acres of very productive loamy red land, all in old pasture excepting twenty acres, which have been recently broken up ; eighty-five acres of peat on a clay bottom, varying from one foot to two feet in depth, mowing ground, excepting eight acres, which are under the plough. The house and homestead are indifferent, and, excepting one barn and a stable built within a few years, must come down and be rebuilt, to meet an improved system of cultivation. The outgoings are trifling, viz., a customary payment to the lord of the manor 2*s.* 6*d.*, land tax 20*s.*, tithes £8 14*s.* 10*d.* a year ; and the poor, church, and highway rates do not exceed on an average 1*s.* per acre a year. On the farm will be found an excellent quantity of clay for making bricks, tiles, etc. ; also capital stone for building and filling up drains. Lime may be had within two miles at 1*s.* per tail of five Winchester bushels, and coals within five miles, at from 2*s.* 6*d.* to 4*s.* 6*d.* per ton. There are great facilities for the disposal of all kinds of produce within six miles, a station of the Llanelly (a sea port) railroad within six miles, and there will be a station upon the South Wales line, now in progress, within three or four miles of the farm ; the red land needs only good husbandry, and the application of lime, to bring it into very profitable condition. The peat requires draining and surface-claying operation, easily performed, as the clay under it is near at hand. The rent is 15*s.* per acre, the tenant having undertaken to drain and improve the land at his own expense, and to pay 5 per cent. additional upon the outlay he may require the landlord to make in building ; but, should the farm be disposed of, he will give up possession at Michaelmas next, on certain conditions being complied with by the landlord. The annual value must be subject to adjustment, and the life annuity to the settlement of an actuary, agreeably to the terms specified in the advertisement."

On the 4th of August, 1848, the plaintiff received from the defendant the following letter :

"I shall feel obliged by your informing me whether it is intended that the present rental of 15*s.* per acre shall form the basis upon which the annuity is to be calculated ; whether the purchaser would have to

pay the present tenant any compensation on his giving up possession ; and also the extent of the land unclosed, and what proportion the owner of your farm would be entitled to should an inclosure take place. I should also be glad to know whether the land lies well together, and whether the country is hilly."

The plaintiff replied to this letter ; and on the 14th of August, 1848, received from the defendant another letter, which contained the following passage : " If the mansion is let I suppose the sixty-five acres would be let also. Perhaps you could inform me what the rental of the mansion would be with or without the land. Perhaps it would be convenient to you to meet me in town some day after Thursday, to-morrow week."

Subsequent correspondence took place ; and at length, on the 3d of October, 1848, the plaintiff and the defendant went together to the farm, and continued there until the 18th of October, when the plaintiff left. The defendant remained until some time in the month of November, 1848, and employed the time in going over and inspecting the estate, and the stock and property of Mr. Ford, the occupying tenant.

On the 10th of October, 1848, it was verbally agreed, that, instead of the consideration being paid by way of annuity, the plaintiff should sell to the defendant the estate, comprising the mansion and the whole of the 268 acres of land, for a gross sum of £5,000.

On the 13th of October, 1848, the plaintiff and defendant signed the following memorandum, which was prepared and written by the defendant himself :

"Memorandum of an agreement made the 10th day of October, 1848, between Willam Ward Abbott, of Eynesbury, in the county of Huntingdon, of the one part, and Thomas Sworder the younger, of Hertford, in the county of Hertford, of the other part ; whereby the said William Ward Abbott, for himself, his heirs, executors, administrators, and assigns, agrees to sell, and the said Thomas Sworder for himself, his heirs, his executors, administrators, and assigns, agrees to purchase, all that freehold messuage or tenement called or known by the name of Cennen Tower ; and also all that farm called Cefnyfedw, containing by estimation 270 acres, and by the tithe commutation admeasurement 268A. 2R. 24P., as the same are situate in the parishes of Llandilo and Llangadoc, in the county of Carmarthen, and now in the occupation of the said William Ward Abbott and Henry Russell Ford, or their undertenants ; together with all common rights, members, and appurtenances whatsoever to the said messuage or tenement and farm belonging or in anywise appertaining, upon the following terms, that is to say, the purchase-money for the estate is to be £5,000, and is to be paid or satisfied unto the said

William Ward Abbott in manner following, that is to say, by the said Thomas Sworder taking upon himself to discharge and bear harmless the said William Ward Abbott from all liability to Thomas Collingridge for or on account of a mortgage, bearing date the 10th day of May, 1845, for the sum of £2,500, which the said Thomas Collingridge has upon the said estate; and also from all interest to become due thereon, except a proportionate part of the current half-year's interest, due up to the day of the date hereof; and in which said mortgage it is covenanted by the said Thomas Collingridge that the said £2,500 shall remain a charge on the said estate for the term of — years, provided that interest for the same after the rate of £4 per cent. per annum be punctually paid; and also by the said Thomas Sworder giving unto the said William Ward Abbott a mortgage or further charge upon the said estate for the sum of £2,500, which said mortgage or further charge is to contain a covenant from the said William Ward Abbott, that the said sum of £2,500 shall remain a charge upon the said estate for ten years certain, provided the interest thereon, after the rate of £4. per cent. per annum, is regularly paid by equal half-yearly payments on the 10th day of April and the 10th day of October in each year. The said William Ward Abbott is to deliver unto the said Thomas Sworder an abstract of his title to the said estate; and, a good title being shown, he the said William Ward Abbott hereby agrees to convey and assure the said estate unto the said Thomas Sworder, free from all incumbrances whatsoever, except the land tax and the chief rent of 2s. 6d. payable yearly to Earl Cawdor; and the said William Ward Abbott is to give immediate possession of the said estate unto the said Thomas Sworder, and is to pay for all the materials supplied, and the labor and work done to the said messuage or tenement and buildings up to the 14th inst."

On the 27th of October, 1848, the plaintiff received from the defendant the following letter:

"According to promise I write to you now, that my brother has been over and seen the farm—he came last Saturday and left yesterday morning—it unfortunately set in wet just after he arrived, and continued wet till he left. We, however, managed to get about to see the farm, but he saw very little of the neighborhood; he thinks the farm capable of great improvement by drainage; and that, considering its being such a distance from a town, as well as the land being in a bad state, he thinks the price I have agreed to give for it is the utmost of its value, but if a brewery would answer here the giving so much for the estate would not matter so much."

An abstract of title was sent by the plaintiff's solicitors to the defend-

ant's solicitors, and on the 1st of December, 1848, the defendant's solicitors wrote to the plaintiff's solicitors the following letter :

"We lose no time in sending you our observations on the title : We would especially direct your attention to the will of Mr. Pridham, by which only a portion of the estate contracted to be purchased passed to Elizabeth Johnson, and if so, Mr. Abbott has no title to the remainder ; and consequently not only the contract for the purchase, but also the agreement for a lease, must, we conceive, be at an end. As this state of things is exceedingly inconvenient, we beg particularly to request your earliest attention to this matter."

After some correspondence on the subject of the requisitions, in the course of which the defendant's solicitors proposed terms for rescinding the contract, the plaintiff's solicitors wrote to the defendant's solicitors as follows, on the 12th of February, 1849 :

"In order that there may be no misunderstanding respecting this matter, we think it right on the part of Mr. Abbott to express his readiness forthwith to proceed to clear up the requisitions made by you upon the title, and to supply you with any further evidence which you may require, that the entire estate had, at and prior to the date of Dr. Pridham's will, acquired the proper name of *Cefnyfedw*. We beg to state that Mr. Abbott is fully determined to enforce his rights against Mr. Sworder, and in the event of your client declining to proceed with the investigation of the title, notwithstanding the offer contained in this letter, or to accept a conveyance of the estate, without going further into the title, we shall advise Mr. Abbott immediately to file a bill for a specific performance of the contract. We shall therefore feel obliged by you informing us of Mr. Sworder's intentions at your earliest convenience."

No answer was returned to this letter until the 19th of March, when the defendant's solicitors wrote to the plaintiff's solicitors as follows :

"Mr. Sworder feels that he has abundant reason for declining to complete the contract morally, and we believe that he can do so legally; but as the abstract of title is now before counsel we must decline to give a positive answer until we have obtained his opinion ; if you are disposed to wait until we get that, we will communicate the result to you immediately afterwards."

On the 24th of March the defendant's solicitors wrote a letter to the plaintiff's solicitors, inclosing the following notice :

"To Mr. William Ward Abbott: As you are unable to make a good title to the estate agreed to be purchased by me of you in the parishes of Llandilo and Llangadock in the county of Carmarthen, and having regard to the circumstances attending the contract for the said pur-

chase, and the exorbitancy of the price, I hereby give you notice that I refuse to complete the said contract, and that I am ready and now offer to give up possession of the estate to you, or to Mr. Henry Russell Ford as your tenant, with the option of taking the stock now being upon the said estate at a valuation; but this offer is made without prejudice to my right to demand the repayment by you of the sum of £248 2s. 9d. paid by me to you for the separate purchase of the fixtures and certain other articles which were upon or connected with the said estate at the time of the said contract; or otherwise, in default of such repayment, to remove and retain the said fixtures and other articles, or to any other right which I now have or may hereafter acquire against you in respect of the said estate, or the said purchases or either of them, in the event of your attempting to enforce the said contract and failing therein. And in case you shall accept the aforesaid offer, and the option thereby given you of taking the said stock at a valuation, I hereby appoint Francis Thomas, of Whitehouse, in the said parish of Llandilo, farmer, to value such stock on my behalf, and request you to appoint a valuer on your behalf. Dated this 23d day of March, 1849.

THOMAS SWORDER, Junior."

Mr. Ford (the tenant) upon his cross-examination on behalf of the defendant, deposed that he had had, in the beginning of the year 1848, an interview with the plaintiff on the subject of his tenancy, and on that occasion represented to the plaintiff that the rent was too much in the state the farm was in; but that no arrangement or understanding was come to between him and the plaintiff in consequence of such his representation as aforesaid, to the effect that his agreement for the tenancy should not be rigidly enforced against him, or that he should continue to hold the farm ostensibly under the agreement until the plaintiff could sell the same premises, or anything to that effect; but that what the plaintiff said, was, that the witness must try his best at the farm, and that the plaintiff would not hurt him in respect of the rent.

A Mr. Winfield, on behalf of the defendant, deposed, that in the month of August, 1848, he went over the farm with the plaintiff at his request, and gave him his opinion of the value of the farm, to sell and to let; that he told the plaintiff that the value of the farm and lands, including the whole of the buildings thereon, to sell, was £2,300, and that its utmost value to rent would be an average of 7s. per acre, which would give a rent of £93 16s. for the whole; that he considered his estimate so made the full value; that the plaintiff told him that his estimate was very much less than it cost him, the plaintiff, with his outlay; that he recommended the plaintiff to sell it as quickly as possible; that he had himself lately let better land in the county of Carmarthen at an average rent of 7s. 6d. an acre.

*Mr. Russell* and *Mr. Hardy* were for the plaintiff.

*Mr. Malins* and *Mr. T. J. Phillips* for the defendant.

The substance of the arguments appears sufficiently from the judgment.

The VICE-CHANCELLOR, after stating the earlier facts of the case, said :

The defendant having had possession in October, 1848, I do not find a trace of dissatisfaction having been expressed by him with regard to the price until March, 1849. In the interim, a brother of the defendant went over the farms with him under the disadvantage of bad weather, and told the defendant that he had given the utmost value for them. This was communicated by the defendant to the plaintiff, but without any complaint being made on that score. If there had been a very striking difference between the price and the value, it is hardly conceivable that no more should have been then said about it. It is also to be remembered, that the defendant, though young, was a solicitor, and must be supposed to have been not incapable of attending to his own interests. In such circumstances it would require a very strong case to make a mere excess of price sufficient ground for refusing specific performance, especially as it must be remembered that there are fancy prices not regulated by intrinsic value, and that there is in this instance at least the usual amount of difference of opinion between the witness as to the value.

Judging as well as I can upon the evidence, I should place the value at £3,500. I should think that one who paid that price would have no ground to complain of his bargain. The difference between this and the price of £5,000 I do not think sufficient to induce the court to refuse specific performance on the ground of exorbitancy in the circumstances of the present case.<sup>1</sup>

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

The decree of Vice-Chancellor Knight Brown was affirmed on appeal by the Lord Chancellor, Lord St. Leonards, *Abbott v. Sworder*, 4 De Gex & Sm. 460.

As to the question of inadequacy of consideration, the Lord Chancellor said : Undervalue there was, but the court could not estimate that undervalue in property of this sort. It was property which some people would look at only as a farm. Other persons who wanted a residence might not object to a house on the top of a hill, but might prefer such a situation. However that might be, Mr. Sworder bought the land, and had undoubtedly bought it dear. But the court could not interfere in such a case on the ground of undervalue ; for that purpose the undervalue must be such as to shock the conscience. The defendant personally tested the character of the land by actual diggings, and then thought the property worth £5,000. It was a bad bargain, but the court had no power to relieve the defendant from it.—ED.

## SECTION IV.—DEFENSES.

### (c) *Want of Mutuality.*

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#### FLIGHT *v.* BOLLAND.

IN CHANCERY, BEFORE SIR JOHN LEACH, M.R., FEBRUARY 15, 19,  
MARCH 17, 1828.

[*Reported in 4 Russell 298.*]

THE bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the court that the bill might be dismissed, with costs to be paid by the plaintiff's solicitor. Upon that occasion the Vice-Chancellor made an order that the plaintiff should be at liberty to amend his bill by inserting a next friend for the plaintiff, and the bill was amended accordingly.

Upon the opening of the case a preliminary objection was taken that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

*Mr. Bickersteth* and *Mr. Koe* in support of the objection.

*Mr. Pepys*, *Mr. Morley*, and *Mr. Stuart* for the plaintiff.

THE MASTER OF THE ROLLS. No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plain-



tiff, by the act of filing the bill, has made the remedy mutual.<sup>1</sup> Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion, therefore, is that the bill must be dismissed with costs, to be paid by the next friend.

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STOCKER v. WEDDERBURN.

IN CHANCERY, BEFORE SIR WILLIAM PAGE WOOD, V.C., JUNE 6,  
1857.

[*Reported in 3 Kay and Johnson 393.*]

THE plaintiff, being the owner of certain patents for the manufacture of a material to be used in making bottles and jars and similar articles, was desirous of forming a company to work such patents; and having induced certain persons to be promoters of such a company, on the 14th day of March, 1857, at a meeting between such parties, a pre-

<sup>1</sup> The second general exception to the requirement of mutuality includes all those agreements which, by the provisions of the Statute of Frauds, must be in writing, and which, in conformity with the overwhelming weight of judicial authority, need only to be signed by the party to be charged—that is, by the defendant in the suit brought upon the contract. It follows, therefore, that the plaintiff, who has not signed the memorandum, may enforce a specific performance, although no relief could be obtained against him in respect of the promises made therein on his part. This doctrine is firmly settled, but the reasons given for it are not very convincing. Some cases have explained it by saying that the Statute of Frauds requires a signature by one party only. This is undoubtedly true as a fact, but it wholly fails to account for the rule under consideration. It does not show why a mere compliance with a requirement of this statute should override a general principle of the law of contracts which is completely outside of that enactment, since the Statute of Frauds has no necessary connection with the element of mutuality. The reason commonly given, however, is that the plaintiff, who has not signed the memorandum, by commencing a suit upon it waives all objection to the absence of mutuality, makes himself liable on the contract, and thus, in fact, renders the remedy mutual. This reason does not seem to be entirely satisfactory. As a practical result from the Statute of Frauds, the contract, which must be written and which is subscribed or signed by one party only, lacks the mutuality of obligation; and this is even literally true in all those states whose statutes pronounce such contracts void; and the objection arising from the absence of this essential feature, at the very time of entering into an agreement, cannot, as a general proposition, be waived by the subsequent consent or act of the party who is not bound. It is, on the whole, best to concede that the doctrine rests upon no basis of principle; that it was arbitrarily laid down by the earlier decisions which interpreted the statute, and has been followed by the great majority of subsequent cases; and that it is useless to account for or explain it by reasons which conflict with other well-settled rules.—Pomeroy, Sp. Per. Cont., § 170.—ED.

liminary agreement was signed, dated the 10th of March, 1857, which was as follows :

“ PRELIMINARY AGREEMENT.

“ 1. The several persons whose names are hereunto subscribed hereby agree to unite as members of a joint-stock company, to be established and incorporated with limited liability under the recent act.

“ 2. The name of the company is to be ‘The Patent Corporated Mineral Company, Limited,’ or such other name as may be agreed.

“ 3. The registered office of the company shall be in England.

“ 4. The objects of the company shall be the manufacture and sale of corporated mineral substances of all kinds.

“ 5. The liability of the shareholders shall be limited.

“ 6. The capital shall, in the first instance, consist of £7,000, divided into shares of £25 each ; but no member shall hold less than ten of such shares in the company.

“ 7. Any special general meeting of the company called for that purpose shall have power, by vote of three-fourths of the shareholders present, to increase the capital of the company to any sum not exceeding £20,000.

“ 8. The undersigned A. S. Stocker, being possessed of an invention for incorporating mineral substances, and having already secured letters patent for the same for Great Britain, France, and Belgium, agrees that such invention and the said patents shall become the property of the company.

“ 9. The consideration for such invention shall be as follows :

“ A. The said A. S. Stocker shall receive for the same the several sums of cash hereinafter provided ; and there shall be reserved and made payable to him during the continuance of the said patents a royalty of one-eighth of the profits which shall be earned by the working of the patent process by the company, such royalty to be settled at the time of declaring the dividends by the company, and payable with such dividends and in like manner thereto.

“ B. The several sums of cash shall be paid as follows :

“ C. The sum of £1,000 out of the first moneys received from calls, and within one week after the incorporation of the company.

“ D. The further sum of £1,000 in two payments, viz., £500 within four months of the incorporation of the company, and the balance at the end of a year, or sooner if practicable, such balance being contingent on the full amount of capital being subscribed and paid up.

“ E. The further sum of £1,000 so soon, within two years from the date of incorporation but not beyond, as the directors shall be satisfied

that the patent process is actually earning to the company, as hereby formed, a profit of £25 per centum per annum.

" F. The further sum of £1,000 is to be retained and applied in payment up of the calls upon forty shares of £25 each, which the said A. S. Stocker has agreed to take in the company.

" G. And if, within three years from the date of incorporation, the company shall be found to pay £100 per centum per annum profit, then the said A. S. Stocker shall receive a further sum of £1,000.

" 10. The said A. S. Stocker engages to take any proceeding required of him by the company at the company's expense to obtain other patents in foreign countries, which patents shall belong to the company; and if an American patent be so obtained, the said A. S. Stocker shall, besides the one-eighth royalty before provided for, receive also one other one-eighth royalty from all profits derived from such patent.

" 11. Mr. Stocker's plant and stock on hand to be purchased at a valuation, to be made, if necessary, by a valuer on each side, and payment to be made within six months of the date of the incorporation.

" 12. The said A. S. Stocker agrees that he will, at the request of the company, and so long as the company shall desire, if not exceeding two years, devote his time to the manufacture of the patented production, and engage himself wholly for the company, to promote its interests in every possible way, and he will use all his skill in improvements in working the patent process; and he will not, during the existence of the company, be engaged in business of a similar nature to that thereby contemplated, without the written consent of three-fourths in number and value of the shareholders. Mr. Stocker's salary to be at the rate of £300 per annum.

" 13. If Mr. Stocker, at any time during the continuance of the patents made over to this company, or any member of the company so long as he is a shareholder, discover or come to the knowledge of any improvement or new invention which shall be applicable to the patent process intended to be worked by this company, Mr. Stocker or such member shall be bound to impart and make over to the company such invention or improvement, but the company shall be bound to pay to such member a proper compensation for the same.

" 14. Until otherwise settled, all the shareholders shall be considered directors, and the affairs of the company shall be governed by them, and by committees to be appointed by them, until the number and qualification of directors shall be otherwise settled.

" 15. All or any of the directors who shall devote their time to the business of the company shall be remunerated according to their ser-

vices by the vote of such sum of money as shall be fixed by a general meeting.

“ 16. No share in the company shall be transferred otherwise than to a shareholder, or to a person previously approved by the directors or an absolute majority of them ; and as often as any shareholder shall propose to transfer any share or shares to any person or persons (not being a shareholder) as to whom an objection shall appear to exist, the director shall certify the fact of such objection, and the holder of such share may then propose some other transferee, or may call upon the directors to find within a month another purchaser at a fair and proper price. But no share shall be transferred till after the expiration of one year from the incorporation of the company.

“ 17. Any disputes arising out of any of the clauses in this agreement are to be settled by arbitration in the usual manner, and this agreement may be made a rule of the Court of Queen’s Bench.

“ 18. The present bankers of the company shall be the London and Westminster.

“ 19. The general regulations of the company shall be such as may be agreed on by a majority of the subscribers, to be assembled in a general meeting previously to the incorporation of the company.

“ Dated 13th March, 1857.

“ ALEXANDER S. STOCKER.”

NAMES.	ADDRESSES.	NO. OF SHARES.
Thomas Garratt, . .	J. S. Club, Charles Street,	20
William Clarke, . .	Army and Navy Club, . . .	20
Henry McManus, . .	6 Stockbr. Ter., Pimlico, . .	20
John Osborne, . . .	67 Eaton Place, Belgravia, .	10
Godfrey W. FitzHugh,	Arthur’s Club, . . . . .	20
Francis Garratt, . .	Army and Navy Club, . . .	20
John Hall, . . . .	Ladbroke Villas, Notting Hill,	20—£500
Alex. S. Stocker, . .	18 Wimpole Street, . . . .	40—£1,000

Some of the same persons (not including the plaintiff), and also the defendants, Wedderburn and Barnett, at a subsequent meeting, executed the following articles of association :

“ Limited Company.—Memorandum of Association of the Patent Corporated Mineral Company, Limited.

“ 1. The name of the company is the Patent Corporated Mineral Company, Limited.

“ 2. The registered office of the company is to be established in England.

“ 3. The objects for which the company is established are the manufacture and sale of corporated mineral substances of all kinds.

"4. The liability of the shareholders is limited.

"5. The nominal capital of the company is £7,000, divided into 280 shares of £25 each. We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

NAMES AND ADDRESSES OF SUBSCRIBERS.	NO. OF SHARES TAKEN BY EACH SUBSCRIBER.
Francis Garratt, Army and Navy Club, Pall Mall, . .	20
John Kellerman Wedderburn, Junior United Service Club, Charles Street, Regent Street, . . . . .	20
John Osborne, Junior United Service Club, Charles Street, Regent Street, . . . . .	10
Godfrey William FitzHugh, Arthur's Club, St. James' Street, . . . . .	20
William Clarke, Army and Navy Club, St. James' Street,	20
Thomas Garratt, Junior United Service Club, Charles Street, . . . . .	20
John Hall, 9 Ladbroke Villas, Notting Hill, . . . .	20
E. Barnett, 30 Bryanstone Square, . . . . .	20

"Articles of Association of the Patent Corporated Mineral Company, Limited.

"1. No person shall be admitted on the register of the company as a shareholder, or remain a shareholder therein, unless he shall hold at least ten shares in the company.

"2. No shareholder shall transfer his shares otherwise than to a shareholder in the company, or to a person previously approved by all the directors, or an absolute majority of them; and as often as any shareholder shall be prevented by an objection on the part of the directors from transferring any share or shares to any person who shall have purchased or be willing to purchase the same, he shall be at liberty to call upon and require the directors, within one calendar month, either to purchase such share or shares on behalf of the company, or to procure some other person, being a shareholder, or a person approved by a majority of the directors, to purchase and to take such shares at a fair and reasonable price.

"3. The regulation of Table B of the Joint Stock Companies Act, 1856, as to increase of capital, numbered 20, shall not extend to authorize the increase of the company's capital so as to exceed £40,000, in the whole.

"4. The regulation of Table B as to votes of shareholders, numbered

38, shall not apply, and every shareholder shall have one vote in respect of every share he holds.

"5. The regulation of Table B as to disqualification of directors, numbered 47, shall be subject to the following additional exception, that no director shall vacate his office by reason of his acting as an attorney or solicitor on behalf of the company, or being concerned or participating in the profits of any business transacted by himself or his partner or partners in that capacity, or being manager of any part of the company's business, and receiving allowances for the same.

"6. The regulations of Table B as to rotation of directors, numbered 48 to 54, both inclusive, shall not apply. All the shareholders in the company for the time being, not expressly disqualified under the regulation of Table B, numbered 47, as modified by these articles, shall be directors, until regulations fixing the number, mode of election, term or office, and order of rotation of directors shall be adopted by an extraordinary general meeting.

"7. The regulation of Table B as to accounts, numbered 73, shall not apply.

"8. The regulations of Table B as to auditors, numbered 74 to 84, both inclusive, shall not, in the first instance, apply.

"9. Any shareholder who may discover or come into the possession or knowledge of any improvement or new invention in or connected with the manufacture of corporated mineral substances, and available for the purposes of this company, whether patented or otherwise, shall forthwith communicate the same to the company, and shall give to the company the option of becoming the absolute owners thereof, or of taking the exclusive or any partial use thereof, at the discretion of the company, on being paid such remuneration for what the company shall so take, as shall be fixed by the directors or settled by arbitration.

"10. No shareholder shall, without the written consent of the majority of the other shareholders, be engaged in the manufacture or sale of corporate mineral substances of any kind, otherwise than in connection with the company.

"11. Any dispute which may arise between any of the shareholders amongst themselves, arising out of the affairs of the company, shall be settled by arbitration in the usual manner."

Opinions of counsel were afterwards obtained favorable to the patents, but the parties seem to have doubted their validity ; for, on the 26th of March, 1857, the majority of the original promoters signed a letter to the solicitor of the association, which was in the following terms :

"In consequence of the unfavorable report received of Mr. Stocker's patents, we think that we cannot properly be parties to forming the

joint-stock company contemplated for working them ; we therefore now revoke our assent and signatures to the declaration and articles signed for the purpose of establishing such company, and beg you to consider this as a distinct intimation that the same are not to be made use of."

The solicitor, in consequence of this notice, refused to take the necessary steps for registering the company.

The plaintiff then filed this bill against all the promoters who had signed the agreement and the articles, other than himself, stating that the plaintiff had incurred serious expense in preparing to be in readiness for commencing operations on behalf of the said company ; and he had already received great detriment and injury in relation to his said patents, by the conduct of the defendants in refusing to perform the said agreements, the title to his patents having been by such conduct put in jeopardy, for which any redress at law would be wholly inadequate ; and charging, that, under the circumstances, the defendants ought to be compelled specifically to perform the said agreement, and to pay the costs of the suit ; and praying that the defendants might be decreed specifically to perform the said agreement of the 13th of March, 1857, and for that purpose to take all such steps as might be necessary for the registration and incorporation of the said company, pursuant to and in accordance with the said memorandum and articles of association respectively, and to do all other necessary acts for carrying the said agreement and articles into full effect, the plaintiff being ready and willing, and thereby offering, specifically to perform the same on his part.

The defendants demurred.

*Mr. Cairns*, Q.C., and *Mr. Cotton* for the demurrer.

*Mr. Rolt*, Q.C., and *Mr. W. Collins* for the bill.

VICE-CHANCELLOR SIR W. PAGE WOOD. It has been argued that, where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are such as the court can decree to be specifically performed ; and that it will in such cases consider it to be the substantial part of the agreement, that a deed should be executed so as to vest in the parties the legal rights which they have mutually agreed to confer. I concur in this view. If, in this case, one term of the agreement had been for the execution of a deed containing the same provisions as are contained in the agreement itself, the court might have decreed the execution of such a deed. Or if the agreement had been, that, in consideration of the plaintiff assigning to them his patents, the defendants should form themselves into a registered company, of which the plaintiff should be a member—it is not necessary now to determine the point—but it is possible that

the plaintiff would not have had great difficulty in obtaining specific performance. The court might be inclined to decree specific performance, in order to give to a plaintiff all the advantages which would accrue from the company being so constituted as that he could sue it at law.

The agreement here is entire, and cannot be divided into an agreement to form a company, and a separate agreement when the company is formed for the purchase by them of the plaintiff's patents, and that he should give them the other benefits which are stipulated on his part. It is clear, that it is agreed that a company should be formed for the purpose of working the patents, and for the other benefits mentioned in paragraphs 10, 12, and 13.

[His Honor read them.]

The last provision in the 12th clause is open to the observation, that it may infringe the rule against restraint of trade, not being confined within any limits, either of time or place.

It is not specified that these stipulations shall be inserted in the partnership deed, but they are part of the contract on which the parties agree to form themselves into a company under the Joint Stock Companies Act, and agree to pay to the plaintiff several sums of money, a certain sum immediately, and afterwards a royalty: £1,000 out of the first money to be raised by calls, and a further sum of £1,000 within a certain time after the incorporation of the company.

I will assume that the company was incorporated at the time of the agreement, and that the agreement was for sale to the company of the plaintiff's patents, and that the plaintiff should devote himself to the service of the company for two years. I think it is plain that this court could not enforce such an agreement at the suit of the plaintiff, because the company would certainly not have been able to enforce the plaintiff's part of such an agreement against him. With respect to the observations that have been made upon the cases in which injunctions have been granted to restrain the breach of a negative term in an agreement, that this amounts in fact to specific performance of a part of those agreements, upon the plaintiff in the cause agreeing to do all that is requisite on his part as in *Dietrichsen v. Cabburn*,<sup>1</sup> the distinction in those cases is, that where a person is ordered by injunction to perform a negative covenant of that kind, the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved. But in this case, if I were to compel the defendants to form themselves into a registered company, I could not afterwards undo that, whatever were to happen. They would have to pay

<sup>1</sup> 2 Ph. 52.



the plaintiff at once £1,000; and when he was in possession of this money, and they were subject to all the liabilities which such a decree as is now asked for would impose upon them, what could the court do if the plaintiff were to refuse to perform his part of the contract.

Lord St. Leonards, in *Gervais v. Edwards*,<sup>1</sup> drew a distinction between the case of an agreement to execute a deed, which the court would decree to be specifically performed, and an agreement to do acts beyond the power of the court to enforce, to which he adhered in *Lumley v. Wagner*. In *Gervais v. Edwards*,<sup>1</sup> the bill was for specific performance of a contract, of which one term was, that, if any damage should result to the lands of the defendant above a mill-dam, which it was agreed should be erected, from such dam, the plaintiff should give an equivalent in land as compensation for such damage, the damage and equivalent to be given to be ascertained and set out by arbitrators.

It was argued in that case, as it has been argued here, that the court should direct a deed to be executed containing certain covenants. Lord St. Leonards said: "If the jurisdiction of this court permitted it, I should willingly grant a specific performance of this agreement, because the merits are altogether on the side of the plaintiff; but I do not see how it is possible specifically to execute this contract. The court acts only when it can perform the very thing in the terms specifically agreed upon; but when we come to the execution of a contract depending upon many particulars and upon uncertain events, the court must see whether it can be specifically executed. Nothing can be left to depend upon chance, the court must itself execute the whole contract. There are cases where some of the acts to be done consequent on the specific execution of the contract may be performed subsequently. Thus, a contract for sale of timber can be specifically executed, although the timber is to be cut down at a future time or at intervals, and the money to be paid by installments. It is a certain contract, and the manner of dealing with the thing sold by future cuttings is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution. This admits of no doubt." He added subsequently: "It is said, that this operates either in *presenti* and has been executed by the award, or that the agreement in this respect might form a part of the deed. I am clearly of opinion that this is not a matter to be presently ascertained, but is dependent upon the operation of works contracted to be erected, and can only be ascertained after the works have been in operation. The provision was to guard against the probable chance of future damage to the defendant's land. No evidence has been read to show that it formed any part of the award, or

<sup>1</sup> 2 Dr. & War. 80.

that the arbitrators took it into their consideration ; and the language of the award does not imply that they did. Well, then, it is a prospective measure, and what is the decree to be ? It cannot be made the subject of covenant ; that is not the agreement of the parties."

The plaintiff in this case has not agreed to execute a deed containing covenants to do certain acts, but he has agreed to do certain things. He now seeks to compel the defendants to form the company, and then they would be left to their remedy against him at law if he should fail in his part of the agreement. On these grounds alone I think that I could not decree specific performance as prayed by this bill. There is indeed a further difficulty, that the defendants might refuse to act as directors if the company were formed ; and also as there are only two members of the company who are desirous that the company should be formed, the others might assign all their shares to one of themselves, and then there would not be a sufficient number of members to satisfy the requirements of the Joint Stock Companies Act. But perhaps it might be answered to these objections, that it would not be competent to the parties to do any acts tending to annihilate the agreement they have entered into.

However, it appears to me that this is one entire agreement, and I cannot decree specific performance of part of it, so as to give to the plaintiff all the benefits for which he has stipulated, while the other terms of the agreement are of such a nature that the court is unable to decree specific performance of them.

The demurrer must be allowed. The grounds of my decision do not leave any possibility of improving the case of the plaintiff by amendment of the bill. The plaintiff must pay the costs of the suit. I am not bound to assume that all the allegations in the bill are true, for the purpose of determining who is to pay the costs. Otherwise, in every case, defendants might be driven to defend a cause up to the hearing instead of demurring, in order to save their costs.

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## PETO v. BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RAILWAY COMPANY.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., JUNE 20, 25, 1863.

[*Reported in 1 Hemming & Miller 468.*]

THIS was a motion for an injunction.<sup>1</sup>

By the Brighton, Uckfield & Tunbridge Wells Railway Act, 1861, the

<sup>1</sup> This motion was not in fact made till after the motions in *Filder v. The Brighton Railway Company*, and *Barchard v. The Uckfield Railway Company* (*post*, p. 489), but for convenience' sake it is reported before them.

Brighton, Uckfield & Tunbridge Wells Railway Company (hereinafter called the Uckfield Company) was incorporated and authorized to make a certain line of railway.

Early in December, 1862, the directors of the company employed Mr. George Hinton Bovill to make an arrangement for the construction of their line, and they authorized him to treat with the plaintiffs, Messrs. Peto & Betts (the well-known railway contractors) for the purpose.

On the 2d of February, 1863, the defendants, Cary, Fox, and Jameson (the then directors of the company) wrote and sent to Bovill the following letter :

“ 41 PARLIAMENT STREET, 2d Feb., 1863.

“ BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RAILWAY :

“ DEAR SIR : We hereby authorize you to agree with Messrs. Peto & Betts on our behalf to execute the works of our railway in accordance with the several plans and sections supplied to them by you for the sum of £215,000, payable by £65,000 in debentures bearing £5 per cent. interest, and the balance in shares of the company taken at par, the payments to be made in the usual way as the works progress.

“ Yours faithfully,

“ JOSEPH CARY, Chairman.

“ HY. HAWES FOX.

“ ROBERT O'B. JAMESON.

“ TO GEORGE BOVILL, Esquire.”

Immediately after this letter had been given to Bovill, Mr. Carnsew, the solicitor of the company, had an interview with him on the subject, but there was conflicting evidence as to what passed thereat and consequent thereon. According to Carnsew's account, a draft of this letter was shown to him for the first time on the 2d of February (after the original had been given to Bovill) and his affidavit proceeded in the following words :

“ As soon as I had read the same, I was satisfied that no contract on the basis of the said letter could be sanctioned by my said company ; and I arrived at that conclusion by reason of the fact that the balance of unexpended capital and of the money raisable under the borrowing powers of my said company was totally inadequate to provide for the purchase of land and payment of the debts and liabilities of the company, over and above the £215,000 provided by the said letter to be paid to the plaintiffs ; and I say that, having explained to the directors the position in which they would be placed if the terms of the said letter were carried out, they at once informed me that the said letter was not to be considered as binding the company, but was merely written as an authority to the said Mr. Bovill to negotiate with the plaintiffs on their

behalf. I felt, however, the importance of at once seeing Mr. Bovill, and informing him of my objections to the contents of the said letter, and accordingly, with the express sanction of the directors, went at once, accompanied by the defendants Joseph Cary and Robert O'Brien Jameson, to the offices of the plaintiffs in Great George Street, Westminster, where I thought it probable I should find the said Mr. Bovill. The said defendants left me at the entrance to the plaintiffs' said offices, and I went into the waiting-room, where I found the said Mr. Bovill alone. He said that he was waiting to see the first-named plaintiff, and I at once complained of his having allowed my said directors to sign the said letter. He asked me why I was dissatisfied, as the terms were the same as had been previously discussed. I said to him: "Take some paper, and I'll soon show you why," or words to that effect; whereupon the said Mr. Bovill took down on paper, from my dictation, the particulars of the capital and borrowing powers of the company; and I explained to his entire satisfaction, as admitted by him at the time, that the terms of the said letter could not be acted on, and that the said company had not in fact the means at their command of entering into any contract for the construction of their railway upon the basis of the said letter. The said Mr. Bovill then said, that the first-named plaintiff was on the point of leaving for Vienna, and that to discuss the subject with him, as I had then explained it, might lead to the plaintiff's withdrawal from all further negotiation; and that it had better be left as a matter of detail to Newman, meaning thereby Mr. Newman, of the firm of Freshfields & Newman, the plaintiffs' solicitors. I thereupon immediately stated, that whatever course he might choose to pursue in his approaching interview with Sir Morton (meaning thereby the first-named plaintiff), he must distinctly understand from me that I would not advise my board to enter into an agreement upon the terms contained in the said letter which was lying on the table, and that I was satisfied my directors would not sanction it, as I had explained the difficulties to them, and they had quite concurred in my views. I say that in the course of a day or two after the said interview, the said Mr. Bovill called at my office in Parliament Street aforesaid, and informed me that he had seen the first-named plaintiff since our interview on the 2d inst., but that he had not communicated to him the particulars of our then conversation; and he stated that the said plaintiff had referred the matter to the said Mr. Newman to settle the details. I then, understanding that the said Mr. Bovill had not yet seen Mr. Newman on the subject, impressed on him the absolute necessity of his at once informing the said Mr. Newman of what took place at our interview on the 2d; and although the said Mr. Bovill appeared at first disinclined, he ultimately agreed and promised to do so."

Mr. Bovill, on the contrary, asserted that the terms mentioned in the letter in question had been arranged between himself and Cary, with Carnsew's concurrence, so long previously as the 16th of January, and that on the 2d of February Carnsew had come into the board-room of the Uckfield Company before he (Bovill) had left it; and that Cary had handed a copy of the letter to Carnsew, with the remark, "That's all right; it's the same as we settled the other day"; and that Carnsew had read it without making any remark; and he denied that Carnsew had ever said to him that the company had not the means of carrying out the contract, and that Mr. Newman's name had ever been mentioned; and he said that the only conversation which took place on the occasion in question had been that Carnsew had said that the estimate had been arrived at on the basis of taking the shares of the company at par to meet all the estimated payments, and that Cary considered that the plaintiffs ought to contribute to any deficiency that might arise if the shares should fall below par; and that he (Bovill) had pointed out that a large part of the expenses were to be paid for in shares, and that if the plaintiffs undertook the contract, the shares would be marketable at par, to which Carnsew had replied, "that is all right." He then said that Carnsew had pressed him to get Sir Morton Peto to sign a letter to the directors of the Uckfield Company accepting the contract on these terms, and he produced a draft letter (which was, as he swore, in Carnsew's handwriting) in the following terms:

"BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RAILWAY:

"GENTLEMEN: Having examined the plans and estimates of this railway, we hereby undertake to accept the proposals contained in your letter of this date and to execute a contract on the terms thereof, to be settled in case of dispute by J. H. Lloyd, Esq., of King's Bench Walk."

Carnsew was afterwards cross-examined before a special examiner, when he admitted that this draft letter had been written in his office on the 2d of February after he had heard of the letter of authority, and had been given by him to Bovill, and that he had asked Bovill to get that letter signed by Sir Morton Peto; and he said in explanation of his having done so, "When I was shown the letter of authority I did not believe that Mr. Bovill was in communication with Sir Morton Peto at all, as it is too much a custom to hawk the contracts about in this way; and after receiving the authority of the directors mentioned in my affidavit, I roughly sketched out the letter, to see whether Sir Morton really knew anything about the transaction; and with that view, as a thing to test him, I asked him to get Sir Morton Peto to sign it. He said, 'he won't do that,' or words to that effect. On his objecting, I

did not press or urge him, but asked him to get a letter from Sir Morton to the directors, saying that he was ready to treat."

Both the directors and Carnsew said that Bovill was upon this occasion, or at any rate before the 2d of February, informed that the authority in question was revoked "and the said letter was to be treated as withdrawn"; but this was distinctly denied by Bovill, and it was admitted that the letter had been left in his possession.

On the 23d of February, 1863, the following memorandum of agreement was signed :

"LONDON, 23d February, 1863.

"Agreed with Messrs. Peto & Betts, that they shall make the Tunbridge Wells & Uckfield Railway Works in accordance with the plans and sections supplied to them, for the sum of £215,000, terms of payment and all other conditions as stipulated in the directors' letter of authority.

"For the Brighton, Uckfield & Tunbridge Wells Railway Co.,

"GEORGE H. BOVILL.

"For S. M. Peto & Self,                      EDW. L. BETTS."

On the same day Bovill wrote to the directors of the Uckfield Company, and personally delivered to them, the following letter :

"41 PARLIAMENT STREET, WESTMINSTER, S.W.,

"23d February, 1863.

"TO THE CHAIRMAN AND DIRECTORS OF THE BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RAILWAY CO.:

"GENTLEMEN: I beg to inform you, that in accordance with your instructions and letter of authority I have this day concluded with Messrs. Peto & Betts the contract for making your railway, for the sum of £215,000, the payment and other conditions upon the terms stipulated in your said letter of authority to me.

"I am, gentlemen, your obedient servant,

"GEORGE H. BOVILL."

There was considerable conflict of evidence as to what took place at the interview which Bovill then had with the directors, but the court treated the point as immaterial.

During this time the directors of the Uckfield Company were also in treaty with the London, Brighton and South Coast Railway Company (hereinafter called the Brighton Company), with a view of disposing of the line to them; and it appeared that a principal object with them was to get into their hands the Midhurst and Bognor Railway Company, which they could only do by means of the Brighton Company. On the same 23d of February the Uckfield board received a letter from Mr.

Schuster, the chairman of the Brighton Company, dated the 24th of February, which contained an offer on the part of that company to construct the line on certain terms, afterwards embodied in a formal contract.

It appeared from the rough minute-book of the Uckfield Company, that Bovill's letter had been read at the board prior to the letter from the Brighton Company; but the latter letter was entered in the fair minute-book above the former. In explanation of this, Mr. Stahl-schmidt, the secretary of the company, swore that Bovill's letter had in fact been read at the board about half an hour before the letter from the Brighton Company, but that Cary had directed him to enter this letter in the fair minutes before Bovill's. He also said that Carnsew had afterwards directed him to destroy the rough minute-book.

Immediately after this board meeting another interview took place between Carnsew and Bovill, the effect of which was differently deposed to by them. Carnsew's account of this matter was as follows :

"After the said Mr. Bovill had left the room, the defendant Joseph Cary placed the letter set forth in the 8th paragraph of the bill" (being Bovill's letter<sup>1</sup> of that date) "upon the table. I was much surprised in reading the said letter; and very shortly afterwards (within half an hour) I met the said Mr. Bovill, and thereupon a discussion took place between us relative to the last-mentioned letter; and I then found that he insisted on treating the said two letters of the 2d and 23d of February as constituting a binding agreement between the plaintiffs and my said company. I was much startled at the view taken by the said Mr. Bovill, and told him I should immediately communicate with the directors on the subject; and I did so."

Bovill, on the contrary, gave the following version of this meeting :

"After the board meeting of the Uckfield directors on the 23d of February, I went into Lucas' restaurant, in Parliament Street, and there I met the said Henry Carnsew. He came up to me and said, 'I am very glad I have seen you, for Cary is under some misapprehension as to our understanding, for he considers that the arrangement made with Peto & Betts does not preclude him from still making an arrangement with Schuster'; and he added, 'I told him he was wrong, and that, after the letter concluding the contract, he could not do so. He wanted me to go to Schuster, but I refused'; and he (Carnsew) said that Cary had replied to him, 'then I will,' or words to that effect. The said Mr. Carnsew then requested me to return to his office and write to the said Joseph Cary, which I consented to do, and did; but owing to the hurry in which the letter was written, and the desire of Carnsew to send the same off to Cary, to stop him, as he said, from

<sup>1</sup> *Supra*, p. 473.

going to Schuster, I did not keep any copy of the said letter. Carnsew also wrote to Cary a letter to accompany my letter, which letter he (Carnsew) read over to me." Bovill further stated that he had applied to Cary for copies of these letters, but had been unable to obtain them."

Copies of these letters were, however, afterwards procured through the instrumentality of Mr. Stahlschmidt.

Bovill's letter was as follows :

" 41 PARLIAMENT STREET, WESTMINSTER, S. W.,  
" 23d February, 1863.

" DEAR CARY : Mr. Carnsew tells me that you are under the impression that I told you that under the arrangement I made with Peto & Betts there was no objection to your still treating with Mr. Schuster. You must have quite misunderstood me, for such a proceeding would be quite opposite to our policy. You will remember that I told you that Peto & Betts would have no objection to take over the whole concern, instead of simply the contract which I have concluded with them, and retain the other directors to carry it out. Any communication to Mr. Schuster, under the circumstances, I'd consider would be a breach of faith with Peto.

" Yours faithfully,                      GEORGE BOVILL.

" JOSEPH CARY, Esquire."

Cary's letter (about the production of which some difficulty was made, but which was ultimately produced) was in the following terms :

" 41 PARLIAMENT STREET, S.W.,  
" 23d February, 1863.

" MY DEAR JOE : The enclosed from Bovill, whom I accidentally met at the luncheon bar, shows how wrong it is to trust to verbal communications in the face of written instructions.

" The only thing to be done is to avoid seeing Schuster until we have settled with these people, and say we could not agree with him on account of his proposed deviations.

" Farewell Bognor, Midhurst, etc.

" Ever yours,  
" H. C."

On the 25th of February the directors of the Uckfield Company caused the following letter to be written and sent to Bovill :

" BRIGHTON, UCKFIELD AND TUNBRIDGE WELLS RAILWAY,  
" 41 PARLIAMENT STREET, S.W., 25th February, 1863.

" DEAR SIR : I am desired to inform you that this board cannot recognize the arrangement referred to in your letter of the 23d instant.



I am further directed to express the surprise of the directors that you should have acted upon it when you were informed by the solicitor of the company (before submitting it to your principals) that it did not embrace the terms upon which an arrangement could be carried out.

“ I am, dear sir, yours faithfully,

“ H. STAHLSCHMIDT, Sec.”

To this letter Bovill returned the following reply :

“ DURNSFORD LODGE, WANDSWORTH, S.W.,

“ 26th February, 1863.

“ TO THE CHAIRMAN AND DIRECTORS OF THE BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RAILWAY COMPANY :

“ GENTLEMEN : I have to acknowledge receipt of your secretary's letter of yesterday's date, informing me that ' your board cannot recognize the arrangement referred to in my letter of the 23d instant ' ; and also stating, ' I am further directed to express the surprise of the directors that you should have acted upon it when you were informed by the solicitors of the company (before submitting it to your principals) that it did not embrace the terms upon which an arrangement could be carried out ; I beg to state in reply that you are my principals, that I was applied to by your chairman to assist your company out of the difficulties it was in at that time (14th December last). After several conferences with you all, you employed me professionally to negotiate with Messrs. Peto & Betts for the making of the works of the railway, or for purchasing the company out and out. Subsequently, on the 2d February, I had carried forward the negotiations with Messrs. Peto & Betts to the point that they were willing to take the contract for making the line for payment in shares or debentures, as proposed by you, provided, on taking out the quantities and going over the country through which the railway was to be made, they found the prices I had offered them on your behalf were sufficient. A letter was then written (2d February), signed by all the directors, authorizing me to agree with Messrs. Peto & Betts on the terms and conditions therein set out for making the railway. I have acted upon my written instructions, and from time to time have reported to you the progress of the investigations of the plans and estimates by Messrs. P. & B. Moreover, your own agent, Mr. Fernandez, has from time to time assisted Messrs. Peto & Betts's agents in checking the estimates and quantities, and subsequently went over the ground with them. I am at a loss therefore to understand the meaning of the last paragraph of your secretary's letter ; indeed, so far from your solicitor informing me that it did not embrace the terms upon which an arrangement could be carried out, I must remind you that almost day by day down to the very hour of my closing the contract, you have been

urging me to get the arrangements concluded with Messrs. Peto & Betts ; and your solicitor has generally been present at our meetings. I have referred to my minute-book of the frequent meetings, and I now state most distinctly that the only definite instructions I have received are those contained in the letter of the 2d February, and I have acted as your agent strictly in accordance therewith. With reference to the suggestion that Messrs. Peto & Betts are my principals, I beg to say, that in order to assist in carrying out the agreement for a contract for your line, I, at their request, agreed to negotiate, with the assistance of yourselves, for the East Grinstead & Groombridge and Hartfield & Uckfield Railways, so as to get possession of the district, and thereby greatly improve the value of your line. On the 4th February I saw Mr. Carnsew, your solicitor, thereon ; I explained to him, and subsequently to yourselves, in the fullest confidence, the policy and importance of such an arrangement, and in which you were principally interested. Mr. Carnsew and yourselves quite appreciated the importance of acquiring these lines, so as to have them as part of a whole system with yours, instead of being opposition lines, and Mr. Carnsew entered into negotiations with Mr. Roy to obtain an offer nominally to your company, but really for Peto & Betts, of these said railways. . . .

“ I have taken the trouble to write at this length, for I am determined not to be misrepresented ; moreover, I cannot help saying that if the last paragraph of your secretary’s letter was really written by your direction it was most unwarrantable. From the conversation that occurred on Tuesday, between Mr. Cary, Mr. Carnsew, and myself, it seems pretty clear to my mind, that the real cause of your desire to repudiate the contract I have concluded on your behalf with Peto & Betts, may be traced to your having sold yourselves (the company) to the Brighton Company. It would certainly have been more straightforward if you had so stated (for the facts must come out), instead of attempting to support your acts by imputing improper conduct to me ; I will venture to say that neither of the gentlemen I have the honor to address would in his individual capacity have so acted. I will, of course, hand a copy of your secretary’s letter to Messrs. Peto & Betts, and it will be for them to act in the matter as they may think proper.

“ I am, gentlemen, your obedient servant,

“ C. H. BOVILL.”

On the 16th of March, 1863, the plaintiffs filed their bill for specific performance of the contract, and other relief ancillary thereto ; and they submitted specifically to perform the same on their part.

On the same 16th of March, the Uckfield and Brighton Companies finally concluded a definite agreement with one another, whereby

(amongst other things) the Brighton Company undertook to find solvent persons to take up all the unpaid capital of the Uckfield Company, and to apply for proper parliamentary powers for the purchase of the said company, who were in the meantime to complete the construction of their line with all convenient speed.

The plaintiffs now moved for an injunction in the terms of the prayer of the bill.

*Mr. Giffard*, Q.C., and *Mr. Druce* for the motion.

*Sir Hugh Cairns*, Q.C., and *Mr. Speed* for the Uckfield Company.

*Mr. Waller* for the directors of the Uckfield Company.

*Mr. Rolt*, Q.C., and *Mr. J. H. Taylor* for the Brighton Company.

VICE-CHANCELLOR SIR W. PAGE WOOD. This case turns upon the question, how far this court can interfere where a contract provides that the plaintiffs, in consideration of certain shares and other advantages which the company engaged to give them, were to complete the construction of some ten or eleven miles of railway, a contract, which I shall assume, for the present purpose, to require the works to be executed on the terms which are ordinarily inserted in agreements of this nature. This being the nature of the contract, the bill asks, "that it may be declared to be valid and binding on the Uckfield Company, and that it may be specifically performed, the plaintiffs being willing to perform the same on their part; and that the Uckfield Company and the directors thereof may be restrained by injunction from permitting the Brighton Company or any other person, except the plaintiffs, to make the railway and works in question, and from disposing of and dealing with the £215,000 shares and debentures agreed to be applied in payment for the construction thereof, and from entering into any agreement or doing anything whereby the said line of railway and works may be constructed otherwise than in accordance with the Act of 1861, or whereby the plaintiffs may be prevented from performing and having the full benefit of the contract."

Now, on this the difficulty at once arises, that if I restrain the transfer of these shares I can only do so on an undertaking on the part of the plaintiffs that they will perform their part of the agreement; a submission to do so is a necessary ingredient in the bill, and it is essential that that offer should be one over which this court should have complete control; if that were not so, the result would be to restrain the company from dealing with these shares without securing to them the benefit of the plaintiffs' undertaking. At the same time, the case strikes me as one exceeding an ordinary case of breach of faith, and I was very unwilling to part with it without giving the defendants an opportunity of explaining their conduct. Their conduct seems to me to have assumed this character; they deliberately entered into a contract which

they thought would be beneficial to them, and they determined upon an equally deliberate breach of that contract so soon as they found, or thought, it to be to their interest so to do.

Let us see how the matter stands: Bovill was appointed their agent to carry out the negotiation with the plaintiffs—I should not, on an interlocutory application, have entered into the question whether such an appointment was or not within the powers of the directors; I should have left that question to be determined at the hearing, and have restrained the defendants in the meantime—then they say that his authority had been revoked before any contract was concluded; true, that authority was given in writing and they left him in possession of the written document; but they say that he had had verbal notice two or three days before the agreement was concluded that his authority had been revoked, and that the agreement would not be confirmed. I must say I never knew a more extraordinary case than that put forward on the part of the defendants. I merely mention Mr. Carnsew's evidence on this point, and leave it to speak for itself, without adding a single word by way of comment upon it. [His Honor read the affidavit and deposition on cross-examination, *supra*, pp. 469, 470, 472.]

Therefore, in effect, he says, "I saw that the agreement could not be carried out; I told the board so as soon as I heard of it, and I expressly said so to Bovill." But then at the very time when he was telling Bovill that the agreement could not be carried into effect, he produced to him this paper, and proposed that he should sign it. [His Honor read the draft letter to Sir Morton Peto, set out above, p. 471.]

The terms of this letter were, as he says, impossible terms; and yet he wishes Bovill to get Sir Morton Peto to sign a contract by which he is to be bound, but which, on this view of the case, was incapable of execution. Then how does he try to explain this conduct? He says, "I thought Bovill was a speculator, who was hawking about the company" (such persons do, I believe, exist), "and I wanted to test him." That may or may not be so, but this fact remains, on which I do not think it necessary to comment, that Carnsew having made up his mind that this was an improper contract, not only left in Bovill's hands that contract and the written authority upon which it was founded, but also tried to induce him to act towards the plaintiffs in a manner calculated to bind them to its performance.

Then it is said, "At the last of the conferences on the subject Bovill was told of the treaty with the Brighton Company, and he must have known that both contracts could not be concluded."

I do not think that this argument at all improves their case, it merely proves, at most, that they then informed Bovill of their determination to throw over that which he had done with their authority.

I do not pause here to consider the dealings with the rough minute-book, further than to remark that what there appears confirms the view I have taken of this matter.

Now, when we come to Bovill's evidence the matter is put beyond question. Bovill says, "I met Carnsew at the coffee-house, and he told me that Cary thought they might still go on with the Brighton treaty; and, when I said that that could not be, he proposed that I should write a letter to that effect, which he could send to Cary; and I accordingly did so." Then Carnsew's first affidavit denies that what Bovill has deposed to in fact took place; but the letter is produced, which shows that Bovill's statement is true in every respect, and we have the effect of this interview on Carnsew's mind shown by the very remarkable letter from him to Cary which accompanied Bovill's letter.

[His Honor read this letter; see *ante*, p. 476.]

"Farewell Midhurst, Bognor, etc.," what does that mean? What but that he found, or thought he had found, that it was impossible to get off the contract with the plaintiffs, and therefore supposed that all chance of connection with the Brighton line, which carried with it the Midhurst, etc., had to be relinquished.

Mr. Speed asks me to disbelieve Bovill; the evidence leads me to do just the contrary. I say nothing more on this point, but I cannot leave the evidence without making some remark upon the subsequent treatment of Bovill by the directors. [His Honor read the letter of February 25th, *ante*, p. 476]. I never read a more discreditable letter. The man is their agent, acting under their written authority, and yet they attempt to turn round on him and tell him that he had been informed he was not to act, which is entirely untrue. The best comment on this is Bovill's reply, with every word of which I agree. [His Honor read Bovill's letter of February 26th, *ante*, p. 477.]

I have every possible inducement to afford the plaintiffs as large a measure of relief as I can give them consistently with the established principles of this court, but I feel the difficulties to be quite insuperable.

If there were a distinct negative contract in this agreement, such as the contract which has now become usual in ordinary agricultural leases, that the lessee will not farm otherwise than according to the custom of the country, the court might fasten upon that, and separating that from the rest of the agreement might enforce specific performance of that contract; but when a plaintiff comes into this court upon an agreement which does not contain any such direct negative clause, and where you must infer the negative from the necessity of the case, the instances in which the court has found it possible to act are very few and special. In *De Mattos v. Gibson*, where the plaintiff had nothing on his part to perform, the Lords Justices said, "We will not permit the defendant to

do that which would render it utterly impossible for him to perform his contract." So, in a case which came before me some time ago, where an actor had agreed to perform at a particular place on certain days, I thought myself justified in restraining him from acting elsewhere upon those days during the ordinary hours of theatrical performance.

But I cannot bring this case within the principle involved in *De Mattos v Gibson*, because here the plaintiffs have to perform their part of this agreement by constructing the railway, whereas no difficulty existed, inasmuch as, in doing complete justice, the plaintiff had nothing to do but to pay the sum agreed upon by the charter party, a condition which it was within the power of the court to enforce.

Then it is said, that in *Lumley v. Wagner* the same difficulty occurred; but the difficulties there were small in comparison with those which I have to meet. No doubt it might be very important to *Mdlle. Wagner* not to be compelled to sing, unless she had every arrangement of the best kind to enable her to make as great an impression as possible; but then it was clearly *Lumley's* interest to afford her every facility in his power; and if he did not do so, she would have obtained all she wanted by being released from her agreement. But here I perfectly agree with the observation of Sir Hugh Cairns, that these shares are of such a character, that it is no consolation to the defendants to be told, that if the plaintiffs should fail to perform their part of this agreement, the injunction will go, and the shares thereby be let loose; they might be depreciated by the very fact of such failure. I do not lay any stress upon the fact that I should lock up the land of this company for an indefinite time. In *De Mattos v. Gibson* the Lords Justices thought that the principle of *Lumley v. Wagner* made it right that the ship in question in that case should remain utterly useless if not used in performance of the contract; and I should be ready to act on the same principle here.

Perhaps the case which bears the closest analogy to the present one is *Ogden v. Fossick*. That case ultimately turned on the consideration that the court could not compel the plaintiff to employ the defendant according to the agreement. I thought that I could separate the two parts of the agreement, and decree specific performance of the contract to give a lease, leaving the defendants to apply in respect of the other clauses; the Lords Justices, however, thought that that could not be done; but they seem to have at first supposed that the desired end might be reached by a condition for re-entry if the plaintiff did not perform his part of the contract, and they remitted the case to me with an expression of that opinion. I endeavored so to settle the lease as to meet their Lordships' view; but when the case was again before them, they, without expressing any opinion upon the form of the lease, simply dismissed the bill,

apparently on the ground that they could not, even in that way, do complete justice. Lord Justice Turner, in giving judgment in that case, observed, "It is said that the performance of the agreement might be affected by covenants in the lease for the employment of Mr. Fossick, to be enforced by a general condition of re-entry; but, looking at the effect of the agreement, I do not think this would be possible. I cannot doubt that the purpose of the employment of Samuel Fossick was, that he might continue his connection with the business without its being diverted to other channels. In this respect, the above mode of carrying the agreement into effect would not avail Samuel Fossick. He would be driven to his remedy at law, and in the meantime his business would be broken up.

Similarly here, if these gentlemen, being under an undertaking, express or implied, to perform this agreement, should fail in doing so, I could not place the parties in the position in which both sides intended that they should be; and I should be driven to leave the defendants, when they came here to complain of such failure, to their remedy at law.

Seeing, therefore, that no arrangement could so deal with the case as to do complete justice to both sides, I think the only proper course for this court to take is to leave both parties to their remedies at law.

I must, therefore, refuse this motion. As against the London, Brighton and South Coast Railway Company, the costs will be costs in the cause, but as against the Uckfield Company and their directors, I refuse the motion without costs.

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### WILKINSON v. CLEMENTS.

IN THE COURT OF APPEAL, IN CHANCERY, NOVEMBER 14, 15, 1872.

[*Reported in Law Reports, 8 Chancery Appeals 96.*]

THIS was an appeal by the plaintiff from a decree of Vice-Chancellor Wickens dismissing his bill without costs.

An agreement, dated the 21st of July, 1869, was entered into between the defendant Clements of the one part and Edmund Wood of the other part, the stipulations of which were to the following effect: (1) That Clements should grant to Wood, his executors, administrators, and assigns, and that Wood, his executors, administrators, or assigns, should accept, such distinct and separate leases as were thereafter mentioned of a piece of ground at Turnham Green, delineated

in an annexed plan, and colored pink, green, and yellow, for ninety-nine years from Midsummer Day, 1869, at the rent of a peppercorn for the first year, £50 for the second year, and £100 for every subsequent year, the rents to be apportioned in manner thereafter mentioned, and paid on the usual quarterly days. (2) That Wood should build on the pink plot, on the east side of an intended new road shown on the plan, not less than twenty houses, and on the green plot, on the west side of that road, not less than seventeen houses, each house to be of the prime cost of £200 at least, and to be of not less than certain dimensions therein mentioned. (3) That Wood would build on the yellow plot not less than five houses, such as therein mentioned. (4) That each house should be of the prime cost of not less than £200, and should be built of good, sound, substantial and new materials, in a workmanlike manner, and according to such plans and specifications as should be approved by Clements or his surveyor. (5) That twelve houses should be finished and fit for occupation by Midsummer Day, 1870; twelve more by Midsummer Day, 1871; and the rest by Midsummer, 1872. (6) That Wood should make the road, as shown on the plan, to the satisfaction of Clements' surveyor, and keep it in repair till taken to by the parish. (7) That Wood should make all drainage and sewerage at his own cost, and in such a manner as would best serve the interest of the estate and to the satisfaction of Clements' surveyor. (8) That Wood should be entitled to two separate leases of the plot colored pink as soon as he had built thereon and finished, ready for occupation, ten houses to the satisfaction of Clements or his surveyor, at the yearly rent of £25 for each plot colored pink; and two separate leases of the plot of land colored green as soon as he had built thereon and finished, ready for occupation, eight houses to the satisfaction, etc., at the yearly rent of £20 for each plot colored green; and a separate lease of the plot colored yellow as soon as he had built thereon and finished five houses to the satisfaction, etc., at the yearly rent of £10. (9) That the leases should be prepared by the solicitor of Clements, his heirs or assigns, and be in the form agreed upon by Wood and Clements, and signed by them on the execution of the agreement. (10) That the plans and elevations should be submitted to Clements or his surveyor for approval, and his signature or that of his surveyor should be conclusive of such approval. (11) related to fire insurance. (12) reserved to Clements certain rights over the road. (13) provided for Woods' putting up fences and gates in front of all the houses, building garden walls, etc. (14) That until all the land comprised in the agreement had been demised, Wood, his executors, administrators, and assigns, should, as to so much of it as should not have been included in any demise, pay the rent agreed, or so much thereof as should



remain after allowing for the separate rent or rents payable under any lease or leases which should have been granted, and would observe all the covenants on the part of Wood, his executors, administrators, and assigns, contained in the draft lease thereinbefore referred to, so far as they were applicable to so much of the premises as should not have been separately demised and the buildings to be erected, or which should have been erected thereon, and the works and things to be done or omitted with reference thereto, and that Clements, his heirs and assigns, should have a power of distress for rent in arrear upon the lands not demised, as if it had been reserved by a lease. (15) provided for reference of disputes to the arbitration of the lessor's surveyor. (16) That the agreement should not operate as an actual demise. (17) gave a power of re-entry for non-payment of rent in respect of lands not actually demised, and (18) provided that the lessee should not call for the lessor's title.

The form of lease referred to in the agreement purported to be a lease by Clements to Wood of a piece of ground situate on the side of a new street, intended to be called Belmont Road, at Turnham Green, as the same was shown in the plan thereon, and all those messuages thereon, for the agreed term, at the rent of £ , and contained covenants by the lessee that the lessee, his executors, administrators, and assigns, would forthwith, at his and their own expense, complete and finish, fit for habitation and use in every respect, the said messuages or tenements thereby demised, according to the plan, elevations, and specifications already approved by the lessor's surveyor, and would at all times during the term bear and pay a reasonable proportion, to be assessed by the lessor's surveyor, of the expense of supporting, cleansing, and repairing Belmont Road, and of making, cleansing, and repairing all sewers, drains, party walls, etc., used or capable of being used in common by the lessee and the lessees of other parts of the estate. It contained no covenant as to constructing the road or any drainage thereon.

Wood commenced building on the plot colored yellow, and being in want of money applied to the plaintiff, and by an indenture dated the 5th of August, 1869, Wood assigned to the plaintiff, by way of mortgage, all the right, title and interest of the mortgagor under the agreement, with full power and authority to do all necessary acts, deeds, and things for obtaining the leases thereby agreed to be granted, and for that purpose to use the name of the mortgagor in any suit or proceeding relating thereto; to hold the premises to the mortgagee for all the residue of the term mentioned in the agreement, subject to a proviso for redemption on payment by the mortgagor of such sums as should be due from him to the mortgagee, with interest, according to the cove-

nant thereafter contained. There followed a covenant by the mortgagor for payment of all sums which should be owing from him, with interest, and a covenant to complete the houses, with power to the mortgagee to enter if the mortgagor made default in observing any of the covenants in the mortgage.

The plaintiff soon afterwards purchased from Wood and Clements the plot colored yellow, with the houses which Wood had built upon it, and it was absolutely conveyed to the plaintiff by indenture of 30th of April, 1870.

On the same 30th of April, 1870, an agreement was entered into between Clements of the first part, the plaintiff of the second part, and Wood of the third part, which recited the original agreement, the mortgage and the conveyance of the yellow plot to the plaintiff, and recited that Clements and Wood, with the concurrence of the plaintiff, had agreed to make certain variations in the agreement, and that the plaintiff had agreed to join therein for the purpose of testifying his assent to the variations in the agreement, but not so as to make himself responsible in respect thereof. The only stipulations which need be referred to for the purpose of this report were: (4) That the ground rent to be received in respect of the land colored green on the plan annexed to the former agreement should be increased from £40 to £45, and that £25 thereof should be charged on such part thereof as was in the plan annexed to the second agreement colored blue, on which eight houses were to be built, and no more, and the remaining £20 thereof on the part thereon colored green, on which ten houses were to be built, and no more; and that the lease of the land colored blue was to be granted by Clements as soon as four of the eight houses thereon and two of the ten to be erected on the land colored green in the second plan were severally covered in; and the lease of the land colored green was to be granted as soon as five of the ten houses to be erected thereon were covered in. (9) That, except as altered by the second agreement, the former agreement should remain in force.

On the same 30th of April, 1870, Clements signed and gave to the plaintiff a letter: "Sir: I shall be willing to extend the time mentioned in the agreement of the 21st July, 1869, from Midsummer, 1870, to Christmas, 1870."

By an agreement dated the 30th of June, 1870, between Clements of the first part, the plaintiff of the second part, and Wood of the third part, it was agreed that moneys advanced and to be advanced by Clements up to a certain amount to Wood to enable him to complete thirteen of the houses on the green and blue plots, with interest, as thereafter mentioned, should take precedence of the plaintiff's security, and should be repaid by Wood, with interest at £7 per cent., at the

time the leases were ready for execution; and that if Wood was not then prepared to pay the amount, and the plaintiff should fail to pay it for two months after demand, the amount of principal and interest should be satisfied by increasing the amount of ground rent to be reserved by the leases.

Wood, in the course of 1870, became insolvent, and the plaintiff proceeded with some of the houses. On the 19th of October, 1870, six of the houses on the green plot in the second agreement having been covered in, except the back offices or additions in the rear, the plaintiff wrote to Clements asking him to have the leases prepared. After some correspondence Clements, on the 25th, wrote to say that the lease of the green plot would be granted at once when the buildings were advanced as required by the second agreement. On the 23d of November Mr. Smith, the plaintiff's solicitor, wrote to Mr. Avis, the solicitor of Clements, for a draft of the lease of the green plot. In reply, Mr. Avis sent a copy of a letter from Clements, inclosing one of a letter from Clements' surveyor to Wood, complaining that Wood was not proceeding in accordance with clauses 4, 7, and 10 of the first agreement, and declining to certify for a lease unless Wood adhered to the plans prepared for him and fulfilled the clauses generally. On the 12th of December, 1870, Mr. Smith wrote to Mr. Avis, repeating his request for a draft lease of the green plot, and also asking for a draft lease of the blue plot, as the plaintiff would be entitled to a lease of it in the course of the week. On the 20th of December Mr. Avis wrote to Mr. Smith, stating that Clements had been over the ground with his surveyor and found (1) that the drainage and sewerage had not been commenced; (2) that the rain-water pipes had not been put up; (3) that three division walls had not been put up; (4) that the boundary walls were not finished; (5) that the back offices in the blue plot were not finished; all which things he alleged must be done before the leases could be granted.

After some correspondence of rather a hostile character, the draft leases were furnished on the 3d of January, 1871. They contained covenants to complete fit for habitation the messuages thereby demised (being seven on the blue plot and six on the green) by Midsummer, 1871, according to the specification which was sent along with them; and the draft lease of the green plot contained a covenant, on or before Midsummer, 1871, to erect, complete, and finish fit for habitation four other messuages according to the specification. The specification, beside other provisions to which the plaintiff objected, contained a provision as to laying down a twelve-inch stoneware pipe in the roadway and completing the roadway. Mr. Smith settled the draft leases and specification, making the plaintiff liable for only half the roadway, as the

property demised lay wholly on one side of the road, and varying the covenant to complete the fresh houses by Midsummer, 1871, into a covenant to finish them forthwith, on the ground that it was now impossible to complete them by Midsummer, 1871, and the covenant in the signed form was to finish forthwith. On the 13th of March the drafts were returned by Mr. Avis, with a letter refusing to assent to the above alterations. Further correspondence and communications ensued, and on the 4th of April, 1871, Clements wrote to the plaintiff, saying that if the leases were not taken up within fourteen days he should proceed in ejectment, and that, referring to the clause in the original contract which required twelve houses to be fit for occupation by Midsummer, 1870, twenty-four by Midsummer, 1871, and the rest by Midsummer, 1872, he should not grant any further extension of time. The parties being unable to come to any understanding, Clements, on the 6th of May, 1871, commenced an action of ejectment, his solicitor writing on the same day to the solicitor of the plaintiff, saying that, as the plaintiff declined to accept the leases in the proposed form or to approve the specification, and as a quarter's rent was in arrear, Clements had instructed him to issue a writ in ejectment. The plaintiff thereupon filed the present bill, praying that it might be declared that the plaintiff, as assignee and nominee of Wood, was entitled to leases of the plots colored green and blue in the plan annexed to the supplemental agreement of the 30th of April, 1870, together with the houses or carcasses thereon, such leases to be according to the form of lease referred to in the original agreement, at the increased ground rents provided for by the agreement as to Clements' advances, and that such leases, and if necessary a proper specification and plan to be therein referred to, might be settled by the court, the plaintiff offering to execute counterparts and pay the ground rent, and that, so far as necessary for the purposes aforesaid, Clements and Wood might be decreed specifically to perform the original agreement as varied by the subsequent documents, and for all necessary inquiries, and for foreclosure against Wood, and for an injunction to restrain the action of ejectment.

A motion for injunction was ordered to stand over till the hearing the plaintiff giving judgment in the ejectment to be dealt with as the court should direct.

At the hearing on motion for decree Vice-Chancellor Wickens dismissed the bill without costs.<sup>4</sup>

*Mr. Karlake, Q.C., and Mr. Bagshawe*, for the plaintiff, in support of the appeal.

<sup>1</sup> The opinion of the Vice-Chancellor has been omitted.—Ed.

*Mr. Greene, Q.C., and Mr. Graham Hastings* for the respondent Clements.

SIR W. M. JAMES, L.J. This is an appeal from a decree of the Vice-Chancellor Wickens dismissing the plaintiff's bill without costs. The judgment of the Vice-Chancellor proceeded upon one ground, an important ground, as applicable to this particular kind of contract. But, independently of that ground, other defenses were taken by the evidence, there being no pleadings except the bill. I think it proper to deal first with the defense, which, if true, would have been a complete defense to the bill, namely, that the buildings were not covered in by the time and in the manner which were required by the agreement before the lease of this particular part of the property should be granted. The only evidence in support of this defense is that there were not water-pipes put up, and evidence is given by several surveyors that water-pipes ought to be put up before a house can be said to be, strictly speaking, "covered in." What that amounts to, whether it is anything more than the mere trivial expense of pence or shillings, is not stated. It is, however, reasonably clear that a water-pipe to a cottage costing £200 must be a matter causing only a trifling expenditure, much too trivial, I think, to afford a ground for saying that a builder who had omitted it had not completed his contract for the present purpose. It might almost as well be said that if a slate had been blown off the houses were not covered in. On the other hand, a great number of witnesses say that the houses were covered in "according to the plans." They do not, indeed, apply themselves directly to the question of the water-pipes; but they have not been cross-examined. It is, moreover, quite clear, from the specification sent in on the 3d of January by the defendant's surveyor to the plaintiff, that the houses were then treated as covered in, although no water-pipes were then fixed, and that the surveyor, who is the best witness as to what was understood between themselves as to covering in, does not in any way say that the buildings were not covered in at that date. I think, therefore, there is no weight in this objection.

It is then said that it would be utterly impossible to perform this agreement, because it provided that the buildings were to be according to the plans and specifications that were to be submitted to the surveyor and approved by him, and that such plans and specifications were not submitted and approved. The surveyor says that a plan was submitted to him by Wood, upon which improved plans were subsequently prepared by him and copies furnished to Wood, and that the houses which have been in part erected are in accordance with such plans. If there was any default on the part of the plaintiff or Wood as to sending in plans and specifications, it was committed at the very beginning, and

not only did the defendant allow the building to go on, but he superintended it, and was party to an arrangement by which the benefit of the agreement was assigned to the plaintiff by way of security; and, by a tripartite arrangement between Wood, the plaintiff, and Clements, the defendant Clements himself advanced money and took a security, for which he obtains precedence over the plaintiff's security upon these very houses, which, of course, therefore, must be understood to have been built to his satisfaction. The only object of the stipulation that plans and specifications are to be sent is that the ground landlord may have sufficient control over the nature of the buildings, and as he has practically approved what has been done, I am of opinion that he has entirely waived the stipulations as to plans and specifications.

The question then resolves itself into this, Is the decision of the Vice-Chancellor correct that the plaintiff, being assignee of the whole of the contract, is unable to obtain specific performance in this court without putting himself under an obligation to perform the whole of what the agreement bound Wood to perform? I am of opinion that there is no authority, and I am unable to find any principle, for imposing that term as a condition precedent upon a person in the plaintiff's position in respect of a contract of this kind. The contract is made in its terms a divisible contract. It is made separable with respect to the leases, and it is so made, as it appears to me, for the very purpose of avoiding the application of any such rule. In truth, if that rule were held to apply in this case, all contracts of this nature would come to an end—a landlord could not enter into a building agreement of this kind with any chance of its being carried into effect. It is well known that a builder is seldom a person with money enough to complete the whole of the buildings which, by a contract of this sort, he undertakes to erect; in order, therefore, to enable him to raise funds for the purpose the contract is made divisible, and provides that as soon as he has built to a certain extent on certain portions of the land he shall have separate leases of them, which he can take into the market for the purpose of raising money to enable him to complete the rest of the contract; that as soon as he has built upon other portions he shall have a lease of them; and that when he has completed the whole he shall have leases of the remaining part, all distinct and separate leases, the lessees in which would be under no obligation to perform the obligations of the others. Then it appears to me if Wood had come here and said, "I have completely covered in the buildings on the green and blue plots according to the terms of the contract, and I am now entitled to have leases granted to me of those plots," it would have been no answer to him to say, "We do not know whether you will ever perform the rest; we cannot grant specific performance of this, as we are unable to grant

specific performance against you of that part which remains unperformed." This would be entirely inconsistent with the true meaning of the parties, which was that he was to have leases of those plots as soon as he had covered in the houses on them, whether anything could or could not be done as to the other parts. If such would have been Wood's position, is the plaintiff in any worse position? I am of opinion that as soon as Wood was entitled to a lease of a particular plot he could have assigned that right to the plaintiff, and he might have made a separate assignment to somebody else of his right to a lease of a second part and have retained the third part to himself. If he had done that it would, as it seems to me, have been impossible to say that specific performance is not to be granted to the assignee of part, because he does not take upon himself to perform the whole residue of the original agreement. It appears to me that if Wood had performed the conditions as to these plots he would have been in a position to ask for specific performance as to them, and could have been put on no new terms or conditions whatever with respect to the residue; and if the plaintiff had filed this bill in the name of Wood, which, it appears to me, he might very well have done under the power of attorney given to him in his mortgage-deed, asking the landlord to grant a lease to Wilkinson as the nominee of Wood, it would be no answer to say, "You, Wood, have entered into an agreement with Wilkinson by which he may be entitled to the whole agreement; and I will not do anything until Wilkinson has put himself in some way in your place." That would have been no answer, any more than it would have been an answer to an action at law in the name of Wood for breach of the undertaking of the landlord to grant a lease. It cannot make the slightest difference what the form of agreement was between Wood and Wilkinson, that being a matter with which Clements really had nothing whatever to do. Wood and Wilkinson, the day before the bill was filed, might have altered the whole arrangement as to the mortgage, and confined it to this specific portion. If so, the landlord could not have said, "No doubt at present you are only assignee of part, but there was a time at which you were assignee of the whole; and if you had been assignee of the whole, and had sued as such, I could have insisted upon your entering into some undertaking or agreement to perform the covenants; and because that once existed, I say you have no right to go to your mortgagor and try to put yourself in the position of assignee of part." It appears to me that this would have been perfectly idle. No injury is done to the ground landlord by treating the contract as separable; he has got a particular portion of his property covered with houses, finished to a certain extent, and he will have a lessee of those houses, who, having laid out money already to a considerable amount upon

them, will, for his own sake, be anxious to complete them and make them fit for habitation, and will be bound to pay him the ground rent. With regard to the remaining ground, he still retains exactly the same right he had under the agreement—that is to say, he has got the right against Wood which he always had—and I cannot find any obligation or condition implied in this contract that if the intended lessee shall assign to anybody, that assignee shall enter into a distinct and separate agreement and covenant on his part to perform the whole agreement. Wood remains liable to perform it as to the rest of the property ; if he does not perform it the landlord gets the property, and in this case he has got possession, which he will retain because Wilkinson does not seek to interfere with it. That being so, I differ from the Vice-Chancellor in the ground of his decision, and I hold that the plaintiff was entitled to specific performance of the agreement, so far as it relates to the distinct leases of these two particular portions of ground upon which he has built the houses, and that he was not required, in order to entitle him to that, to enter into any agreement or obligation or undertaking of any kind to take upon himself the liability of Wood with respect to the remaining part of the property. It appears to me that the cases which have been cited, and which are to this effect, that if the thing must be performed at all it must be performed *in toto* by this court, can have no application to an agreement like this, which in its very terms and from its very nature contemplated successive performances of successive parts independently of one another.

I am of opinion that the plaintiff is entitled to a decree for specific performance, with a declaration that the clause as to plans and specifications has been waived. Refer it to Chambers to settle a lease, and the plaintiff must have his costs of suit.

SIR G. MELLISH, L.J. I am of the same opinion, and wish only to add a few words as to the important question upon which the Vice-Chancellor has decided this case. I quite agree that as a general rule all agreements must be considered as entire. Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other, and if the court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the court will not compel the defendant to perform his part or any part of the agreement. As a general rule, therefore, an agreement is entire. I can also conceive that a court of equity might treat an agreement as entire even in cases where a court of law would say that the performance of one part is not a condition precedent to the performance of the other part, because the court might see that those rules as to conditions precedent, which to a certain extent are technical, might not



meet the real justice of the case. But, on the other hand, I do not find it laid down anywhere that it is impossible for the parties so to frame an agreement that there may be a specific performance of part. For instance, if they had said in terms, "This agreement is to be construed as if it were three separate agreements for the several portions," nobody, I suppose, would doubt that the court would treat it as if there were three separate agreements, and would not say, "If you meant them to be separate agreements you ought not to have put them on the same piece of paper, but on three separate pieces." That being so, it is really a question of construction whether practically that is not what the parties have done, and the court ought to carry out the agreement according to what it sees is really the intention and object of the parties in making it.

Looking at this agreement, it is in a form not at all unusual in agreements for a large amount of building between a ground landlord and a builder, and it appears to me that the agreement that separate leases should be granted, not at the same time, but at different times, with a considerable interval between the time when the lease of one plot is to be given and the time when the lease of another plot is to be given, evidently shows the parties to have contemplated that the houses were to be built in succession, and that those on the pink plot were to be built last. That is done that the builder may have an opportunity of raising money by selling or mortgaging a part before he has completed his agreement for the whole. That is obviously for the benefit of both parties, because it is a plan which makes it most probable that the builder who makes the agreement with the ground landlord will be enabled to fulfill the whole of his agreement. If he does not fulfill the whole of it, at any rate he will fulfill a part of it, and the ground landlord will obtain what he desires to obtain, namely, leases, with houses built upon his land so as to secure to him the ground rent. When such an agreement has been made, and a person who is willing to advance money to the builder for the purpose of performing it, having seen the agreement and seen the object of it, is willing to assist him by lending him money for building houses on some part, it appears to me that it would be most unjust if, after he had advanced his money upon the footing that there was to be a separate lease granted when a certain number of the houses were built, his object were to be defeated and the landlord be held entitled to say, "I shall not grant you a lease of that part unless you will undertake to build the whole." I confess I do not see how, if he did give that undertaking, he could even then be entitled to the specific performance of part, because the rule, when an agreement is really entire, is that the court will not perform a part unless it can compel the actual performance of the whole. Now, it is settled that,

as a general rule, the court will not compel the building of houses. Therefore, if this were to be treated as being an entire agreement, it seems to me that no specific performance could be granted at all until the whole of the houses had been built. That appears to me entirely contrary to the agreement of the parties, for their intention appears to me clearly to have been that the landlord should be compelled, as between him and Wood, to grant a lease of a part when a sufficient number of houses were covered in upon that part; and that being the agreement with Wood, why should Wood not be able, according to the ordinary rule of law, to assign, either by way of sale or mortgage, that part to which he was so entitled, for the purpose of raising money? It appears to me that he must be so entitled. How can it make any difference that in fact he mortgaged the whole of the agreement to the plaintiff instead of mortgaging a part? I cannot see that it makes any difference. The cases decide that where an agreement is entire the court cannot grant any specific performance unless it is in a position to grant specific performance of the whole, but I do not find any case which says that an agreement cannot be so worded that a party may have specific performance of a particular part of it, although he has not performed, and possibly never will perform, the rest of it; nor do I find any case which says that an assignee may not be in the same position. I therefore cannot agree with the judgment of the Vice-Chancellor, and I think we should do great harm to all parties interested in such agreements, and especially to ground landlords, if we held that this agreement could not be carried out according to what appears to me to be the true meaning of the parties.

Solicitors: *Mr. F. R. Smith, Mr. H. Avis.*

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## IRON AGE PUBLISHING COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

IN THE SUPREME COURT OF ALABAMA, DECEMBER TERM, 1887.

[*Reported in 83 Alabama Reports 498.*]

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. Thomas Cobbs.

The bill in this case was filed on the 2d August, 1887, by the Iron Age Publishing Company, a domestic corporation organized under the general statutes in 1882, against the News Publishing Company and the Morning Herald Publishing Company, two domestic corporations also incorporated under the general statutes; the Western Union Telegraph Company, a corporation organized under the laws of New York, but

having an office and doing business at Birmingham; the New York Associated Press, and the Western Associated Press, two corporations organized under the Laws of New York, and William H. Smith, a citizen of New York, who was the general manager of said two corporations last named. The complainant was engaged in the business of publishing a morning newspaper at Birmingham, called *The Birmingham Age*, and claimed the exclusive right, under contract with said New York Press associations, to have and use the "Associated Press Dispatches," as they were termed; and the bill prayed an injunction, "to enjoin and restrain said Western Associated Press and New York Associated Press from selling, transmitting or furnishing, and said Western Union Telegraph Company from delivering the 'Associated Press Dispatches' to said News Publishing Company, said Herald Publishing Company, or to any one for them."

As to said "Associated Press Dispatches," the second paragraph of the bill contained these averments: "Said Western Associated Press and New York Associated Press are corporations engaged in gathering and disseminating news, in this way: They have one or more agents and correspondents in many of the large and important cities and towns in the United States, who gather and transmit daily, by telegraph, to the chief offices of the Associated Press in New York City, and other points, all news of importance and general interest to the public; and said Associated Press transmits said news daily, by telegraph, to all newspapers in the United States that are entitled thereto, such news so transmitted being known as 'Associated Press Dispatches'; but the newspapers which get these dispatches are required to pay said Associated Press a stipulated price therefor. Said Associated Presses are consolidated, and operated under one management, and are in effect the same corporation; and said W. H. Smith is the general manager of both of them."

The contract under which complainant claimed the exclusive right to these press dispatches was thus stated in the third paragraph of the bill: "Ever since complainant began the publication of said *Birmingham Age*, it has been a subscriber for said Associated Press Dispatches, and has received and published the same. Complainant has paid therefor large sums of money, ranging from \$45 to \$85 per week. Complainant has always had, and still has, the sole and exclusive right to receive and publish said Associated Press Dispatches in Birmingham. Complainant has this right under and by virtue of a good and valid contract heretofore made and entered into with said Associated Presses, for a good and sufficient consideration. Besides paying for said dispatches, complainant gathers and transmits to said Associated Presses items of news transpiring in and around Birmingham, as a part of the considera-

tion therefor, complainant being their agent and correspondent at Birmingham under said contract. Said contract was made with the said Associated Press, through its agent, who was duly authorized to make the same, and is now in full force and effect, and will, by its terms, continue to remain in full force and effect, so long as complainant shall pay said Associated Press therefor, and shall comply with its agreement to act as the agent and correspondent of said Associated Press at Birmingham, Alabama, in the transmission of news to the same. Complainant alleges that it has, at all times, fully complied with all the terms of said contract, and is ready, willing, and able to do so. Complainant alleges that the contract herein set forth, made with complainant by said Associated Press, through its authorized agent as aforesaid, was, after the making of the same, duly made known to said Associated Press, and said Associated Press has, with full knowledge thereof, furnished to complainant the dispatches therein provided for; and complainant has paid for the same, as provided for in said agreement, and has rendered the services therein provided for as agent and correspondent at Birmingham. The terms of said contract have been fully understood by both parties thereto, except with reference to the right of said Associated Press to send dispatches to an evening paper published in the city of Birmingham. The correspondence between complainant and said Associated Press, in relation thereto, shows that said Associated Press knew that said contract, made as aforesaid, clothed complainant with the exclusive right to the dispatches covered by the terms of said contract."

A demurrer to the bill was filed by the Western Union Telegraph Company and also by the "Herald Company," each assigning specially thirteen causes or grounds of demurrer. The assignments from one to seven, inclusive, alleged that the bill was "vague, indefinite, and uncertain," in these particulars: 1st, "because it fails to aver when the said alleged contract was executed"; 2d, "because it fails to allege where the said contract was executed"; 3d, "because it fails to allege what consideration was paid, or to be paid, under said alleged contract"; 4th, "because it fails to allege when the said alleged contract was to begin, or become operative"; 5th, "because it fails to allege when said contract was to terminate"; 6th, "because it fails to show whether said alleged contract was verbal or written"; 7th, "because it alleges that complainant made a contract with an agent of said Associated Press, but fails to state who the agent was, or to give his name." The 8th assignment was: "Because the bill fails to show such a complete contract between complainant and said Associated Press as this court could enforce, nowhere setting out the terms of said contract, but only the legal conclusions of the pleader." The 12th assignment was: "Because the

bill shows that the Western Associated Press, the New York Associated Press, and W. H. Smith, at the time of filing said bill, were non-residents of the State of Alabama, and that they are indispensable parties to the suit, without whom it cannot be maintained against this defendant; and the bill shows that the suit does not concern an estate or charge upon lands, or the disposition thereof, nor any interest in, title to, or incumbrance upon personal property within this State; nor did the cause of action arise, nor was an act on which the suit was founded to have been performed, in this State."

The Chancellor sustained the demurrer on the 8th and 12th causes assigned, and his decree is here assigned as error.

*Smith & Lowe, and Taliaferro & Smithson* for appellant.

*Webb & Tillman, J. J. Altman, and Martin & McEachin, contra.*

SOMERVILLE, J. The bill is one in the nature of specific performance, seeking, by the auxiliary force of an injunction, to prevent the breach of an alleged contract by the New York Associated Press selling, as is insisted, to the complainant—the Iron Age Publishing Company—an exclusive right to receive and publish at Birmingham, Alabama, all of the Associated Press Dispatches gathered and prepared for the press by the New York company, and transmitted over the telegraph lines of the Western Union Telegraph Company, which body corporate is also made a party defendant to the bill. The breach complained of is averred to be the delivery of these dispatches, for publication, to the Morning Herald Publishing Company and the News Publishing Company, which companies publish a daily paper in the city of Birmingham, and are also made parties defendant to the present suit.

The Chancellor sustained a demurrer to the bill, and the complainant brings this appeal. Some of these grounds of demurrer we proceed to discuss.

There seems to be one feature about the present contract, however, which renders it impracticable to be specifically enforced, with justice to both parties. This is its want of mutuality, both of the obligation, and of the remedy as to one of its features.<sup>1</sup> From the averments of the bill it is made to appear that the contract in question is to remain in force only so long as the complainant shall continue to act as agent and correspondent of the Associated Press at Birmingham. It is not shown whether this duty was assumed forever, for any definite period, or might terminate at will. In either contingency, we are unable to see how the court is to compel performance on the part of the complainant.

The general rule, to which it is true there are many exceptions, seems

<sup>1</sup> Only so much of the opinion is given as relates to this question.—Ed.

to be, that contracts, in order to be enforced by specific performance, must be mutual in obligation, as well as in remedy. Mr. Pomeroy says, and such we think is the general rule, that "it is a familiar doctrine, that if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement."<sup>1</sup> With some established exceptions, it may be stated that equity will decline to enforce a contract against a defendant, where the case is of such a nature that the court has no power to compel the complainant to perform his part of it.<sup>2</sup> There are many unilateral contracts, which constitute an exception to this rule, including the right to exercise certain options, and cases affected by the Statute of Frauds, to say nothing of others, which stand on peculiar principles. This case is not of that class.<sup>3</sup>

How, it may be asked, is it practicable for the court to compel the complainant to perform personal services, as agent and correspondent of the Associated Press at Birmingham, which it has contracted to perform from year to year, under this agreement? We have seen that the duty involves the exercise of special skill, judgment, and discretion, being intellectual as well as mechanical in its character. These duties are also continuous in their nature, and of indefinite duration. There can be, as we have shown, no specific performance affirmatively of such duties by a court of equity. The most that can be done is to negatively enforce them by injunction prohibiting their breach, and this only on bill filed praying such particular relief.

It is clear that but one of two decrees can be rendered in this case: (1) we can tie the hands of the Associated Press, and the other defendants by injunction, forbidding the delivery of the press dispatches to any one else than the complainant, as prayed for, and leave the complainant free to terminate the contract at its will without limitation of time or circumstance, or to perform its duties as correspondent as negligently or diligently as discretion may dictate; or (2) to keep the injunction in force so long as the duties imposed by the contract shall be faithfully performed by complainant, which may be for all time to come, in view of the possible perpetuity of complainant's corporate existence. The first decree suggested would be entirely opposed to all equity prece-

<sup>1</sup> Pomeroy on Contracts, §§ 162-165.

<sup>2</sup> Moon v. Crowder, 72 Ala. 79; Irwin v. Bailey, *Ib.* 467; 3 Brick. Dig., p. 361, §§ 421, 422; Fry on Spec. Perf. 286; Cooper v. Pena, 21 Cal. 404; Duvall v. Meyers, 2 Md. Ch. 401; Richmond v. Dubuque, etc., R. R. Co., 33 Iowa 423; Marble Co. v. Ripley, 10 Wall. 359; Meason v. Kaine, 63 Penn. St. 335; Rogers v. Saunders, 10 Me. 92; s. c. 33 Amer. Dec. 635.

<sup>3</sup> Richards v. Green, 23 N. J. Eq. 536; Heflin v. Milton, 69 Ala. 354; Pomeroy on Contr., §§ 167-174; 2 Lead. Cases Eq., p. 1077.

dents and practice ; the settled rule being that the courts will not interfere by injunction in cases of this kind, if indeed in any case, where defendant cannot be made secure in his rights and remedies for violation of the duties imposed on the complainant by the contract sought to be enforced.<sup>1</sup>

The second decree above suggested would also be impracticable, not only for the reason that the court cannot compel the performance of the personal services assumed to be undertaken by the complainant, involving as they do the exercise of special skill, judgment, and discretion, but it would be out of the question for the court to keep this case open for all time, or even for an indefinite term of years, to superintend the continuous performance of these duties by the complainant. This might involve the frequent necessity on the part of the court of hearing complaints from the defendant, charging the complainant with a breach of its duties, or from the complainant, arraigning the defendant for contempt for a violation of the injunction. There would thus be no end to the number of occasions when the court might be called on, from year to year, to say whether the complainant has performed the duties in question faithfully and efficiently, so as to have kept the injunction in force, or negligently and unskillfully, so as to justify its breach. For these reasons, the rule is that "equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind which the court cannot superintend."<sup>2</sup>

The contract being one which cannot be specifically enforced in a court of equity against the complainant, we deem it inequitable to enforce it against the defendants.

The demurrer to the bill was properly sustained, and the decree is affirmed.

<sup>1</sup> *Bromley v. Jeffries*, 2 Vern. 415 ; *Richmond v. Dubuque, etc.*, R. R. Co., 33 Iowa 422, and cases cited on p. 486.

<sup>2</sup> *Waterman on Spec. Perf.*, § 49 ; *Richmond v. Dubuque, etc.*, R. R. Co., 33 Iowa 422 ; *Caswell v. Gibbs*, 33 Mich. 331 ; *Port Clinton R. R. Co. v. Cleveland R. R. Co.*, 13 Ohio St. 544 ; *Atlanta, etc., R. R. Co. v. Speer*, 32 Ga. 550 ; *Blanchard v. Detroit R. R. Co.*, 31 Mich. 43 ; *Marble Co. v. Ripley*, 10 Wall. 339.

## DEF. BALLOU ET AL. v. JAMES MARCH.

IN THE SUPREME COURT OF PENNSYLVANIA, MARCH 3, 1890.

[*Reported in 133 Pennsylvania State Reports 64.*]

BEFORE Paxson, C.J., Sterrett, Green, Clark, Williams, and Mitchell, JJ.

No. 238, January Term, 1890, Supreme Court ; court below. No. 81, November Term, 1883, C.P. in Equity.

On March 18, 1889, DeForrest Ballou and William Eccles, Jr., filed a bill in equity against James March, in which it was averred :

" 1. That the said defendant, James March, did, by his writing dated the twenty-eighth day of June, A.D. 1888, a copy of which is hereto attached and made a part of this bill, agree with your orators, through Richard B. Osborne, that, in consideration of the performance on the part of your orators of the conditions therein mentioned to be done and performed on their part, he would assign the judgment obtained by him, the said defendant in the above-entitled case, as of November Term, 1883, No. 81, to your orators, or such person or persons or corporation as they might designate for the purposes of said agreement, and in general do all things and sign all such papers as might be necessary to carry the full import of said writing or agreement into full force and effect ; and that the said Richard B. Osborne was acting for your orators in making said agreement, and has assigned all rights accruing to him thereunder to your orators.

" 2. That, in accordance with the terms of said writing, your orators have taken the necessary steps and proceedings to carry out the true intent and meaning of such contract, and have performed, and are now ready and willing to do and perform, all conditions precedent to be performed on their part to entitle them to a performance on the part of the said defendant of his part of said contract, and have applied to and requested of the said defendant to assign upon the record and mark said judgment to the use of your orators, which the said defendant, James March, has and does refuse to do, and has in every respect totally failed to carry out the terms of his said contract, in fraud of the rights of your orators therein.

" 3. That your orators have not an adequate remedy at law, and that, for the purpose for which said agreement was made, they should have specific performance of said contract, otherwise they will sustain a large loss and irreparable injury."

So averring, the plaintiffs prayed that the defendant should be de-



creed to specifically perform the contract, a copy of which was set out in the bill, as follows:

"RICHARD B. OSBORNE, ESQ., E.C.:

"DEAR SIR: I hold a judgment against the South Mountain R. R. Co. for \$25,000, with interest and costs, for work done in the construction of said railroad, upon which has been sold the corporate franchises and assets of said corporation, purchased by my attorney, and are now held by me. This judgment I agree to transfer, with the corporate rights, franchises and property acquired by me under said sale, unto you, in trust for such parties as you represent, who will re-organize a railroad company under the corporate franchises of said South Mountain R. R. Co., and for which I agree to accept from said re-organized corporation, securities thereof for my judgment, interest, costs, franchises, rights and property, and a contract for the construction of a part of said road; and in furtherance thereof I agree to aid and co-operate in such re-organization with your parties, assign said judgment by marking the same to their use, or to the use of such person or persons or corporation as they may designate for that purpose, and in general to do all things and sign all such papers as may be necessary to carry the full import of this paper and re-organization of such corporation into full force and effect.

"Yours respectfully,

"JAMES MARCH,

"June 28, 1888.

Per Attorney."

"Signed by J. P. S. Gobin for James March, in my presence, by his direction.

RICHARD B. OSBORNE."

"June 28, 1888: I accept on behalf of the parties whom I represent the terms of the foregoing, and agree for them to carry out the same into force and effect.

RICH'D B. OSBORNE."

"This witnesseth that the foregoing writing was obtained at the request of DeForrest Ballou and William Eccles, Jr., and that I now assign, transfer, and set over unto them, their heirs and assigns, the same, and all benefit and advantage to be derived therefrom. It being understood that I, Richard B. Osborne, am to retain the power as agent for the said James March, to see that the stipulated conditions with him herein contained are fully carried out.

"Witness my hand and seal, June 28, 1888.

"RICH'D B. OSBORNE. [SEAL.]"

"Witness: WM. P. MAHONEY."

To the foregoing bill, the defendant filed a general demurrer. Issue having been joined on the demurrer, the court, on June 24, 1889, filed an order overruling the demurrer, and directing the defendant to answer,

all questions to remain open until the facts were found by a Master. The defendant having answered, and issue being joined, the cause was referred to Mr. Charles M. Zerber, as examiner and Master, who on December 16, 1889, filed a report recommending a decree in favor of the plaintiffs against the defendant, as prayed for.

To the report of the Master the defendant filed exceptions, certain of which were as follows :

8. The Master erred in finding from the facts and the law that the plaintiffs were entitled to a specific performance of the assignment of the said judgment by the said defendant to the said plaintiffs and marking the same to their use.

11. The Master erred in finding that there was a mutuality of remedy by specific performance between the said plaintiffs and the said defendant, the one against the others, and vice versa.

Said exceptions having been overruled by the Master and filed with his report, on January 3, 1890, after argument thereof, the court, MCPHERSON, J., filed the following opinion :

When the demurrer was overruled, all questions were expressly left open for future determination, and it now becomes necessary, therefore, to decide whether the plaintiffs have made out a case which entitles them to equitable relief.

Subject to some exceptions, not now material, the general rule in equity is, that to entitle a party to a decree for specific performance the contract must be mutual. As was said in *Bodine v. Glading*, 21 Pa. 53 : "Both parties must, by the agreement, have a right to compel specific performance; otherwise, it would follow that the court would decree a specific performance when the party called upon to perform it might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet if advantageous to him he could not compel a performance." And in *Meason v. Kaine*, 63 Pa. 340, the court say : "One of the fundamental principles adopted by courts of equity in bills for specific performance is that there must be mutuality of remedy. Both parties must have a right to a decree." See, also, *Newell's App.*, 100 Pa. 518, where *Bodine v. Glading* is recognized as authority. Another rule upon this subject is thus stated in *Hammer v. McEldowney*, 46 Pa. 336 : "It is a settled rule in equity, that the specific performance of a contract will not be decreed, unless its terms are clear and capable of ascertainment from the instrument itself." To the same effect is *Backus's App.*, 58 Pa. 195 : "An agreement to be carried into specific performance ought to be certain, fair, and just in all its parts." We also refer to *Waterman on Specific Perf.*, Ch. III. and VI. Tested by these rules, the bill before us cannot be sustained, because the contract sought to be enforced is, in some ma-

terial parts, too vague and uncertain, and because, therefore, the remedy here is not mutual.

The contract is too vague and uncertain, because the consideration agreed to be given to March is not sufficiently determined. He agrees to accept from a corporation thereafter to be organized, "securities thereof for my judgment, interest, costs, franchises, rights and property, and a contract for the construction of a part of said road." But the contract does not inform us what securities are meant, whether bonds alone, or stock alone, or bonds and stocks together; or, in the latter event, what proportion of each. Neither do we know at what rate these securities are to be accepted, whether at par, at a premium, or at a discount; or, whatever be the rate, to what amount they are to be given. In reference to the construction contract, we have as little information. We do not even know between what points the South Mountain Railroad is to run; the length of the road which the defendant is to be allowed to build, and the situation of this section and the price he is to receive for the work are equally undetermined. It may very well be, that under the circumstances, the consideration could not have been more precisely specified. As to this we cannot speak; the fact certainly is, that such general terms are used that no definite conclusion upon this matter can possibly be reached. In other words, the contract is one which the defendant cannot specifically enforce.

The contract is too uncertain also, because of the doubt whether the plaintiffs ever will be in a situation to carry out its provisions. Assuming that the plaintiffs are personally bound to March, how can it be said with certainty, or even with sufficient probability, that the proposed corporation will be organized by them or in their interest? They desire to use March's judgment in order to sell the franchises of the road, expecting to buy them at the sheriff's sale, to recognize under existing legislation, and thus, and not otherwise, to be in a position to give March his securities and award him his construction contract. But suppose, as may readily happen, that other persons buy at the sheriff's sale and organize a corporation from which the plaintiffs are wholly excluded; how then could March compel specific performance by the plaintiffs, whatever his legal rights under the contract might be?

Assuming, however, that the proposed corporation is organized by the plaintiffs, or in their interest, and that the contract in question is held to bind the corporation as far as it now binds the plaintiffs, could March compel the company to deliver securities to him and award him a construction contract? Obviously, the uncertainty already referred to, as surrounding both these matters, would still exist, and would be fatal to his bill for this purpose against whomsoever it might be brought,

and he would be turned over to whatever legal rights he might be found to have.

Without further elaboration, it seems to follow that, if the considerations thus briefly indicated are well founded, the remedy by specific performance upon this contract is not mutual, and therefore that the bill must be dismissed. In this view of the case, it is unnecessary to discuss the other question suggested, and we intimate no opinion thereon. We simply decide, that because of the uncertainties above referred to and the consequent lack of mutuality in the remedy, this proceeding cannot be maintained.

The eighth and eleventh exceptions are sustained, and it is now decreed that the plaintiffs' bill be dismissed at their costs.

A decree having been entered dismissing the plaintiffs' bill, etc., the plaintiffs took this appeal, specifying that the court erred:

1, 2. In sustaining defendant's exceptions.

3, 4. In dismissing the bill and in refusing the relief prayed for.

*Mr. Furman Sheppard* (with him *Mr. A. W. Ehrgood* and *Mr. DeForrest Ballou*) for the appellants.

*Mr. W. M. Derr* (with him *Mr. Grant Weidman*) for the appellee.

PER CURIAM: This decree is affirmed upon the opinion of the learned judge of the court below.

Decree affirmed, and the appeal dismissed, at the costs of the appellants.

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WATTS v. KELLAR ET AL.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY 1, 1893.

[*Reported in 56 Federal Reporter 1.*]

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

In equity. Bill by Edmond Hanney Watts against James M. Kellar and E. W. Rector for the recovery of money, the declaration and enforcement of a lien on real estate, and for general relief. The court below sustained a demurrer to the bill, and dismissed the cause, from which decree complainant appeals. Reversed.

Statement by CALDWELL, Circuit Judge:

This suit grows out of the following contract:

"HOT SPRINGS, Ark., November 17, 1890.

"We, the undersigned, James M. Kellar and E. W. Rector, of the

city of Hot Springs, State of Arkansas, agree with Edmond Hanney Watts, of London, England, that if the said Edmond Hanney Watts will purchase of Albert B. Gaines, of said city of Hot Springs, lot twelve (12) in block one hundred and twenty-six (126) of said city for the sum of seven thousand dollars, we, the said James M. Kellar and E. W. Rector, at the expiration of one year from the date hereof, will buy from the said Edmond Hanney Watts said lot, if he sees proper at that time to sell it, and pay him the sum of seven thousand seven hundred dollars therefor, less the amount received for rent or other account from said property by said Watts during his ownership of the same. And it is understood and agreed that if we purchase said property we hereby bind ourselves to accept such title of the same as the said Watts gets from the said Gaines. Witness our hands the day and year above written.

“JAMES M. KELLAR.

“E. W. RECTOR.”

The bill alleges “that the spirit and intent of said contract was as follows: The defendants and others being extremely anxious at the time to control the title of the lot therein described for business purposes, and, knowing that your orator had the present means of accomplishing that object, induced him to purchase the said lot for their use and benefit, with the distinct understanding and agreement on their part that if, at the end of one year, your orator should request the same, they would pay him therefor in cash the amount so advanced, with interest at the rate of ten per cent. per annum from date until paid. It was well understood that the transaction was in the nature of a loan by your orator to defendants, with a reservation that your orator should be authorized to retain the property if he should so elect. That, in order to induce your orator to make the necessary advance, the defendants represented to your orator that in this way he would be sure to receive his interest for his money, which was all he desired, with the additional advantage of holding the property if he thought it best. Your orator further states that at the end of the year stipulated in said contract he notified the defendants that he should require the re-payment of said money in accordance with its terms, and tendered to them a deed therefor, conveying to them the said lot, duly executed in accordance with law. Defendants have failed and refused to comply with the terms of said contract by accepting said deed, or by the payment of said sum of money justly due your orator. Your orator is advised that he is entitled to a judgment against the defendants for the amount of the said seven thousand dollars (\$7,000) so advanced by him, with interest at the rate of ten per cent. per annum from the date of said contract till

date, and that to secure the payment of the amount he has a lien in and upon said lot number twelve, in said block numbered one hundred and twenty-six, and that your orator holds said lot in trust for the benefit of the defendants. And your orator now brings into court said deed from himself and wife, conveying to the defendants the title to said lot number twelve, in block number one hundred and twenty-six, derived from said Gaines under the terms and conditions of said contract, which was fully and in good faith complied with at the time by your orator. He prays that a decree be entered in his favor and against the defendants in the sum of seven thousand dollars, with interest at the rate of ten per cent. per annum from the 17th day of November, 1890; that to secure the said amount a lien be established and declared in his favor in and upon the said lot number twelve, in said block number one hundred and twenty-six, in said city of Hot Springs, and, unless the same be paid within a short time, to be fixed by the court, may the equity of redemption of the defendants in said lot be barred and foreclosed, and may the same be sold under proper orders of this honorable court, and the proceeds of such sale be applied to the satisfaction, as near as may be, of this decree, and the surplus, if any, for the benefit of the defendants; and to this end may said decree divest the title of said lot out of your orator and vest the same in the defendants. And your orator prays further for costs and general relief."

The defendants interposed a demurrer to the bill upon the following grounds: "First, that the said complainant hath not in and for his said bill made or stated such cause or such a case as entitles him in a court of equity to any relief; second, that the said bill doth not contain any matter of equity wherein this court can ground any decree, or give to the plaintiff any relief against these defendants, or either of them; third, that the allegations of said bill show that plaintiff hath a complete remedy in a court of law for alleged wrong done him, as shown by the allegations of his said bill; fourth, that the allegations in said bill of complaint show that if the plaintiff hath any cause of complaint against these defendants, or either of them, it is in a court of law for a breach of contract, sounding in damages for such breach." The court below sustained the demurrer, and dismissed the bill, and the plaintiff brought this appeal.

*C. S. Collins (F. T. Vaughan, on the brief) for appellant.*

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge (after stating the facts). Upon the allegations of the bill the contract between the parties from its inception was, in equity, a mortgage. It is expressly averred in the bill that "it was well understood that the transaction was in the nature of a loan by your orator to defendants, with a reservation that your orator should be

authorized to retain the property if he should so elect.' The necessary implication from the averments of the bill is that the plaintiff loaned the defendants \$7,000, and that to secure the payment of the same the defendants caused the lot in question to be conveyed to the complainant by a deed absolute in form, upon the understanding and agreement that at the expiration of one year the complainant should have the option to retain the title to the lot in satisfaction of the loan, or to demand payment of the sum loaned, with ten per cent. interest thereon, and, upon the payment thereof, convey to the defendants the same title to the lot which he had received. This agreement, in equity, constituted a mortgage.<sup>1</sup> The demurrer admits the truth of the averments in the bill. In this aspect of the case the bill may be regarded as one to foreclose a mortgage, and is sufficient for that purpose. A foreclosure was the only remedy open to the complainant to bar the defendants' equity of redemption in the property. Upon the facts stated the complainant's election at the expiration of the year to retain the property in satisfaction of the loan would not have operated to bar the defendants' equity of redemption.<sup>2</sup> This equity of redemption would have remained, and could have been enforced, until barred by laches or the Statute of Limitations.

If we lay out of sight the allegations of the bill which show the transaction was a loan of money, secured by a conveyance absolute in form, but in equity a mortgage, and determine the rights of the parties by the letter of the written contract, the defendants are not benefited. By the terms of this contract the defendants, in consideration that the plaintiff would pay \$7,000 for the lot, agreed to pay the plaintiff \$7,700 therefor at the expiration of one year from the date of plaintiff's purchase, if the plaintiff should then elect to sell the lot at that price. The consideration for this agreement is expressed in the contract, and is sufficient. An option to sell land is as valid as an option to buy. When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed, and pay the price. Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them. A suit for that purpose is, of course, subject to the general rule that the specific enforcement of contracts for the purchase or sale of land is not a matter of course, but rests in the discretion of

<sup>1</sup> Pom. Eq. Jur. §§ 1192-1196; *Russell v. Southard*, 12 How. 139.

<sup>2</sup> *Russell v. Southard*, *supra*.

the court, in view of all the circumstances. But the rules by which the court will be guided, in a suit like this, in decreeing or refusing a specific enforcement are the same that they are in other suits for the specific enforcement of contracts relating to land. Cases may be found which hold that such contracts will not be specifically enforced, because the right to a specific enforcement is not mutual. The want of mutuality of right to a specific performance of a contract, which sometimes precludes its enforcement in equity, has no application to an option contract of the character we are considering. The purchaser of an option to buy or sell land pays for the privilege of his election. It is that very privilege which the other party to the contract sells. In the absence of an agreement to the contrary, each party to a contract to buy or sell land may have it specifically enforced against the other,<sup>1</sup> but the very purpose of an optional contract of this nature is to extinguish this mutuality of right, and vest in one of the parties the privilege of determining whether the contract shall be vitalized and enforced. An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a lawsuit for an uncertain measure of damages as of any value. The modern, and we think the sound, doctrine is that when such contracts are free from fraud, and are made upon a sufficient consideration, they impose upon the makers an obligation to perform them specifically, which equity will enforce.<sup>2</sup> In the case last cited the Supreme Court of the United States enforced, quite as a matter of course, the specific performance of a seller's option which was in these terms :

"It is further understood and agreed that, if said executors desire it, said Brown shall, at the expiration of five years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines at \$25,000. . . ."

The opinion of the court was delivered by Chief Justice Waite, and discusses at length the sufficiency of the executors' notice of their election to sell, and the question whether the tender of the deed was timely, but contains no intimation that the want of mutuality in the contract

<sup>1</sup> *Raymond v. Land & Water Co.*, 4 C. C. A. 89, 10 U. S. App. 601, 53 Fed. Rep. 883.

<sup>2</sup> *Pom. Cont.* §§ 167-169, and notes; *Willard v. Tayloe*, 8 Wall. 557; *Brown v. Slee*, 103 U. S. 828.



was an impediment to its specific enforcement. The want of mutuality was too obvious to be overlooked, and the fact that it was not adverted to shows that, in the judgment of that court, the right to enforce the specific performance of such a contract was too well settled to require or justify any observation. Viewed in any light, the bill presented a case of equitable cognizance, and it was error to dismiss it.

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings therein not inconsistent with this opinion.

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JOHN V. TEN EYCK v. GEORGE M. MANNING.

IN THE COURT OF CHANCERY OF NEW JERSEY, OCTOBER TERM,  
1893.

[*Reported in 52 New Jersey Equity Reports 47.*]

ON final hearing on bill and answer and proofs taken orally.

*Mr. Woodbridge Strong* for complainant.

*Mr. George C. Ludlow* for defendant.

VAN FLEET, V.C. This is a suit for specific performance. The material facts may be stated in a few words. On the 12th day of December, 1890, the parties made a written contract, by which the complainant agreed to well and sufficiently convey to the defendant, by deed of warranty, free from all incumbrance except a mortgage debt of \$4,000, certain lands in Middlesex County; and the defendant agreed that he would, as the consideration for the complainant's conveyance, well and sufficiently convey to the complainant, free from all incumbrance except a mortgage debt of \$3,500, a farm in Somerset County, and also assign and deliver certain goods and chattels. The deeds were to be interchanged at a short day in the future. The lands which the complainant agreed to convey are described in the contract as all the lands conveyed to the complainant by deed of Louis G. Knowles, on March 15, 1884, recorded in a book and on a page designated. No lands were conveyed by Mr. Knowles to the complainant. The deed referred to, by way of description, was not made to the complainant, but to his wife. At the time the contract was made she was the owner of the lands which the complainant agreed to convey, and is still their owner. She was not a party to the contract, and is not, of course, bound by it. She is not a party to this suit. The defendant refused to perform, and thereupon the complainant brought this suit. In addition to a decree for specific performance, he asks that the contract may be so reformed that it shall describe

the lands which he agreed to convey as lands conveyed by Mr. Knowles to his wife. The case will be considered as though the contract had been originally drawn so as to impose upon the complainant an obligation to well and sufficiently convey, by deed of warranty, lands belonging to his wife and not himself.

Of the many defenses set up only one need be considered, and that is that the contract which the complainant asks to have enforced does not give to the defendant a right to the same remedy against the complainant which the complainant seeks against the defendant; in other words, that this court could not, on the defendant's application, compel the complainant to specifically perform the contract. The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require. The enforcement or denial of this remedy is regulated by certain well-established principles, one of which is that it will not be granted, as a general rule, in cases where mutuality of obligation and remedy does not exist; or stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance.<sup>1</sup>

While the forms in which this principle has been expressed are somewhat variant, they are identical in substance. Sir James Wigram, Vice-Chancellor, in *Waring v. Manchester Railway Co.*,<sup>2</sup> stated it in this form: "If that which the defendant is entitled to be something which the court cannot give him, it certainly has been the generally-understood rule that that is a case in which the court will not interfere." And in *Van Doren v. Robinson*<sup>3</sup> Chancellor Green said: "The general principle is that where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other." In *Beard v. Linthicum*,<sup>4</sup> Chancellor Johnson held that if one of the parties is not bound, or is not able to perform his part of the contract, he cannot call upon the court to compel specific performance by the opposite party; and in the subsequent case of *Duval v. Myers*<sup>5</sup> the same judge said in substance that the right to the specific execution of a contract depends upon whether the agreement is obligatory upon both parties, so that upon the application of either against the other the court can compel a specific performance. And Chief-Justice Beasley, in pronouncing the opinion of the Court of Errors and Appeals in *Richards v. Green*,<sup>6</sup> said: "In every case that I can find where specific performance has

<sup>1</sup> Fry. Spec. Perf. § 286; Waterm. Spec. Perf. § 196.    <sup>2</sup> 7 Hare 481, 492.

<sup>3</sup> 1 C. E. Gr. 256, 259.

<sup>4</sup> 1 Md. Ch. 345, 350.

<sup>5</sup> 2 Md. Ch. 401, 405.

<sup>6</sup> 8 C. E. Gr. 536, 537.

been ordered a mutual remedy existed upon the contract at the time of rendering the decree. It seems to me that the rule is universal to this extent, that equity will not direct a performance of the terms of an agreement by the one party when, at the time of such order, the other party is at liberty to reject the obligation of such agreement." The reason on which this principle rests was stated by Lord Redesdale in *Lawrenson v. Butler*<sup>1</sup> in this wise: "Were it otherwise it would follow that the court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet if advantageous to him he could not compel a performance. This is not equity, as it seems to me."

This, like many other general rules, is subject to exceptions. A covenant to renew a lease will be enforced against the lessor, though the lessee is under no reciprocal obligation to accept an additional term.<sup>2</sup> And so, too, where an optional or unilateral contract to convey rests on a sufficient consideration to make it obligatory the contract may be specifically enforced. As, for example, if a lessor, by the lease, agrees to convey the demised premises to the lessee at a future time, at a fixed price, without requiring the lessee to enter into a reciprocal obligation to purchase, a specific performance of the contract may be ordered against the lessor, the presumption in such a case being that the lessee agreed to pay a larger sum as rent, in consideration of the optional right to purchase, than he otherwise would have agreed to pay.<sup>3</sup> But, except in these cases and others resting on a similar foundation, the principle, I think, must be considered to be firmly established, by a multitude of adjudications, that specific performance will not be decreed in any case where reciprocity of remedy does not exist.

In my judgment, the statement of this principle decides this case. No argument is required. As is manifest, no court could compel the complainant, on the application of the defendant, to specifically perform the contract. He does not own the lands which he agreed to convey, and cannot, therefore, convey them. A decree directing him to do so would be mere empty words without the least coercive force. Even if such a decree should be made at his instance he could not obey it. If it was performed at all, his wife would have to do the essential act, namely, convey the land, and she would have to do it as a favor and without being entitled, by force of the contract, to receive anything in return for her land. A decree ordering the com-

<sup>1</sup> 1 Sch. & L. 13, 18.

<sup>2</sup> *Van Doren v. Robinson*, 1 C. E. Gr. 256, 259.

<sup>3</sup> *Hawralty v. Warren*, 3 C. E. Gr. 124, 126.

plainant to specifically perform this contract would be just as impotent to accomplish its purpose as a like decree against an infant. No such decree can be made against an infant, because he is incompetent to make a valid contract to convey. If he signs such a contract and an attempt is made to enforce it by suit by his next friend, the suit will be dismissed at the cost of the next friend.<sup>1</sup> The Chief-Justice cited this case in *Richards v. Green*, *supra*, as furnishing a pointed illustration of the way in which the doctrine, that a court of equity will never order the specific performance of an agreement in favor of a complainant whom it cannot compel to perform his part of the bargain, was applied.

The precise question raised here has already been decided. *Luse v. Deitz*<sup>2</sup> is in all material respects precisely like the case under consideration. There, as here, a husband agreed to exchange land belonging to his wife for land of the defendant; and there, as here, the defendant, on tender of a deed executed by the husband and the wife, refused to make a conveyance to the husband, and the husband then brought an action for specific performance. Relief was denied on the ground that the right to the remedy sought was not reciprocal. The court, after declaring that the want of mutuality in remedy constituted an insurmountable obstacle in the way of decreeing specific performance, added: "The fact that Luse tendered to Deitz a deed in due form, executed by himself and his wife, does not affect the case. The objection still exists that Deitz could not have enforced performance against Luse if Luse and his wife had been unwilling to convey. If a party, who is not bound to specifically perform, may, by tendering performance, enforce a specific performance against the other party, he may, at his option, enforce the specific performance of any contract, though not bound to like performance himself."

I think it is thus made plain that the complainant must be denied relief in conformity to both principle and precedent. His bill must be dismissed, but I do not think that costs should be awarded against him. The defendant interposed many defenses, some of which are without either substance or merit. The defendant's course in this respect has greatly increased the cost of the litigation to the complainant. In view of this and other circumstances, I think the dismissal should be ordered without costs to either party against the other.

<sup>1</sup> *Flight v. Bolland*, 4 Russ. 298.

<sup>2</sup> 46 Iowa 205.

## SECTION IV.—DEFENSES (CONTINUED).

### (d) *Concealment, Fraud, Misrepresentation.*

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#### SHIRLEY v. STRATTON.

IN CHANCERY, BEFORE LORD THURLOW, C., EASTER TERM, 1785.

[*Reported in 1 Brown, Chancery, 440.*]

THIS was a bill for the specific performance of an agreement for the purchase of an estate in marsh land at Barking, in Essex, and for payment of a sum of £1,000, the purchase-money. The defense was, that the estate was represented to the defendant as clearing a neat value of £90 per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an out-going of £50 per annum. And it appearing upon evidence that there had been an industrious concealment of the circumstance of the wall during the treaty,

LORD CHANCELLOR dismissed the bill, but without costs.

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#### BOWLES v. ROUND.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C.; JULY 19, 1800.

[*Reported in 5 Vesey 508.*]

THE object of the bill was to obtain a specific performance of an agreement entered into by the defendant to purchase a meadow, called Burnett's Meadow, near Clewer, which was sold by auction to the defendant for £950.

The principal objections made by the defendant were, first, that the premises were described as a meadow, consisting of fifteen acres, without any notice of a way round and a foot-path across it; secondly, that the lot was raised to an extravagant price by puffing.

The *Attorney-General* and *Mr. Thomson*, for the plaintiff, pressed

for a decree with costs, the defendant having raised several objections, none of which he could sustain. The way round the field was stated by the answer to be a public road ; but upon the evidence it appeared to be only a foot-path, and the answer stated that the defendant was owner of a house and ground adjoining.

Upon the other objection, they said the person bidding for the plaintiff was declared by the auctioneer. It was put up at £900. The defendant bid £910 ; the person employed for the plaintiff bid £920 ; and it was knocked down to the defendant at £950.

The *Solicitor-General*, for the defendant, observed upon the variance from the description, and the disadvantage arising from this way, which by length of time had become very wide.

LORD CHANCELLOR. Certainly the meadow is very much the worse for a road going through it ; but I cannot help the carelessness of the purchaser, who does not choose to inquire. It is not a latent defect.

Decree according to the prayer of the bill with costs.

### ELLARD *v.* LORD LLANDAFF.

IN CHANCERY, IRELAND, BEFORE LORD MANNERS, C., DECEMBER 19, 20, 1809 ; JANUARY 26, 1810.

[*Reported in 1 Ball and Beatty 241.*]

JAMES ELLARD, the plaintiff, having, on the death of his father in 1806, become entitled to a leasehold interest, granted for three lives, of which his uncle Thomas Ellard, then about seventy, was the survivor, subject to a yearly rent of £84, in the month of October in the same year, applied to the defendant Lord Llandaff, in whom the reversion was vested, and who, under a settlement executed on his marriage, was tenant for life, with a power of granting leases for three lives, reserving the highest rent, with the reversion in fee ; stating he was about to conclude a treaty of marriage, and being anxious to secure a provision for his intended wife and family, proposed for a renewal of the lease for three lives, of which his intended wife was to be one, at an annual rental of £600. Lord Llandaff in reply stated, he had no objection to treat for a renewal, but until he had examined the lands, and had a communication on the subject with Mr. Lanigan, his agent, he would enter into no treaty. On the proposal being laid before Lanigan by Lord Llandaff, he was of opinion that on the lease, which was held for the life of Thomas Ellard (with whom he was intimate, and whom he stated he considered likely to live six or seven years), being surren-

dered, and which he looked on as the ground-work of the treaty, three guineas per acre would be a fair rent for the lands. On the 7th of November, the plaintiff wrote to Lord Llandaff in a very urgent manner, to conclude the treaty without delay, and requesting him and Lanigan to meet him the following day on the lands. Lanigan the same day answered the letter, mentioning Lord Llandaff would meet him as desired; accordingly, on the 8th November, Lord Llandaff, accompanied by Lanigan, met the plaintiff on the lands, which were twenty miles distant from his residence, and the agreement being concluded at three guineas per acre, amounting to a rent of £785, Lord Llandaff and Lanigan, at the request of the plaintiff, repaired to a house in the neighborhood, where the proposal was reduced to writing by the plaintiff, and accepted by Lord Llandaff, and the plaintiff surrendered the old lease, which he had brought with him; on the same day, between four and five in the afternoon, Thomas Ellard, the *cestui que vie* in the old lease, died.

It appeared, that when the treaty commenced, Thomas Ellard was in a good state of health, was in the habit of attending the fairs in the neighborhood, and frequently rode twenty miles a day. About the beginning of November he was seized with a stranguary, and three days before his death was attended by a physician, who recommended a surgical operation to be performed, as the only means of saving his life, and which it was doubted he would be able to survive. The house of the plaintiff was distant about two hundred yards from his uncle's; he was apprised of his state of health, that the operation was to be performed, and that no hopes were entertained of his recovery; and immediately, on receiving this information, he wrote the letter to Lord Llandaff, which Lanigan answered.

Creswell, the surgeon, stated that on the 7th of November he was called in to attend Thomas Ellard; saw him about twelve o'clock; he was then in a stupor, in which he continued till his death; the plaintiff was in the room with him at the time; when they came out the plaintiff inquired what he thought of his uncle? He replied, he was in such a state he could not recover; the plaintiff observed, that was the opinion of the physician. Shortly afterwards the plaintiff despatched a messenger with a letter. Deponent dined and slept that night at the house of the plaintiff, who at an early hour in the morning left the house, and did not see deponent until some time after, when he apologized for having left the house before deponent had risen, as he wished to see Lord Llandaff before the report of his uncle's state of health had reached him, in order to get a renewal of a lease; and, on deponent inquiring if he had succeeded, replied he had to the utmost of his wishes, and had made a pretty thing of it since last he saw him.

On the 26th of November the marriage of the plaintiff took place, and it appeared that the renewal of the lease, and the life of the intended wife being inserted in it, were the instruments to the marriage.

Lord Llandaff, on discovering the state of health of Thomas Ellard, at the time the agreement was concluded, and that the plaintiff was apprised of it, refused to abide by the agreement, and brought an ejectment to recover the lands, part of which the plaintiff had immediately demised at a considerable profit.

The plaintiff, by the present bill, sought to restrain the proceedings in ejectment, and to perform a specific performance of the agreement.

The *Attorney-General*, *Sergeant Ball*, *Sergeant McMahon*, and *Mr. Franks* for the plaintiff.

*Mr. Plunket*, *Mr. Grady*, *Mr. Goold*, and *Mr. Parsons* for the defendant.

The LORD CHANCELLOR. This is a bill for the specific performance of a contract, entered into and signed by both the plaintiff and the defendant. That such an agreement was concluded, that all the terms agreed on are contained in it, and that it was reduced to writing, and signed by both parties, is not disputed; but Lord Llandaff resists the performance of it on two grounds. First, he insists that the plaintiff is not entitled to relief here, from having suppressed the state of health of Thomas Ellard, the then surviving life in the old lease, and which he alleges formed part of the consideration for granting the new lease. Secondly, that as this was a contract for a lease for three lives, and that he, Lord Llandaff, was, under the settlement executed on his marriage, strict tenant for life with a limited leasing power, this court ought not to enforce it; and although he may be personally liable to answer in damages, in an action at law for not performing the contract, this court will not lend its assistance to enforce what would be a fraud on the power, and on those entitled to estates in remainder.

In respect to the first ground relied on, the circumstances are these: On the 23d October, 1806, the treaty first commenced; Thomas Ellard was not then in a dangerous state of health, but was able to be out on horseback, though certainly an old man. On the 8th of November following the treaty was concluded, and Thomas was then *in extremis*, which was known to the plaintiff and not to the defendant. Then the question is, was that a material fact in the contract? It is manifest Lanigan advised Lord Llandaff to accept of three guineas per acre, taking into consideration the surrender of the lease, then depending on the life of Thomas Ellard; Lord Llandaff therefore calculated on that as part of the consideration, and to him it appeared a material fact. This was known to the plaintiff, and unless Creswell be perjured, it was equally material to the plaintiff. Creswell states, that on the morning



of the 8th of November, when Thomas's life was despaired of, the plaintiff left the house at an early hour, and when he next met him he apologized for not seeing him before his departure, assigning as the reason that he was obliged to see Lord Llandaff before the news of his uncle's illness reached him, that he had concluded the business, and would make a pretty thing of it. Is not this quite decisive to show that in the opinion of the plaintiff this was a material fact? But, it is said, the plaintiff denies this; supposing he were to deny it in answer to a cross-bill, who is best entitled to credit, Creswell, who has no interest in the transaction, or the plaintiff? Can it be for a moment contended that a life of this description was of no value, and can I pay any attention to the plaintiff when he asserts it? Surely it speaks for itself, and Creswell proves the anxiety of the plaintiff to have the business concluded before Lord Llandaff should hear of it.

On the part of the plaintiff it has been contended that unless there be a latent defect, the principle that governs contracts of this description is *caveat emptor*; and the case of *Oldfield v. Round*<sup>1</sup> is referred to, where it is laid down that the negligence or carelessness of a purchaser is no ground for not executing an agreement. I remember the case perfectly well, and I believe the bar was not very well satisfied with the decision; however, the principle upon which that case was determined does not apply to the present; the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it. Had he used ordinary caution, he would have discovered the easement. Here Lord Llandaff had no reason to suspect that any material change in the health of T. Ellard, between the 23d of October and the 8th of November, had happened; the plaintiff knew the fact, and must know that it was a material fact in the transaction, so as to vary the contract, as treated for in the October preceding. The principles on which dealings of this description are to be carried on are now well understood; this is too sharp a practice to be countenanced here. The plaintiff must not be allowed to deal on a lease, as a good and subsisting one, when at the time he was conscious it was worth nothing, and that the other party was ignorant of that fact. The other authorities referred to were cases where the difference was in the description of the estate, and there was no suppression to vitiate the contract.

It is observed by Lord Hardwicke in *Burton v. Lyster*<sup>2</sup> "that nothing is more established in this court than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance." All the material facts must be known to both parties;

<sup>1</sup> 5 Ves. 508.

<sup>2</sup> 3 Atk. 383.

and is it not against all principles of equity, that one party, knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance? Thus far I have considered the case on the first ground of defense relied on by Lord Llandaff; and if he were owner of the fee, and enabled to grant a lease on the terms agreed on, I should feel no hesitation in dismissing this bill.

But it is in the second place contended, that the defendant being, under his marriage settlement, tenant for life with a power of leasing at the highest rent, to grant a lease, on the terms agreed upon, would be a fraud on the power, as the surrender of the old lease constituted part of the consideration, which must therefore reduce the rent. Now, that the surrender did form part of the consideration has, I think, been fully established; and in such a case, where a party cannot grant a lease, in pursuance of the terms agreed on, which shall bind the inheritance, the court will not decree a specific performance, by directing an invalid lease to be executed, which might encumber and embarrass those entitled to estates in remainder.

On either ground, therefore, the plaintiff is not, in my opinion, entitled to have this agreement specifically executed, and I shall leave him to any remedy he may have at law. So far as the bill seeks a specific performance it must be dismissed. Then remains the question of costs: I could wish much it were in my power to dismiss the bill without costs, but I think the suppression of this fact must subject the plaintiff to the costs.

The bill dismissed with costs.

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### HESSE v. BRIANT.

IN CHANCERY, BEFORE LORD CRANWORTH, C., DECEMBER 6, 8, 1856.

[*Reported in 6 De Gex, Macnaghten and Gordon 623.*]

THE question in this case was whether the plaintiff, the Rev. James Legrew Hesse, was entitled to enforce against the defendant, Frederick Caleb Briant, the specific performance of an agreement by the latter to sell certain premises forming the subject of the contract. Vice-Chancellor Stuart, before whom the case came in June, 1856, made a decree in the plaintiff's favor, and the defendant now appealed. The following are the material facts of the case:

The plaintiff and defendant were both clients of the same solicitor, Mr. Mellersh; and the statement in the bill was, that on the 6th of June, 1853, the defendant gave Mr. Mellersh authority to sell to the

plaintiff the premises in question, and that under this authority Mr. Mellersh on the 10th of June, 1853, entered into the agreement with the plaintiff which it was the object of the suit to enforce. The fact that such an authority to sell was given was not denied by the defendant, but he alleged that at the time of entering into the agreement he was completely under the control of Mr. Mellersh, and he insisted that the position in which Mr. Mellersh stood towards both parties vitiated the contract, and that under the circumstances of the case it could not be enforced. There was a great deal of conflicting evidence, much of it being directed to the question whether there had not been fraud and misconduct on the part of Mr. Mellersh in reference to the contract generally. The mode, however, in which the Lord Chancellor disposed of the case renders it necessary, in addition to the other circumstances alluded to by his Lordship, to refer only to the principal point; namely, the circumstances which led to and attended the giving of the authority by the defendant, and in consequence of which the contract was formally entered into. As to these the representations made by the plaintiff and defendant respectively were in substance as follows:

The plaintiff alleged that on the morning of the 6th of June, 1853, the defendant came to the office of Mr. Mellersh at Godalming, when a long consultation took place between him and Mr. Mellersh on the subject of the propriety of selling to the plaintiff a certain part of the property about which there had been some negotiation between the plaintiff and the defendant as far back as the year 1848, when an estimate of the rental and value had been made and reduced into writing by Mr. Johnson, the managing clerk of Mr. Mellersh; that the defendant, after referring to the estimate of 1848, and maturely considering the subject, came to the determination in the presence of Mr. Mellersh and Mr. Johnson to sell that part of the property for £600, and accordingly Mr. Johnson, under the instructions of the defendant, wrote out that part of the authority which related thereto; that when this had been done, the defendant and Mr. Mellersh directed their attention to another part of the property, and it was suggested (but whether in the first instance by Mr. Mellersh, or the defendant, the plaintiff was unable to set forth) and ultimately determined upon by the defendant that the offer of sale of the first-mentioned part of the property to the plaintiff should be coupled with an offer to sell him the other part for £500; that at about this stage of the interview the plaintiff called at Mr. Mellersh's office upon other business, and when he was announced to Mr. Mellersh the defendant and Mr. Johnson retired into another room before the plaintiff entered Mr. Mellersh's room, and that Mr. Mellersh on the

plaintiff entering his room offered both properties to him for £1,125; that the plaintiff upon the price being mentioned was rather surprised at its amount, but said he would consider of it, and as he was going on to Guilford would return in the evening and give Mr. Mellersh an answer, and the plaintiff then left the office; that at this time the plaintiff did not know that the defendant was with Mr. Johnson in another room; that immediately after the plaintiff had left, Mr. Mellersh communicated to the defendant what had taken place between himself and the plaintiff, whereupon Mr. Johnson, acting under the instructions of the defendant, added to the authority that part which related to the second portion of the property, and the defendant then signed the authority, but particularly requested that it should not be known or mentioned; that in the evening the plaintiff returned to the office of Mr. Mellersh, and agreed with Mr. Mellersh to give the sum asked by him, namely, £1,125.

The statement of the defendant in reference to the same matter was, that he was at Mr. Mellersh's office on the 6th of June, 1853, and that on that occasion Mr. Mellersh advised and recommended him to sell the property in question, but that he did not state that the plaintiff was desirous of purchasing, though he the defendant was aware from a previous conversation that the plaintiff wished to be a purchaser; that he the defendant did not see the plaintiff on the 6th of June, though he had since been informed that the plaintiff was at Mr. Mellersh's house while he, the defendant, was there; that in consequence of the advice and recommendation of Mr. Mellersh, an authority was prepared which he, the defendant, signed and left with Mr. Mellersh; that he did not at the time of signing the authority know or suspect that Mr. Mellersh was the solicitor of the plaintiff; that Mr. Mellersh suppressed and kept secret from him until the 7th of October, 1854, the contract entered into with the plaintiff; that Mr. Mellersh did not on the 6th of June, 1853, communicate to him anything that had taken place between him, Mr. Mellersh, and the plaintiff, and did not tell him or lead him to believe that he had had an interview with the plaintiff on that day, or that he was acting or in any wise authorized to act on behalf of the plaintiff; that he, the defendant, did not give instructions for the preparation of the authority, and that any instructions that were given were given by Mr. Mellersh; that he did not request that the documents signed by him should not be known or mentioned, but that Mr. Mellersh advised him not to speak of what he had done.

It may be here mentioned that the Vice-Chancellor, in making the decree appealed from, expressed his opinion that the evidence as to unfairness amounted to little or nothing that seemed important to His

Honor's mind, and as to the rule, which it was said would not permit a person in a confidential relation to abuse it by acting on behalf of both parties, His Honor was of opinion that he could only consider what was done by the plaintiff with regard to the contract as done by himself on his own judgment, that there were none of the circumstances to introduce into the transaction the confidential relation in the matter of the contract, that it was the plaintiff's contract influenced only by his own judgment and not influenced at all by Mr. Mellersh. His Honor then added, "If there had been upon either part of the case even a doubtful case as to the fairness of the transaction, or if the case had been one in which there was a reasonable color for treating Mr. Mellersh as acting on behalf of Mr. Hesse in the matter of the contract, the jurisdiction in specific performance being a discretionary one, it would, I think, have been the duty of the court to have refused its assistance to the performance of this contract, and to have left the plaintiff and the defendant reciprocally to any remedies they might have at law; but in my opinion the case is one in which on both grounds the defense so entirely fails, that I cannot satisfy my mind that I should be justified in treating the contract as an invalid contract, or otherwise than as a binding contract so as to enforce it by the decree of the court."

*Mr. Bacon*, with whom was *Mr. H. Stevens*, for the plaintiff, supported the decree of the Vice-Chancellor.

*Mr. Malins*, with whom was *Mr. G. M. Giffard*, for the appellant.

THE LORD CHANCELLOR. The law applicable to cases of this nature has been well settled for upwards of half a century; the simple question is, what are the obligations imposed on a person who deals for his own benefit, or as the agent of another with the property of one to whom he stands in a fiduciary character? I quite agree with what fell on this subject from Lord Eldon in *Ex parte Bennett*, where, alluding to the facts of that case, he says: <sup>1</sup> "Upon the general rule both the solicitor and the commissioner have duties imposed upon them that prevent their buying for themselves, and if that is the general rule it follows of necessity that neither of them can be permitted to buy for a third person, for the court can with as little effect examine whether that was done by making an undue use of the information received in the course of their duty in the one case as in the other." The principle to be deduced from the decided cases is, that there must be entire good faith, and in the instance of a solicitor it is incumbent upon him to satisfy the court that he has done as much for his client as he would have done if the purchaser had been a third

<sup>1</sup> 10 Ves. 400.

person. I think this principle applies to almost all cases, and applying it to the one before me I do not come to the same conclusion as that arrived at by the Vice-Chancellor.

The first question is, was Mr. Mellersh acting as the solicitor for both parties? I think that he was, but if I had any doubt on the subject, it would be as to whether he was acting for Mr. Briant. It is quite clear that he was all along acting as the professional adviser of Mr. Hesse, who had consulted him on the matter of this purchase, as appears by the items in his bill of costs, which is in evidence. He must also be taken to have been acting for Mr. Briant. Such being the case, there was a necessity for the most perfect good faith and openness of dealing. Was there, however, this openness and good faith? In my opinion there was not. It appears that on Friday, the 3d of June, Mr. Mellersh had an interview with Mr. Briant; on the next day he wrote to Mr. Hesse, telling him that the property was for sale; and having previously appointed Mr. Briant to be with him on Monday, the 6th, he writes to Mr. Hesse and desires him to come on that day in order to treat. Now, I don't find that this was ever communicated to Mr. Briant, though it was very important to a man in the defendant's position to know who was likely to become the purchaser, as if he had known that Mr. Hesse was the person, he might have insisted upon his giving a higher price. If then that was not communicated, it would, in my opinion, upset the whole transaction, because any fact which ought to have been made known, and which was not communicated, would be enough for that purpose. The plaintiff came to Mr. Mellersh's office accordingly, and had an immediate offer of the property made to him, which he accepted. There is considerable complication in the evidence as to whether the defendant, who was at the office at the time, was made acquainted with this fact, and knew who was the purchaser. The more direct testimony is, that Mr. Hesse's name was not mentioned to Mr. Briant, and that Mr. Briant did not know that he was there. I think it very unlikely that any express authority had been then given by the defendant to sell to the plaintiff, judging from the language of the letter in which Mr. Mellersh subsequently communicated the fact of the sale to the defendant, and in which he does not mention the name of the purchaser.

The circumstances show conclusively to my mind that there was not that fair, open dealing between the parties which the relation in which they stood to each other demanded. Although, therefore, I do not lay it down that an agent cannot act for and bind opposing parties, yet it must appear that the principals were at arms' length in the transaction; and it would require a very strong case to make this

out where, as in the present instance, a vendor and purchaser are together in the same house, but the vendor is excluded from the room where the negotiation is going on, and the agent does not disclose to them both the whole nature of the dealing. Mr. Briant having intrusted to Mr. Mellersh the conduct of the sale, it seems to me quite impossible to sanction such a proceeding as that which took place. The case is not, in my opinion, one in which relief ought to have been granted, but one in which the bill ought to have been dismissed with costs.

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## COOK v. WAUGH.

IN CHANCERY, BEFORE SIR JOHN STUART, V.C., MAY 7, 8, 1860.

*[Reported in 2 Giffard 201.]*

PRIOR to the 18th of December, 1856, Messrs. Waugh were in treaty for a lease of a house, No. 2 Russell Place, Fitzroy Square, with the plaintiff, Robert Cook. A negotiation had been going on as to the repairs, which, it was ultimately agreed, should be done by the plaintiff according to a specification prepared by the defendants, on the understanding that they would take a lease. The specifications, *inter alia*, described certain "cracks" in the wall which were to be repaired, but contained no reference to general or substantial repairs.

On the 18th of December, 1856, the parties signed the following memorandum: Robert Cook agrees to let, and Edgar Achilles Waugh and Rufus Decimus Stephen Waugh agree to take, a lease of No. 2 Russell Place, Fitzroy Square, from Christmas, 1856, for seven years, at the clear yearly rent of £70, payable quarterly, such lease to contain the usual powers of re-entry, and all such covenants as are contained in the lease under which the said Robert Cook holds the same. The said Edgar A. Waugh and Rufus Decimus Waugh agree to execute a counterpart of the said lease, and to pay all rates and taxes, tenant's or landlord's, except the property tax. The rent to commence on the 1st of February, 1857.

There was considerable conflict in the evidence as to what took place on and after the signing of the agreement. E. A. Waugh, who was the active party in the arrangement, deposed that, at or before signing the agreement, he told the plaintiff he must put the house in "substantial repair"; and that he mentioned particularly the state of the walls, and observed that the plaintiff must have them put right. That the plaintiff thereupon remarked, that the cracks were of no importance, and only required filling up.

The said E. A. Waugh deposed that he signed the agreement on the faith of this representation.

At the time the repairs were being done, the district surveyor called, when E. A. Waugh happened to be in the house, and went with him into the drawing-room, which was then in process of being papered. The district surveyor thereon remarked, that it was a pity to paper the walls, as they were unsafe, and eighteen inches out of the perpendicular, and required underpinning. The defendants alleged, that in consequence of this opinion of the district surveyor, they called on the plaintiff, and told him of the surveyor's opinion. The plaintiff, in reply, assured them that the walls were quite safe, and had been thoroughly repaired and underpinned about three years before. The defendants thereon insisted on having the foundations examined, which, as they alleged, the plaintiff promised should be done, but which he denied having promised.

On the 4th of February, 1857, the defendants entered into possession of the house, and paid the plaintiff for extra repairs, which he had done at their request, and paid the rent in pursuance of the agreement up to Christmas, 1857.

In March following, the district surveyor served a notice on the defendants, that the party wall between the houses Nos. 1 and 2 should be secured. This notice they returned to the surveyor, stating that they were tenants only, and that the landlord was the proper party to apply to. The surveyor then called on the plaintiff, and some steps were taken to underpin the house No. 2, but ultimately the district surveyor required the party-wall to be rebuilt, and gave information to the Commissioners of Police that the house was in a dangerous state.

On the 24th of March the defendants gave notice to the plaintiff that they intended to quit and give up possession of the house, stating also, that if the same was put into safe and tenantable repair, they would return to it when certified by their surveyor to that effect. That the rent due would be paid, but that they would expect compensation for inconvenience and expense incurred.

The plaintiff, in reply, stated that the defendants were bound to repair, and that he should insist on the contract.

On the 17th of April, 1858, the defendants wrote, stating, that from what the surveyor had said, they did not consider themselves safe, and must leave, and all relations existing between them and the plaintiff must cease. On the 23d they left the house, and sent the key to the plaintiff, which the plaintiff returned, saying he would not accept the surrender of the house. Shortly after the defendants left a notice was affixed to the door by the police that the house was in a dangerous condition. On the 30th of May the plaintiff was served with a notice under the Metro-



politan Building act, requiring certain repairs to be done, and ultimately an order of justices. The plaintiff thereupon was compelled to have the repairs done, for which he paid £169.

On the 7th of September the defendants sent to the plaintiff a check for the amount of rent up to the period of their leaving the house. The plaintiff was absent, but his servant gave a receipt, but the plaintiff immediately after returned the check.

On the 1st of October, 1858, the plaintiff sent a draft lease of the house to the defendants, together with an application for payment of three quarters' rent up to the preceding Michaelmas, and of a sum of £160 expended by him in repairs. He also called on them to paint and repair, etc., etc., the house when required.

The defendants returned the lease, repudiating all liability to the plaintiff, who thereupon filed this bill for specific performance of the agreement to take a lease and for the payment of the rent, and of the sum of £169.

There was adduced on the part of the defendants the evidence of a former tenant, who stated that he had pointed out the cracks in the wall to the plaintiff, who directed him to have them repaired, which was done superficially. That some time before he quitted the house he pointed out to the plaintiff the dangerous condition of the premises, and, in particular, that the joists were not more than half an inch in the party-wall.

*Mr. Bacon and Mr. Southgate for the plaintiff.*

*Mr. Malins and Mr. Langworthy.*

THE VICE-CHANCELLOR. The case of the defendants wholly fails. The agreement which the defendants entered into to take this house as the plaintiff's tenants, was made with such knowledge on their part that the house was in a bad state of repair, that, before entering into the agreement to take the lease, there was a preliminary stipulation by the defendants that certain repairs should be done upon the house. The defendants did not think fit, before entering into the agreement, or before specifying what repairs they wanted to employ a surveyor, but acted on their own judgment, and on the best information they could get. The specification of the repairs which the defendants required is very full; it notices the existence of cracks in the wall, and provides for those cracks being repaired in a particular way. They did not exact from the plaintiff any guarantee, or bind the plaintiff generally to put the house in a state of substantial repair. They might, in their specification, if they had pleased, have said that "in all other respects," or, "in all respects," the plaintiff should put the house into "good and substantial repair." There is, however, no stipulation of the kind. On the contrary, the preliminary agreement was for those repairs to be

done, and those only, which were stated by the defendants themselves. Content with that, they deliberately entered into an agreement to take a lease of this house, which was a house with a cracked wall, and otherwise greatly out of repair. The agreement is perfectly clear and simple. It is not, as has been said, that all the terms of the contract are not in the agreement, because the main agreement was not made or signed by the defendants until after the preliminary agreement had been made, and was in the course of completion.

What the defendants rely upon is a studied concealment of certain defects known to the plaintiff, and not communicated by him to them. This case has not been proved, for the defects arising from the cracks in the wall, and from the wall being eighteen inches off the perpendicular, were of a kind to arouse the vigilance of any intending lessee, and to make him see that it was necessary for a great deal to be done before the house could be safely inhabited.

If the case rested there, it would be wholly destitute of any evidence of suppression of the truth, or suggestion of what was false, upon the part of the plaintiff, except as to what was mere matter of opinion. The fact of the bad state of repair of the house was apparent from the existence of cracks in the wall; and the cause of those cracks, without an examination of the foundations, could not be accurately or perfectly ascertained. So clear is this upon the evidence, that even the district surveyor (who is the defendants' own witness) did not, until after a great deal had been done, discover that it was necessary to take down the party-wall. Therefore, the defendants' own evidence shows that it was impossible the plaintiff could have concealed the knowledge of that which was unknown even to the surveyor himself until that examination was made which, if the defendants had been persons of reasonable vigilance, they would have taken care to have seen made before they bound themselves by an agreement to take a lease.

The case, however, does not rest merely upon the defendants having agreed to take a lease, after stipulating that certain things should be done which have been done; for, before the defendants took possession, the district surveyor was found by one of them, apparently accidentally, in the house, certainly by no appointment of the defendants; and he, a man of skill, when he found that the walls were being papered according to the defendants' specification, told the defendant that it was a needless process—in fact, told him in plain terms that the wall was unsafe. What do the defendants do upon this? They go to the plaintiff and tell him the opinion of the surveyor. It was not the plaintiff's business to do anything upon that. The defendants had a perfect right to say, "We cannot, in this state of things, without a thorough examination, take possession or proceed further under the agree-

ment." The defendants' own statement of their case upon this part of it seems decisively against them, because they say the plaintiff promised to have the foundations examined; and yet, just when they were taking possession of the house, on the 4th of February, they wrote to say the foundations had not yet been examined.

It was the defendants' business to satisfy themselves upon this question after having had the opinion of a surveyor; and, without any further opinion than the plaintiff's saying he would have the foundations examined—a thing he was not bound to do—it was the defendants' own duty, being thus put on their guard, to have examined them before they proceeded further. The bare fact that the defendants took possession after being told the wall was unsafe, and knowing that no examination of the foundations had taken place, seems to me to make it impossible for them to bring their case within the principle of that doctrine, which is very well established, and which I hope will never be weakened—that if a vendor or a lessor is aware of some latent defect, and does not disclose it, the court will consider him as acting in bad faith.

In this case the real extent of the mischief was patent to all parties. It was apparent to the defendants that a party-wall, with extensive cracks in it, was eighteen inches out of the perpendicular. What is certain is, that the defendants were warned that the wall was unsafe, and with all that warning they took possession of the house, knowing that no examination of the foundations had been made. If they intended to rely on the defective state of the foundations, they ought to have had them examined, and they must not, after having had the opinion of a surveyor that the wall was unsafe, and after deliberately entering into possession of the house, complain that the plaintiff has acted in an unjustifiable manner, and allowed them to put their lives in danger. If their lives were in danger—which does not appear to have been the case in the slightest degree—it was a danger of their own seeking, for they entered deliberately into possession, after having been told that the house was unsafe.

With regard to the evidence in the cause, there are some parts of it upon which there is a direct conflict, which I think requires some notice. The defendants say and swear that the plaintiff told them that the wall had been underpinned three years before. This the plaintiff has positively denied, and therefore I cannot assume that fact to be proved; but if it were, when was this statement made? Why, at a time when the defendants were informed that the wall was unsafe; and even if the wall had been underpinned, the underpinning might not have been sufficient, and the wall might have given way. But the defendants chose to enter into possession of the house with these great cracks in the party-wall, it being out of the perpendicular as far as eighteen inches.

The defendants also say that the plaintiff promised them that the foundations should be examined. This the plaintiff positively denies ; and, between the denial on the part of the plaintiff and the affidavit of the defendants, it is impossible to consider that fact as proved ; and, so far from thinking that the after-conduct of the plaintiff makes it probable, I think the probability is rather the other way ; because, if the plaintiff had promised the foundations should be examined, there is a complete waiver of that by the defendant taking possession without being satisfied that there had been such examination.

Upon the whole, the fact of that statement or promise by the plaintiff that the foundations should be examined becomes wholly unimportant to the case, from the conduct of the defendants themselves. It is not proved, and there is not enough to induce the court to consider that, upon the weight of evidence, the defendants' version of it is more probable than the plaintiff's.

The case, therefore, is one in which there has been no studious concealment on the part of the plaintiff. The house was in a ruinous state at the time when the agreement was entered into ; and (being in that state) the defendants stipulated for certain specific repairs, omitting all stipulation that the whole should be put in substantial repair. All that was stipulated for has been done, and these defendants, therefore, must be decreed to perform their contract and to pay the costs of this suit in which they have been wholly unsuccessful up to the time of the hearing. The lease will be dated, of course, on the day of the agreement, and will contain the usual covenants, to be settled in chambers, if the parties differ, with liberty to apply.

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### FOTHERGILL v. PHILLIPS.

IN CHANCERY, BEFORE LORD HATHERLEY, C., JUNE 29, 30, 1871.

[*Reported in Law Reports 6 Chancery Appeals 770.*]

THIS was an appeal by Rowland Fothergill, one of several persons carrying on business in partnership under the style of the Tredegar Iron Company, from a decree of Vice-Chancellor Stuart.

Joseph Phillips and John Phillips were the owners of a farm of 116 acres copyhold of the manor of Abercarne, in Monmouthshire. Their predecessor in title had sold to the Tredegar Iron Company fourteen acres, formerly part of the farm, reserving the minerals. It appeared that, according to the custom of this manor, the minerals belonged to the copyholders, subject to certain rights in the lord. The farm was

subject to a mortgage for £4,800. In 1859 the Tredegar Iron Company, whose mineral property surrounded the farm, negotiated, through their then manager, R. P. Davis, with the Messrs. Phillips for a lease of the coal under the farm to the company at 6s. per ton royalty, the minimum rent being £250. The company, upon the commencement of these negotiations, drove headings under the farm from an adjoining colliery for the purpose of testing the coal. About October, 1860, the company refused to take a lease, but, without the knowledge of the owners, went on working under the farm, and extracted from it a considerable quantity of coal. In January, 1863, the farm was put up for sale by auction, but it was bought in. On the 14th of April, 1863, an agreement for sale to the company of the farm and of the minerals under the fourteen acres (subject to the rights of the Lord of the Manor) for £5,000 was signed by James Reed, the manager of the company, and by Joseph Phillips, who was treated by the agreement as sole vendor. At the time when this agreement was entered into the coal taken by the company from under the farm amounted to upwards of 2,000 tons, and it was not known to either of the Messrs. Phillips that any coal had been got, except the trifling quantity which had been got in the process of testing. The agreement for sale was entered into by Joseph Phillips without the authority of John Phillips, who, when informed of it, objected, and said that the price was too low; but the solicitors of the mortgage informed him that if he refused to carry the sale into effect the mortgagee would sell under his power. John Phillips, therefore, did not inform the company that he repudiated the sale, but allowed the matter to proceed, though it did not appear that he in any way actively concurred. An abstract was delivered, and considerable difficulties were found in the title, which caused great delay. In July, 1866, the Messrs. Phillips received information which led them to believe that the company had been working under the farm. They thereupon applied for leave to inspect the underground workings, which was refused. They shortly afterwards instructed two persons, who, on the 16th of May, 1866, succeeded in surreptitiously getting into the mine, and discovered that the workings had been going on.

On the 9th of February, 1867, the company filed their bill (Fothergill *v.* Phillips) for specific performance of the agreement.<sup>1</sup> The Messrs. Phillips, in their answer, alleged that the agreement was invalid for want of the concurrence of John Phillips, and because it was entered into in ignorance of the company having got a large quantity of coal under the farm, and because it was a sale at an undervalue, and entered into in consequence of false representations made by the agent

<sup>1</sup> So much of the case as relates to the right of the Messrs. Phillips to compensation for the coal wrongfully taken has been omitted.—ED.

of the company as to the value of the mines. The Lord Chancellor was not satisfied that the undervalue was proved or that false representations had been made, and these two points need not be further noticed.

The evidence as to the state of the underground workings was not complete and satisfactory, but it led to the conclusion that the company had carried coal to some extent from mines of their own through underground workings under the farm, and that water from the company's mines had run into the mines under the farm; but there was nothing to show that any steps had been taken for the purpose of draining the company's mines through the mines under the farm—the flow of water, so far as appeared, being only the natural flow from an upper mine to a lower when the barrier is broken through. It further appeared that air-shafts not reaching to the surface had been made under the farm from one bed to another; but it did not appear that they had been made with any other object than that of ventilating the works carried on for the purpose of getting coal under the farm. That a considerable quantity of coal had been got under the farm at the date of the agreement was admitted.

The cause came on to be heard before Vice-Chancellor Stuart, and His Honor<sup>1</sup> made a decree in both suits, dismissing the bill in *Fother-*

<sup>1</sup> March 14, 1871. Sir JOHN STUART, V.C.: It seems to me that the plaintiffs in the cross cause have entirely failed to show that they have obtained any such agreement for the purchase of the mine in question as can be recognized by this court. In this case, as in every case where a question occurs as to a contract, it is necessary to the validity of the contract that it should have been fairly entered into. It is necessary to its validity that there should be, on both sides, a reasonable degree of knowledge as to its subject-matter. The present case is remarkable. It appears that the two Messrs. Phillips (who are the plaintiffs in the original suit) are the owners of a farm of some extent, and that under this farm there are coal mines; that the Tredegar Coal Company, of which Fothergill and his co-plaintiffs in the cross suit are members, were owners of a colliery adjoining the land under which the coal mine of the Messrs. Phillips existed. Shafts were sunk upon the land of the Tredegar Company, and the coal was being wrought in the land adjoining that of the Messrs. Phillips. The existence of these shafts, of course, was a material circumstance with regard to the purchase of the adjoining coal mine, in which no shaft had been sunk. Negotiations for a lease of these mines took place; but in the year 1860 the negotiations for a lease came to an end, and there seems to have been no further negotiation between the parties until the month of April, 1863. The contract of which the Tredegar Company seek to have the performance was entered into by Mr. Reed, their agent, with Joseph Phillips, who is one of the owners of the lands and mines in question. It is sworn to by Phillips, that in the negotiations for the purchase, which resulted in that which the Tredegar Company say is a binding contract, it was stated to him by the company's agent that at that time the quality of the coal under his land was unknown; and that, in fact,

gill v. Phillips with costs, declaring the agreement for sale not binding on the Messrs. Phillips, and ordering it to be delivered up to be cancelled.

Rowland Fothergill appealed from this decree.

*Mr. Dickinson*, Q.C., and *Mr. Homersham Cox* for the appellant.

*Mr. Greene*, for respondents in the same interest.

*Mr. Greene*, Q.C., *Mr. Fry*, Q.C., and *Mr. Higgins* for the *Messrs. Phillips*.

LORD HATHERLEY, L.C. As regards the main question in dispute, I consider that the decree is perfectly right. The case is no doubt an important one, but it is one in which the defendants in the first suit

the existence of coal there had not been actually ascertained. He says further, that it was represented to him by Mr. Reed, the agent of the Tredegar Company, that there were two faults in the coal adjoining the land of the Messrs. Phillips, which faults must run through the coal under their land. The mention of two faults in the negotiation was, of course, made with a view to depreciate, as a purchaser is entitled to depreciate, the quality of the article he is about to purchase. It is certain that at this time the Messrs. Phillips were ignorant that the coal under their land had been actually worked and brought to the surface to the extent of thousands of tons without their leave, and sold by the Tredegar Company. What is remarkable in this case is, that if Reed tells the truth—and I must assume he has done so—he was as ignorant as the Messrs. Phillips that the coal had been worked. If that be so, what is the value of an agreement where both parties are so ignorant as not to know the condition of the subject-matter of the contract? It would be absurd to say, in that state of ignorance, that a valid contract could have been made; and the court, therefore, has no alternative, in doing justice between the parties, than to say that the bill which has been filed for the specific performance of this agreement must be dismissed with costs. But the matter does not rest there, and the importance of such questions to the public interest makes it my duty to notice this. In cases of mining property there are necessarily great facilities for mistake and for fraud. So strongly has that been felt by the legislature, that there is an enactment that was alluded to in the course of the argument, which makes the willful and knowing abstraction of coal which is not the property of the person who works it a felony. It is needless to go to that extent here. It is needless to say that the gentlemen members of this company, who are the real defendants in this case—I mean Mr. Fothergill and Homfray, and two others—that they personally are guilty; they rely upon the acts and conduct of their agents. But in that reliance, considering the facilities for mistake and for fraud, the duty of this court is to be extremely careful; and those facilities are not to be in any degree aided by anything done in this court during litigation if it can be prevented. In this case the Tredegar Company thought it consistent with their notions of justice to prevent and prohibit the owner of these lands from going down, or sending down agents, in order to see what they had done with reference to his property. That conduct, I think, was highly improper conduct; it was conduct which came before the court at the beginning of this litigation under such circumstances that the court, loth to believe that anything had been

have managed to place themselves most completely in the wrong, and it would be impossible, under the circumstances, for this court to decree specific performance of the agreement.

I must confess that I was considerably impressed with Mr. Dickinson's argument, that it was too late for John Phillips to say that he was not bound by the contract, after having lain by so long without expressing any dissent, though perfectly aware from the first of his brother having entered into it professedly on his behalf. In the view I take of the case it is unnecessary to decide this point, and I have not heard the respondents upon it; but, as at present advised, I am of opinion that it was the duty of John Phillips, if he dissented, to express his dissent

improperly done by fraud, allowed the matter to proceed, and was content with having the matter treated, in the then state of things, upon the plans which were made on behalf of the Tredegar Company themselves. Fortunately, in this case the Messrs. Phillips succeeded furtively and by stealth in getting an examination without which it is very difficult to say that the truth could have been so clearly ascertained as it has been, because it is impossible not to observe upon the unscrupulous character of the evidence which has been given on behalf of the Tredegar Company, and ignorance by the members of the company of what is done is no excuse whatever in this court for what is done through their agents. In this case their bill for specific performance, which I think it my duty to dismiss with costs, is only a cross bill. When the Messrs. Phillips discovered, or their suspicions were aroused, and they knew enough to suspect that great injury had been done to them—when that occurred, they filed their original bill and began this litigation; and the case was represented by the defendants on their bill, and before the cross bill was before the court, as a case of men who had entered into an agreement to sell coal mines, and who, on various pretexts, were endeavoring to escape from the agreement into which they had entered. In that state of matters the court could know nothing of the truth but from the representations on both sides. Now that all the truth is disclosed, it shows a case which is a lesson to the court, and ought to be a lesson to owners of coal mines, of the ease with which mistakes, and even frauds, may be committed under such circumstances.

I do not think it necessary to enter into the question as to whether one of these two gentlemen was bound by this agreement. The owners of the land and the mines were Joseph and John Phillips; the agreement was signed by Joseph alone; John never signed it, says he never assented to it. He says he did not openly express his dissent, because he and his brother were in the grasp of mortgagees, and he was afraid. To say that his abstaining, under such circumstances, from interfering can amount to acquiescence seems to me impossible; and if it were necessary to decide the case upon that, after hearing all that has been said with reference to the law upon that subject, and the authorities that have been cited, I should have held decidedly that John had done nothing by which to bind himself to this agreement; and on that ground alone the bill might have been dismissed. But upon public grounds it is much more important; therefore it is upon the other ground that I wish it to be understood that I deal with this case and dismiss the bill.



as soon as he was informed of what his brother had done, and if there had been nothing more in the case he must have been taken to have ratified the agreement.

With regard to the question of undervalue, I have not heard the argument of the respondents, but I am not impressed by the evidence that the sale was at an undervalue, for the property is a farm surrounded by other mineral property of the company, and not of sufficient extent to be advantageously worked as a separate colliery. Moreover, there is evidence of the existence of faults in the property; but, in my opinion, it is unnecessary to decide the question of undervalue. Mr. Dickinson made considerable impression upon me while commenting upon the judgment of the Vice-Chancellor; but although His Honor's words might seem at first sight to indicate a wider range, it seems to me, on consideration, that his judgment is really founded upon that on which I found mine, viz., that the gentlemen who are now seeking specific performance of the contract were, at the time when it was entered into, aware of important facts not known to the appellants, and which ought to have been disclosed to them. This court requires the utmost good faith between buyer and seller, and will not specifically enforce a contract which is not entirely according to good faith. In the present case the state of circumstances is not merely that the company knew something with regard to the value of the coal which was not known to the vendors, but that the company knew this fact, of which I must take it on the evidence the vendors were entirely ignorant, viz., that the company had helped themselves to a large portion of the property. If a man knows that he has committed a trespass of a very serious character upon his neighbor's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case, and to say to him, "I regret that from mistake" (if it be mistake, and I will assume it to be so for the present purpose) "I have taken some two thousand tons of your coal. I do not know what your view of the case may be; I am ready to buy the property out and out, or I am ready to submit to the consequences of an action or an arbitration, or what you like, with reference to this coal which I have taken." The proposal which he makes is not in reality a simple proposal for purchase of the property; it involves a buying-up of rights which the owner has acquired against him, and of which the owner is not aware. He is therefore bound to inform the owner of the circumstances of the case, and is not at liberty to enter into a contract without disclosing his commission of an act which has rendered him liable to certain consequences, and of which act the person with whom he is dealing has a right to be

informed in order to know what course he is to adopt. The observations of the Vice-Chancellor, as to the purchasers knowing more of the value than the vendors did, would, if I may venture to say so, have been erroneous if made without reference to the special circumstances of the case. I apprehend it would be an error to say generally that you cannot enforce a contract in this court where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good. But I apprehend that the Vice-Chancellor meant his observations to be understood with reference to the circumstances of the particular case, and that when he says the vendors did not know the subject matter of the contract, he means that they did not know that coal had been taken to the extent of 2,000 tons, and that in that state of circumstances they could not be held to the bargain. If, indeed, under-value were shown, this observation would naturally suggest itself: the case is not merely that the purchasers, being more experienced men, knew the value of the coal better than the vendors, but that the vendors, being unable to gain access to the coal, the purchasers took advantage of an unlawful access to it in order to test its value, and did not communicate to the vendors the result. I apprehend that in such a case the court, whatever it might do as to cancelling the contract, certainly would decline to enforce it. The case would, I think, be something analogous to this: Suppose a picture-dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark which will tell him who is the artist, and thus finds a mark showing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist. I do not, however, dwell on that point, as it is not satisfactorily established in my mind that the price was inadequate. The ground of my decision is, that the appellants suppressed the fact of their having wrongfully got a large quantity of the respondents' coal, and so given the respondents a heavy pecuniary claim against them. Mr. Cox contended that this was no prejudice to the vendors, for that they bargained for the sale of the whole concern, so that this coal was paid for. This argument is not sound; for, according to the principle of *Martin v. Porter*,<sup>1</sup> the vendors are entitled to be paid for the coal wrongfully severed a sum much greater than its value while ungotten; and I do not think it possible for a person in any case secretly to subtract from his neighbor's property, and then to

<sup>1</sup> 5 M. & W. 351.

bind him by an agreement for the sale of the property without communicating to him the fact of the encroachment. I think that the company have only themselves to blame for the position in which they are placed, and that the decree as a whole is correct.

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THOMAS MARSH, APPELLANT, v. MARY E. BUCHAN,  
RESPONDENT.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, MARCH  
TERM, 1890.

[*Reported in 46 New Jersey Equity Reports 595.*]

ON appeal from a decree advised by John R. Emery, one of the advisory masters, who filed the following conclusions :

This is a bill by a purchaser against a vendor for the specific performance of a written agreement to convey lands.

The execution of the agreement is admitted by the answer, and also the complainant's payment of the portion of the purchase-money agreed to be paid on the execution of the agreement. The complainant's readiness to comply with the terms of the agreement on his part, at the time and place provided for in the agreement, is proved.

The defendant failed to attend at the time and place appointed for the delivery of the deed, and the complainant's attorney then sought her at her residence, and tendered to her the balance of the cash payment, together with a bond secured by a mortgage on the premises for the balance of the purchase-money, as provided for in the agreement, demanding a deed for the premises. The defendant declined to accept the money or the bond and mortgage, and also refused to deliver the deed.

On August 17 or 18, 1887, and about ten days previous to the time fixed for the delivery of the deed (August 29, 1887), the defendant, through her attorney, notified the complainant that she would not carry out the agreement, and tendered to the complainant the amount of the money paid on the execution of the agreement, which the complainant refused to accept.

The contract in question was signed by one Charles H. Sleight, a real estate broker, as the agent of the complainant, and the ground on which specific performance is now resisted is that the contract was

procured through the fraudulent conduct of Sleight, the agent of the complainant.

The fraudulent conduct is alleged to have consisted in false representations made by Sleight to the defendant, and also in his fraudulent concealment of facts.

[The defendant alleged that, on Sleight's solicitation, she appointed him as her agent to sell the property for her, and that Sleight solicited and accepted this appointment without disclosing to her that he was at this time also the agent of the complainant.—REF.]

[Here follows a statement of the facts as established by the pleadings and evidence in reference to the execution of the contract and Sleight's connection with it.—REF.]

Upon this statement of the facts and evidence, my conclusions are :<sup>1</sup>

First. That Sleight, having been originally employed by the purchasers, must be considered as primarily their agent, although he afterwards acted, or assumed to act, as the agent for the defendant.

Second. Being the agent of the purchasers at the time of his application to the defendant, Sleight had no right to accept from her the employment as her agent to sell the property without a disclosure to her of his agency for the purchasers, and his failure to make this disclosure to the defendant before she signed the written contract was, on his part, a fraudulent concealment of a material fact.

In the present case, I am inclined to think that Sleight was absolutely precluded from accepting the agency for defendant, because he could not, in justice to his original employers, and with a due regard for their interests and rights, disclose that he was acting for all of these associates, or disclose what he knew of their scheme of purchase and improvement. All the persons interested in the purchase, as appears by the bill and their evidence, considered it of vital importance that their plans should not be disclosed, as this might lead to a rise in prices.

They had the undoubted right, I think, by themselves or by their agent, to purchase without making such disclosure, and the mere failure to communicate the scheme to the defendant was no fraud upon her which would entitle her to refuse to perform the contract. But the very fact that the agent of the purchasers knew of the association and knew something of the scheme, and knew, as he must have known, that silence as to the scheme of purchase by these asso-

<sup>1</sup> Portions of the Master's conclusions have been omitted.—ED.

ciates was then of importance to the proposed purchasers, made it impossible for him fairly, openly, and in entire good faith to accept an agency from the sellers.

That Sleight's knowledge as to the proposed plan, however limited it might have been, would have been of some advantage to the defendant, if disclosed, is evident, and he must have known, in assuming the agency for her, that he could not deal openly and fairly with her by disclosing what he knew of the desire of his employers to purchase and of their general scheme for purchase. The bill leaves it open for inference that he knew all about the plan for purchase and improvement, as it makes no qualification or denial of his knowledge, but justifies his concealment of it on the ground that, as the agent of the complainant, he was not bound to disclose.

That Sleight's agency for the purchasers, even if restricted to the mere obtaining of prices, turned out in this instance to be incompatible with his assumption of the confidential relation of agent to the seller is made entirely clear by Sleight's statement that at the time of assuming this agency for the defendant, and in fixing the price, she told him that she wanted a good round price. This was a confidential statement by a principal to an agent, which would scarcely have been made to a person supposed to be an agent of the purchasers, whose duty it would be to disclose it to the purchasers. Such communication, if made, would undoubtedly result in fixing a less sum for the offer.

Third. The mere signing of the contract by Sleight as the agent of Marsh, one of the purchasers, did not operate as a disclosure to the defendant of his agency for the purchasers during the negotiations and at the time the terms were verbally agreed on.

The negotiations were conducted and the terms of sale agreed upon while Sleight was still acting toward the defendant in the confidential relation of agent, and it is also evident, I think, that in accepting the terms offered the defendant was, in fact, influenced by the statements and opinions of Sleight, made to her as his principal, that the price was a fair one and that he could do no better. And the defendant, before signing a written contract binding herself to carry out the terms verbally agreed on while this confidential relation existed, was entitled, I think, to the full disclosure of the relations of Sleight to the purchasers, which existed during the negotiations and at the time when the terms were fixed.

There is no proof of any other information or notice by Sleight than the production of the contract with his signature as Marsh's agent, and the question is, of what facts was this signature notice to the defendant under the circumstances of the case. It was undoubt-

edly notice that in the execution of the written contract Sleight acted as the agent for Marsh, one of the purchasers, but, after the terms had been agreed upon between the defendant and the purchaser, and the reduction of these terms to writing in a form to bind both parties had also been agreed upon, Sleight might, so far as the mere execution of the contract was concerned, have fairly acted as the agent of both parties, if specially authorized by each. Such special authorization to sign the contract for the principal is necessary, and, as has been held in several cases in this State, a broker to sell is not, by virtue of such employment, authorized to sign a written contract for his principal.<sup>1</sup>

It seems to me to follow as a corollary to this rule that a mere authority to sign a contract as agent is not so necessarily connected with the previous negotiations as to make it of itself sufficient notice that in such negotiations also the agent signing the contract was the agent for the same parties. (In this case there is no denial of the fact that, as to the defendant, Sleight assumed in the negotiations to act as her agent.) Nor can the signature to the contract be effective as notice of this previous employment for the purchasers, on the theory that the defendant was by this signature put upon inquiry as to the previous relations of Sleight to the purchasers, and is therefore to be considered as informed of all facts which she would have learned by a truthful answer to such inquiries. This rule, as I understand it, could be applicable only to persons dealing at arms-length, and not to the case of those dealing under the influence of confidential relations.

In view of the relations between Sleight and the defendant previous to and at the time of the contract, it was not, I think, the defendant's duty to suspect and inquire, but it was Sleight's duty to disclose and explain, and the defendant should not be prejudiced by a failure to suspect that Sleight's signature of the contract, as agent for the purchaser, was an indication that he had all along been acting under an adverse appointment.

Fourth. The fact that the price to be received for the property seems to be a fair one will not, so far as Sleight is concerned, prevent the defendant from setting up his fraudulent concealment to resist specific performance of the contract.

The case of *Young v. Hughes*<sup>2</sup> is direct authority upon this point. Mr. Justice Magie (p. 384) declaring the rule to be that the effect of the agent's concealment and neglect of duty in that case did not, so far as the agent was concerned, depend at all upon the question

<sup>1</sup> See *Morris v. Ruddy*, 5 C. E. Gr. 238 ; *Milne v. Kleb*, 17 Stew. Eq. 378.

<sup>2</sup> 5 Stew. Eq. 372.

whether or not the neglect was injurious to the principal, and that the rule was one founded on sound policy, not based on meditated fraud or actual injury. It was, as he says, established to prevent the possibility of injury in such cases.

The question upon this branch of the case is, whether the contract was fairly and openly obtained by Sleight from the defendant, and if it was not so obtained it is evidently no defense or answer that the price was fair. The defendant cannot be obliged to sell her property for what others consider or prove upon a trial to be a fair price, if her consent to take that price was procured by unfair or fraudulent means.

The principals in this case, being ignorant of any fraudulent conduct on the part of their agent Sleight in procuring the contract, the remaining question is, whether the misconduct of the agent is a bar to the complainant's right to a specific performance of the contract. Upon this point I agree with the counsel of the complainant that the case of *Young v. Hughes*<sup>1</sup> is not applicable, for the reason that in that case the court found, as a matter of fact, that the purchasers incited and were partakers in the misconduct of the agent.

But in the examination of the case I find some New Jersey cases not referred to by either side on the argument, which seem to establish the rule that where there is fraud in the conduct of an agent in effecting a sale, of which fraud his principal is ignorant, the vendee, although he cannot sue the principal for the fraud of the agent, may even, as against an innocent principal, rescind the contract and reclaim the money paid.

These cases are *Kennedy v. McKay*,<sup>2</sup> followed in *Decker v. Fredericks*,<sup>3</sup> *Hutchinson v. Warwick*,<sup>4</sup> and *Titus v. Railroad Co.*<sup>5</sup> The case was also approved in *Keen v. James's Executors*.<sup>6</sup> See, especially, opinion of Mr. Justice Dixon at pp. 540 and 544.

If the complainant's counsel desires I will hear further argument upon this branch of the case, with special reference to the applicability of these cases. I will reserve decision upon this point to allow application for argument.

Conclusions of the Advisory Master on point reserved, as stated above :

After further argument by counsel upon the question reserved in the conclusions heretofore filed I am of opinion—

Fifth. That the complainant and his associates, although innocent of any participation in the fraudulent conduct of their agent Sleight in effecting the sale and procuring the execution of the contract by

<sup>1</sup> 5 Stew. Eq. 372.

<sup>2</sup> 14 Vr. 288.

<sup>3</sup> 18 Vr. 469, 472.

<sup>4</sup> 17 Vr 200, 203.

<sup>5</sup> 17 Vr. 393, 420.

<sup>6</sup> 12 Stew Eq 527.

the defendant, are not entitled to the specific performance of the contract.

In fact, the doctrine that an innocent principal cannot avail himself of a bargain obtained by the fraud of his agent seems to have been settled since Lord Holt's time,<sup>1</sup> and the only question open to dispute in later cases has been, whether the principal may also be sued for the deceit of his agent.

2. The present case is one where the principal applies for the specific performance of the contract procured, as I have found, by his agent's fraud.

This relief, being purely equitable, will be denied where the situation of the parties requires perfect good faith and openness of dealing in making the contract, and these have not been observed.

I cannot agree with complainant's counsel in his contention that Sleight's duty to disclose to the defendant his agency for the purchasers did not arise until after the acceptance of his employment as her agent, and was, therefore, only a breach of his duty to her as her agent, for which she must look to him alone, and for which the complainant should not be punished by refusal to decree the execution of the contract. Sleight's duty, as I understand it, was to disclose his relations with the purchasers before accepting the agency from defendant.

It may be that Sleight is responsible to the defendant for his failure to act faithfully as her agent, but it is also clear that as Sleight, after his employment by defendant, was still acting as the agent of the complainant in procuring the contract, the complainant must also be responsible to the extent of not being able to reap the benefit of his agent's fraud.

No question was raised by the defendant as to whether, in view of the evidence showing the joint interest of Eppley and Pierson with complainant in the contract, a decree of specific performance could be made on a bill filed by the complainant alone, and I have not considered this question.

I will advise a decree dismissing the bill, with costs.

*Mr. Leon Abbett* for the appellant.

*Mr. John W. Taylor* and *Mr. Franklin M. Olds* for the respondent.

PER CURIAM.

The decree affirmed, for the reasons given by the Advisory Master.

For affirmance—The CHIEF-JUSTICE, DEPUE, DIXON, GARRISON, MAGIE, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, SMITH, WHITAKER—12.

For reversal—None.

<sup>1</sup> See Whart. Ag. § 711.



## CADMAN v. HORNER.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M.R., NOVEMBER,  
1810.

[*Reported in 18 Vesey 10.*]

THE bill prayed the specific performance of an agreement by which the defendant contracted to sell the fee-simple of certain premises for the sum of £600, payable by installments. The agreement was signed by both parties, and the defendant, having received part of the purchase-money, resisted the performance on the ground that the plaintiff, who was his agent, had misrepresented the value of the estate, producing evidence that it was worth near £1,200; also, that the plaintiff had previously to the agreement represented to him that the houses had been injured by a flood, and would require between £50 and £60 to repair them; whereas in truth the premises at the time of the contract required no more than forty shillings to put them in complete repair. No evidence of the value of the premises was entered into by the plaintiff, but the defendant in his answer admitted that the clear yearly rent amounted to £49, and stated that in 1805 he had purchased these premises for £700, and had afterwards expended £300 in repairing them.

THE MASTER OF THE ROLLS. The evidence of the inadequacy of the price in this case is considerably shaken by the defendant's admission of the clear rent of the premises. It is difficult to conceive that he could be ignorant of the value, having so recently purchased the estate, and laid out money in the improvement of it; and it is not easy to comprehend his conduct, nor does misrepresentation by the plaintiff in regard to what was requisite for the repairs of the houses by any means account for the disparity between the price paid for the estate and the sum at which the witnesses value it; yet, as upon the evidence, the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small, extent, that misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction. This is not a case where the court is called upon to rescind an agreement, and to decree the conveyance executed in pursuance of it, to be delivered up to be cancelled, which would admit a different consideration.

The bill was dismissed without costs.

## TROWER v. NEWCOME.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M.R., JUNE 29, 1813.

[*Reported in 3 Merivale 704.*]

THIS was a bill by the vendor for specific performance of an agreement to purchase the advowson of Honychurch, in the county of Devon. The bill stated (which was admitted by the answer) that the plaintiff being seised in fee of the advowson in question caused the same to be set up to sale by auction, when the defendant became the purchaser, according to the conditions of sale. The printed particulars contained a description of the situation, number of acres, etc., and added "a voidance of this preferment is likely to occur soon," but made no mention of the present incumbent.

The defendant, by his answer, said he was induced to attend at the sale by the representation in the particulars above noticed; that the auctioneer, at the time of sale, said (in explanation) "that the living would be void on the death of a person aged eighty-two," of which the defendant took a note in writing, or a copy of the particulars, and that he was, by such statement, induced to bid, and did bid accordingly, and was declared the purchaser and signed the agreement. He then proceeded to state that he (the defendant) had, since the sale, discovered that the then present incumbent of the living was aged only thirty-two, upon which discovery his (the defendant's) solicitor sent back the abstract (which had been furnished) to the plaintiff's solicitor, with a note on the margin, stating the representation made at the time of sale, with these words added: "How does it become void?" to which the plaintiff's solicitors returned for answer: "We do not consider the purchaser entitled to call for any security for the voidance of the living at the death of a person aged eighty-two. No such security was required at the sale, and the auctioneer only stated that such a voidance would take place. We have no objection, however, to the patron engaging by covenant or bond, that the present incumbent will avoid the living on the death of a gentleman aged eighty-two."

Upon this statement the defendant insisted that the particulars of sale and the representations made by the auctioneer were untrue and calculated to mislead, and that they did, in fact, mislead the defendant; and that he (the defendant) would have not bid for, or become the purchaser of, the advowson, if he had not given credit thereto, and that he, therefore, ought not to be compelled to complete the purchase.

It appeared in evidence that the incumbent of Honychurch expected to be presented to another living on the death of its incumbent, who was aged eighty-two, which would cause the voidance of Honychurch.

*Hart, Wetherell, and Simpkinson* for the plaintiff.

*Sir S Romilly and Stephen, contra.*

THE MASTER OF THE ROLLS thought the representation made by the printed particulars so vague and indefinite that the court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged evidence was likely to take place previous to his becoming the purchaser. That such a representation was capable of being supported by the fact, either of the incumbent being old or infirm, or by various collateral circumstances. His Honor compared this representation to that made in a case lately before him, respecting the purchase of a leasehold estate, which was stated in the particulars to be renewable "on the payment of a small fine," leading to the question, "What is a small fine?" with reference to the circumstances of the property, and the expression being so vague that no importance whatever could be attached to it.

Specific performance decreed.

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VISCOUNT CLERMONT v. TASBURGH.

IN CHANCERY, BEFORE SIR THOMAS PLUMMER, M.R., DECEMBER 6,  
7, 10, 1819.

[*Reported in 1 Jacob and Walker* 112.]

THIS suit was instituted for the specific performance of an agreement between the plaintiff and defendant, who were possessed of contiguous estates in the county of Norfolk, for an exchange of some lands lying on the boundary. The agreement was dated the 8th of March, 1814, and the titles were to be exchanged and possession given within a month from the Michaelmas following.

The land belonging to the defendant, which was comprised in this agreement, was, at the time, in the possession of two tenants, Chasteney and Garrood, under an agreement for a fourteen years' lease. The answer stated that a conversation had taken place between the plaintiff and defendant upon the subject of the proposed exchange, which ended by the defendant declining any further treaty. It then said that a short time afterwards the plaintiff came to the defendant, and informed him

that he had seen the two tenants, and that they were perfectly agreeable to the exchange, and that he had settled everything with them, and that, trusting to this representation, he himself consented, and drew up and signed the agreement, in which, from confidence in the plaintiff, no mention was made of the tenants having assented. Had it not been for his belief of the plaintiff's assurances, the defendant would not, he said, have entered into the agreement; and finding, the next day, that the tenants had in fact not given their consent, he wrote to the plaintiff, stating his determination to put an end to it. He submitted that, until the plaintiff should have procured the assent of the tenants, he was not entitled to call for a performance of the agreement.

After the answer was filed amendments were made in the bill, denying that the defendant had made the representations stated in the answer, and charging that Chasteney and Garrood were willing to give up their interests in the lands of the defendant upon being paid the value of such interests, which, according to the agreement, ought to be paid by the defendant, and also charging that the defendant could make a good title, subject to the interests of Chasteney and Garrood, in which case the value would be proportionally reduced.

Chasteney and Garrood and another witness, Lemoureux, were examined. The substance of their evidence is stated in the judgment of the court.

*Mr. Hart* and *Mr. Wyatt* for the plaintiff.

*Mr. Heald*, *Mr. Phillimore*, and *Mr. Stephen* for the defendant.

THE MASTER OF THE ROLLS. This bill is filed by Lord Clermont for the specific performance of an agreement. The defendant having, in his answer, admitted the fact that the agreement in question was made and signed, and, further, that it was drawn up by himself, it lies upon him to show why he should not be compelled to execute it.

On his part it has been urged, in the first place, that the agreement itself is not, upon the face of it, so clear as to enable the court to carry it into execution; for, undoubtedly, one of the ingredients of a contract, the performance of which can be decreed, is certainty. It was said that there is here only a vague description of the lands to be exchanged; that the quantity is not specified, and that, though it is stated that there was to be a valuation, it does not appear for what purpose it was to be made. These objections are not mentioned in the answer, and, indeed, considering that the contract was drawn by the defendant himself, it would not come well from him to rest his case upon the uncertainty of it.

The more important defense, however, is that made in the answer—that the defendant is absolved from the obligation of this contract, on the ground of its having been obtained by misrepresentation. On this

point there are two questions : First, whether it was so obtained ;<sup>1</sup> and, next, if that was the case, what the effect of it will be : whether it entirely puts an end to the agreement, and deprives the plaintiff of the right of having it performed, or whether, as has been contended for him, it only vitiates it *quoad hoc*, and leaves him at liberty to take the lands, subject to the interests of the tenants, which he stated them to be willing to resign.

Under these circumstances, supposing this fact to be made out, the next question is, what will be the consequence of it. On the part of the plaintiff, it was argued very judiciously, that, supposing the fact of misrepresentation proved, it does not go the length of establishing that the bill must be dismissed, or of preventing the plaintiff from having a right to specific performance, if he will take the estate subject to the lease. It was urged that it would be of no consequence to the defendant if the plaintiff would abide by the agreement, exonerated from what is affected by the misrepresentation. To this it is to be observed, in the first place, that it is not the case made by the bill. It is there said throughout that if the land is to continue subject to the lease, it must be considered as reduced in value, evidently meaning that as by the agreement possession was to be given, the defendant must make a compensation if that article is not performed. But it was contended at the bar that if the fact of misrepresentation was made out, and that the defendant had in consequence of it undertaken to put the plaintiff in possession, in which case it is impossible, that he should be bound to make such a compensation ; yet if that part of the contract be waived, that whatever may be the effect on the costs of the suit, if the plaintiff be willing to pay the costs and relinquish whatever was the effect of misrepresentation, he may demand the performance of the rest.

Thus, what was asked at the bar is not what is prayed in the bill ; and if it were, it would be contrary to those principles on which the court acts in decreeing specific performance. There is no authority anywhere, no case where the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it ; and nothing would be more dangerous than to entertain such a jurisdiction. The principle on which performance of an agreement is compelled requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame ; misrepresentation, even as to a small part only, prevents him from applying here for relief.

The reason of this is obvious: if it be so obtained, the contract is void both at law and in equity. When an agreement has been ob-

<sup>1</sup> The discussion of this question has been omitted.—ED.

tained by fraud, is the effect to alter it partially, to cut it down, or modify it only? No; it vitiates it *in toto*; and the party who has been drawn in is totally absolved from obligation.

If so, what equity has the other party who, by his misconduct, has lost one contract, to call on the court, for his benefit, to make a new one? If the defendant were willing to consent to it, and to enter into a new agreement, it would be a different case; but if he refuses, if he insists that he is absolved from it, what equity can there be in favor of the other.

There are many cases where, although a contract cannot be literally performed in all its parts, the court will modify it, attending to the substance of it, and carry it into execution, relieved from the collateral circumstances that form the difficulty. There are cases of this kind, where, from lapse of time it has become unconscientious to insist upon the agreement *modo et forma*, or where there happens to be a small deficiency in the number of acres. Here the contract becomes inoperative at law, and cannot be strictly performed; yet the court will decree it, dispensing with the articles that are not essential to the substance. But this is only where there has been a perfect *bona fides*; there is no case where it has been done at the instance of a plaintiff, who has practiced any misrepresentation. The principle is, that the party is barred, personally barred. It was on this principle that the late Master of the Rolls, in *Cadman v. Horner*,<sup>1</sup> says: "As upon the evidence, the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small extent, that misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation." He takes the distinction between the case of a bill for specific performance and the cases where the court is called upon to rescind the agreement, which, he says, would admit of a different consideration, and he puts the refusal of relief on the ground of the misrepresentation forming a personal bar.

If it were otherwise, and if a contract under these circumstances were only to be altered *pro tanto*, and only the part thus obtained were to be taken out of it, what encouragement would be offered to fraud? The party, if not found out, would gain his object; and, if detected, would have the benefit of the contract, in the same manner as if he had practiced no deception. The court has therefore settled that he must come with perfect propriety of conduct. If he does not, that alone is a sufficient answer to him.

<sup>1</sup> 18 Ves 10.

Again, consider it with reference to the contract itself. The defendant cannot give possession of the land, as his tenants do not consent; he engaged to do it under a wrong idea; he cannot, therefore, be compelled to do it. That part of the contract cannot be performed. There is, therefore, an end to *that* contract; it cannot be performed specifically, and there is no reason here to substitute another in its place. If the plaintiff came for the strict performance of the contract, terms might be put on him, but how can we put terms on the defendant? By the misconduct of the plaintiff that agreement is at an end; and can we, on that account, say to the defendant, you must not perform that agreement, but you must, instead of it, perform another?

In both ways, therefore, first viewing the misrepresentation as a personal bar to the plaintiff, and, secondly, as destroying the contract, I am of opinion that he is entitled to no relief. The whole of the bill is negatived by the evidence, while the case of the defendant is proved. The bill must be dismissed, and with costs.

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SCOTT v. HANSON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., JULY 22, AUGUST 14, 1826.

[*Reported in 1 Simons 13.*]

AN estate, sold by auction, was described in the particulars of sale as consisting of fourteen acres of uncommonly rich water meadow land, let on lease with other land for a term of which four years were unexpired, and it was then stated that the apportioned rent for this lot was £75.

A suit having been instituted by the vendor for a specific performance of the contract, it appeared in evidence that, on account of the high level of this meadow and the low level of some adjoining land, the former was imperfectly watered. It was objected, for the purchaser, that it was not proved to be a water meadow. But the Vice-Chancellor ruling that a meadow which was watered, though imperfectly, was not improperly described as a water meadow, it was then insisted that to describe it, in the particular, as uncommonly rich water meadow land, was a misrepresentation, and that a court of equity ought not to assist the vendor, but should leave him to his action at law.

For the vendor it was argued that the principles as to representation were the same in equity as at law; that the real quality of this

land, being an object of sense and obvious to ordinary diligence, it was the fault of the purchaser if he did not inspect it and judge for himself; that the amount of the annual rent being stated, which was the criterion of the value, the purchaser could not be deceived; that when the land was said to be uncommonly rich, it was spoken of comparatively only; and that the question throughout the cause has been, not whether the land was uncommonly rich water meadow, but whether it was water meadow at all.

The cases cited for the plaintiff were *Fenton v. Brown*<sup>1</sup> and *Trower v. Newcome*.<sup>2</sup>

The VICE-CHANCELLOR took time to consider the case, and then gave judgment to the following effect:

I do not accede to the argument that the principles upon the subject of representation are uniformly the same in equity as at law; for, in the case of *Stewart v. Alliston*,<sup>3</sup> Lord Eldon, C., states the doctrine of the court to be otherwise. In a bill for a specific performance it is not sufficient to say that the purchaser has been negligent, if the vendor, who seeks the aid of a court of equity, has, in his conduct, been incorrect. I agree with Sir William Grant, M.R., in the case of *Trower v. Newcome*, that a representation which is vague and indefinite is to be treated, by a purchaser, only as a ground for inquiry; and the doubt in that case is whether the purchaser was not justified in concluding that the representation amounted to a statement that the incumbent was eighty-two years of age. Unless the expression used in this case can be considered as a representation that the land in question was not imperfectly, but perfectly, watered, then the expression is vague and indefinite; and, upon the best consideration I can give this case, I think I should strain the meaning of the words "uncommonly rich water meadow land," if I were not to confine the meaning to the quality of the land, and, in that sense, it professes to be nothing more than the loose opinion of the auctioneer, or vendor, as to the obvious quality of the land, upon which the vendee ought not to have placed, and cannot be considered to have placed, any reliance. I lay no stress upon the circumstance that a rent of the land is mentioned in the particular of sale, because it is not a rent fixed by contract with the lessee, but a part of a gross rent paid for the land in question and other premises comprised in the same lease, and is arbitrarily apportioned by the vendor. The purchaser must, therefore, complete his contract.

*Mr. Sugden* and *Mr. Jacob* appeared for the plaintiff.

*Mr. Heald* and *Mr. Girdlestone* for the defendant.

<sup>1</sup> 14 Ves. 144.

<sup>2</sup> 3 Mer. 704.

<sup>3</sup> 1 Mer. 26.



## FELLOWES v. LORD GWYDYR AND PAGE.

IN CHANCERY, BEFORE LORD LYNTHURST, C., NOVEMBER 13, 16,  
1829.

[*Reported in 1 Russell and Mylne 83.*]

THE material facts of this case are stated in Mr. Simon's Reports, Vol. I., p. 63.<sup>1</sup>

The defendant Page appealed from the decree of the Vice-Chancellor.

*Mr. Horne* and *Mr. Keene* for the plaintiff Fellowes.

*Mr. Bligh*, for Lord Gwydyr, who disclaimed all interest in the matters in question, stated that his Lordship gave the plaintiff no authority to use his name, and took no part himself in the negotiation.

*Mr. Pepys*, *Mr. Knight*, and *Mr. Warry* for the defendant Page.

THE LORD CHANCELLOR. Mr. Page, I am satisfied, had every reason to believe that he was contracting with Lord Gwydyr; but the only question here is, what loss or inconvenience has he sustained in consequence of acting under that mistake? There is nothing in the cause which can lead me to suppose that he would not have contracted with the plaintiff, or that he would have declined to offer the sum of 1,500 guineas had he been aware of the party who was really the owner of the property. It was strongly pressed upon me in the argument that the parties should be left to proceed at law. But from the situation in which they respectively stood, as well as from the form of the agreement, they could not have obtained an effectual adjudication upon their rights at law, and it was necessary for the plaintiff, therefore, to come into this court. Mr. Fellowes says that the name of Lord Gwydyr was not used for any improper

<sup>1</sup> The facts are there reported as follows: The defendant, Lord Gwydyr, being entitled, as Deputy Great Chamberlain, to the fittings-up and decorations of Westminster Hall at the King's coronation, sold them to the plaintiff, who was his deputy or assistant in that office, for £1,000. The defendant, Page, had formerly been a builder, and had been employed in that capacity by Lord Gwydyr's father, who was also Deputy Great Chamberlain, and also in disposing of the fittings-up of the hall at the trial of the late Lord Melville. The plaintiff did not remove the articles he had so purchased, but in the name and as the agent of Lord Gwydyr signed an agreement with Page for the sale of them to him for £1,575; and Page undertook to remove them, and to make good any damage that might be done to the hall, on or before the 10th of January, 1822. This agreement was signed by the parties at the office of Lord Gwydyr's solicitor, who had previously perused it and who attested the signature.—ED.

purpose ; but even if it were otherwise, that circumstance alone would furnish no reason why Mr. Page should be released from his contract without showing that the deception had in some way operated to his prejudice.

Decree affirmed without costs.

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HIGGINS v. SAMELS.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., JUNE 10, 26,  
1862.

[*Reported in 2 Johnson and Hemming 460.*]

THIS was a bill for specific performance of an agreement to take a lease of a field for the purpose of quarrying limestone.

The plaintiff was the owner of a field under which was a bed of limestone, which had never been opened from the plaintiff's field, though a quarry had been opened in an adjoining field, and lime procured which was not of first-rate quality, and had been tried and rejected by a railway company when a station in the neighborhood was being built.

The plaintiff, being ignorant of this fact, and having no experience in judging of limestone, on being told by the defendant that the lime would be useless to him unless fit for the London market, represented to him that the limestone would produce lime of first-rate quality, fit for the London market. According to the evidence, the phrase "fit for the London market" would be understood in the trade as signifying lime of the best quality. It appeared also that the rejection by the railway company of the lime from the neighboring quarry was a fact which might easily have been ascertained on inquiry as to how that lime had turned out. The defendant, after this conversation, made a cursory inspection of the quarry in company with the plaintiff and two friends of his own ; but it did not appear that any of these persons were competent to judge, by inspection, of the quality of the stone for the purpose of lime-burning, the plaintiff being a corn-dealer, and the defendant a lime-dealer, but not a lime-burner.

Shortly afterwards, the defendant signed an agreement dated the 11th of June, 1860, for a lease, at a rent of £50 per annum, to be proportionally increased if more than one-tenth of the surface of the field was opened. The defendant subsequently ascertained that the limestone would not suit his purpose, and declined to accept a lease, on the ground that the stone was not such as had been represented to him. The plaintiff thereupon filed this bill for specific performance.

Evidence was gone into at some length as to the particulars of the conversations and the inspection of the adjacent quarry, the result of which is stated in the judgment of the court.

*Mr. Rolt*, Q.C., and *Mr. De Gex* for the plaintiff.

*Mr. Giffard*, Q.C., and *Mr. Bedwell* for the defendant.

VICE-CHANCELLOR SIR W. PAGE WOOD. This is a contest which comes very close upon the boundary that divides cases where the court grants specific performance from those in which it holds its hand on the ground of misrepresentation.

There is some conflict of evidence as to the precise words used in the representations relied on, but to a great extent the facts are common to both sides, and may be summed up as follows :

The plaintiff had become the owner of a small piece of land under which lay a bed of limestone that had never been opened from the plaintiff's field. In a neighboring field a quarry had been dug, from which limestone had formerly been taken and used in the manufacture of lime. It is now admitted that the lime so obtained was not fit to be used in any building of a superior kind, though it was suitable for building purposes of an ordinary description. This, at least, is the almost undisputed result of the evidence. The lime had, in fact, been rejected for the construction of a railway station in the neighborhood, and the company had gone to considerable extra expense in procuring lime for that purpose from a distance. In September, 1859, the plaintiff had a conversation with a person of the name of Coat, who was a friend of the defendant's ; and according to Coat's statement the plaintiff represented the limestone under his field to be "fit for the London market." This expression is not absolutely denied by the plaintiff, though he gives a slightly different color to the conversation. A more important conversation took place in May, 1860, between the plaintiff, the defendant, and Coat. I should state that the defendant is a lime-dealer but not a lime-burner, and therefore not specially qualified to judge of limestone in its unburnt state. Coat is a stone-mason, the plaintiff is a corn-dealer, and it is not pretended that he had any experience as a judge of limestone.

Before the interview in May, according to the defendant's account, Coat had repeated to the defendant what he had previously heard from the plaintiff, that the limestone would produce lime "fit for the London market." At the interview, the plaintiff asked the defendant whether he had thought over what Coat had said to him about taking the limestone field, and added that the limestone was of first-rate quality. The defendant replied that unless the lime would be fit for the London market he would not take the field ; and the plaintiff

then assured him that the stone was of first-rate quality, superior to that commonly burned for the London market.

The plaintiff gives a slightly different version of what passed. He says that he was never qualified to judge of limestone, that he had no knowledge of the quality of the limestone under his field, and was not aware that the expression "fit for the London market" was restricted in the trade to lime of the best quality, as appears to be the case from the evidence adduced by the defendant. He says that he did not represent the stone to be superior to that commonly burned for the London market, but merely stated his own intention to quarry the stone and manufacture lime on his own account; whereupon the defendant said that it would be better for him, as a lime merchant, to take the field, than for the plaintiff, who knew nothing of the business, to work it himself.

It is to be observed, that he gives no denial to the defendant's assertion, that he said that unless the lime would be fit for the London market he could not take the field; nor does the plaintiff deny that he represented the limestone to be of first-rate quality. Upon the whole evidence, therefore, I must assume that these expressions were used; and if the matter rested there I do not know that there would be much difficulty in the case. Very considerable difficulty is occasioned, however, by what was afterwards done by the defendant himself.

The plaintiff's account is that the defendant said he should like to see a sample of the stone, to which he replied that he had better come to the place and look at it. Accordingly, a day or two afterwards, the defendant accompanied by Coat and a Mr. Dean, who is called a surveyor, went with the plaintiff into the open quarry in the neighboring field. Dean applied some acid, and pronounced the stone to be limestone, but said he could not tell anything about its quality. This last observation, I may add, is proved on the part of the defendant, but denied by the plaintiff. They remained only a short time in the field, and returned to Yeovil. The defendant says it was only a quarter of an hour, and that he was too much hurried to make an examination of the quality of the limestone, as he might have done if he had had more time; and he also states that his principal object in going there was to ascertain the distance of the field from the station, and not to examine the limestone, there being no quarry in the plaintiff's field. I think, however, I must take it that part of the object of the visit was to inspect the stone in the neighboring quarry.

Upon this evidence I must hold that in the first instance a representation was made which went beyond the sort of puffing or specu-

lative commendation which is held excusable in a vendor. Either party might have inquired what had been done with the lime procured from the quarry in the adjacent field, and whether it had proved to be fit for the London market; and it is clear from the evidence now given, that, if any such inquiry had been made, there could have been no difficulty in discovering what the facts really were. These circumstances, I think, distinguish the case from the class of which *Scott v. Hanson*<sup>1</sup> is a commonly quoted example, where it was held that the description of a field as an uncommonly rich water-meadow, when it was, in fact imperfectly watered, was too vague a representation to justify the inference that the purchaser relied upon it. The representation here is different, for it assigns a definite quality to the lime by describing it as fit for the London market. Neither can it be regarded as a merely speculative representation.

The strongest authority in favor of the plaintiff upon this point is *Jennings v. Broughton*,<sup>2</sup> which was a bill seeking relief against a purchase of shares in a mine on the ground of misrepresentations of the character of the mine. L. J. Turner in his judgment, after referring to a representation that in a particular level the lode showed a body of solid ore resting on the vein, three feet wide, largely intermixed with lumps of ore and calamine, and continuing to maintain the same width and characteristics to the extent of the workings, being seventeen yards further, says, "I find no evidence to warrant this statement. . . . But to say that these statements in the report were not well founded, is one thing; to say that the plaintiff was deceived by those statements, or was induced by them to purchase these shares, is another thing. Looking at the character which the plaintiff gives of himself, and which is given of him by his witnesses, I think it impossible to believe that he could have been at all induced to purchase these shares by the statement of there being lumps of calamine in this level. And with respect to the lode continuing to maintain the same width and characteristics, the plaintiff was twice at the mine, once before he purchased any shares, and the second time in the interval between his two purchases; and however ignorant he may be of mining, he must at least have been capable of seeing whether the vein had or had not been laid open behind the point where the solid ore was presented to his view. If it had, he must have known what were its characteristics. If (as was the fact) it had not, he must have known this statement could only be matter of speculation, and not of certainty."

<sup>1</sup> 1 Sim. 13.

<sup>2</sup> 5 D. M. G. 126.

That is, undoubtedly, very strong. There was a distinct representation of an alleged fact; but that was followed by an examination of the mine, which, according to the view taken of the evidence by the court, must have shown that the representation was really matter of speculation.

Applying the same principle of law to the peculiar facts of the present case, I hold, first, that there was a definite representation; and, secondly, that the examination (conducted as it was by a lime-dealer or stone-mason and a gentleman who seems to have been something of a chemist and something of an architect) was not such as to show that the previous representation must have been merely speculative. If it ought to be looked upon as a mere speculative statement about the quality of the lime, my judgment should be for the plaintiff; but I cannot come to this conclusion. The quarry had actually been worked, and the lime had been tried in the neighborhood. The quality was not matter of speculation, but matter of fact, which could easily have been ascertained. The information was at hand, which would have satisfied both parties to the treaty that the lime was not of the quality which the defendant required.

With respect to the general rule of law, it is not contended that *Small v. Attwood* carries the doctrine as to representation so far as to cover this case. But there are other authorities which clearly show that it is not necessary to prove that the representation complained of was made with a knowledge that it was false; *Taylor v. Ashton*<sup>1</sup> is express upon the point. There it was attempted to get rid of a contract in consequence of misrepresentation as to the prospects of a company; and Lord Wensleydale in his judgment says, "It was said, that, in order to constitute that fraud it was not necessary to show that the defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue if they communicated that fact for a deceitful purpose; and to that proposition the court is prepared to assent. It is not necessary to show that the defendants knew the fact to be untrue, if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true; in that case it would be both a legal and moral fraud."

*Evans v. Edmonds*<sup>2</sup> carries the doctrine somewhat further. The representation was as to the character of a lady, the wife of the defendant, on whom the defendant was induced to settle an annuity by a separation deed; and Mr. Justice Maule says, "I do not say that it would be necessary to constitute such a fraud as would avoid the deed, to make the plea good on special demurrer, that it should in

<sup>1</sup> 11 M. & W. 401.

<sup>2</sup> 13 C. B. 777.

terms allege that the plaintiff knew at the time he made the representations that the defendant's wife was unchaste ; because I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril ; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made."

The distinction between this kind of fraud and the express warranty of the fact stated is certainly very fine.

In applying the law to the facts of this case, I give entire credit to the plaintiff's assertion that he knew nothing about the quality of lime ; and he has not been asked whether he was aware that the lime obtained from the quarry in the next field had proved a failure. I assume, therefore, that he knew nothing of the matter. But he admits that he knew the lime would be useless to the defendant unless it was fit for the London market, and, therefore (knowing nothing whatever about it), he took on himself to say that it was fit. Up to this point, therefore, the matter is clear, and all that remains is to ascertain whether the defendant acted in reliance on this statement. That he relied solely upon it cannot, I think, be said ; but he undoubtedly did rely to a great extent upon it. What weighs upon my mind is the circumstance that the quality of the lime was not a mere subject of speculation, but a fact which the plaintiff (without any special familiarity with the business) could have made himself acquainted with. He knew the quarry in the adjoining field had been worked ; and if he meant to deal with entire fairness, he ought—before making the representation that the lime was of the desired quality—to have made the obvious inquiry, what became of the lime that had been obtained from it ? Instead of doing so he makes a representation in order to secure a contract, without taking the trouble to inform himself what the truth was.

It is true that the defendant did not rely exclusively upon this statement, because he did go to look at the stone ; still his trade was not that of a lime-burner ; and he cannot be supposed to have trusted merely to what he saw, he really knowing nothing of the quality of limestone.<sup>1</sup>

<sup>1</sup> But then it is said that if the defendant had taken the pains to look, he might himself have seen what was the state of the premises. But this is a suit for specific performance ; and in such a suit it is not an answer to the fact of the plaintiff having made false representations, to say the defendant was impru-

Under all the circumstances, the case does not appear to me to be one in which this court ought to interfere by decreeing specific performance; but it is not necessary to decide the nice question, whether the contract is valid or not.

There was a distinct representation of fact which the plaintiff, though he did not believe it to be false, made without seeking the further information which was within his reach, and which would have shown him that the statement was not true. After this, notwithstanding the inspection made by the defendant, it would not be right for this court to enforce performance.

The bill will be dismissed, but without costs.

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### REDGRAVE v. HURD.

IN THE COURT OF APPEAL, NOVEMBER 25, 26, 28, 1881.

[*Reported in Law Reports, 20 Chancery Division 1.*]

IN January, 1880, the plaintiff, a solicitor of Birmingham, inserted in the *Law Times* the following advertisement :

**Law Partnership.**—An elderly solicitor of moderate practice, with extensive connections in a very populous town in a midland county, contemplates shortly retiring, and having no successor, would first take as partner an efficient lawyer and advocate about forty, who would not object to purchase advertiser's suburban residence, suitable for a family, value £1,600, three-fourths of which might remain on security—no premium for business and introduction. A large field is here open for an efficient man, and great advantages for free education of sons. Address R. J., No. 1919, 10 Wellington Street, Strand.

The defendant applied by letter to the address indicated, and a correspondence ensued, the negotiation proceeding on the footing that the plaintiff should receive the defendant as his partner and transfer to him a moiety of his practice and the plaintiff's leasehold house for £1,600. On the 12th of February the plaintiff and defendant had two interviews, at the latter of which the defendant's wife was present. There was a direct conflict of evidence as to what passed at these interviews, the plaintiff asserting that he stated the

dent. If the case stood on this ground only, I should refuse specific performance. If a plaintiff comes here and asks relief; asks this court to assist him in what is not the assertion of a strict legal right, but to assist him on grounds standing on the peculiar jurisdiction of this court, he must show that his conduct has been clear, honorable and fair. If he has been guilty of misrepresentation, this court will leave him to his remedy, if any, at law.—Sir Richard T. Kindersley, V.C., *Cox v. Middleton*, 2 Drew. 209, 220.—ED.



business to bring him in about £200 a year, the defendant and his wife saying that the plaintiff stated it to bring in from £300 to £400 a year. The parties were examined orally in court, and Mr. Justice Fry held that greater weight was to be attributed to the evidence of the defendant and his wife than to that of the plaintiff, and held that the plaintiff had either represented his business as bringing in about £300 a year or from £300 to £400 a year.

On the 14th of February the defendant wrote to the plaintiff: "Of course I should duly rely on your promise to do all you could to extend the business among your friends. Still I should be glad to have some idea as to the amount of business done at your office in the past three years and the nature of the nucleus with which we should start. Would you, therefore, be able to give me an hour next Tuesday to go into this matter and settle the terms of partnership?"

On Tuesday, the 17th of February, the parties accordingly had an interview at the plaintiff's office. The plaintiff produced to the defendant three summaries of business done in 1877, 1878, 1879. These summaries showed gross receipts not quite amounting to £200 in a year. The defendant asked how the difference was made up, and the plaintiff showed him a quantity of letters and papers which he stated to relate to other business which he had done. No books of account were produced, the plaintiff not having kept any books which showed the amount of his business, but the plaintiff showed the defendant some letter-books and diaries and a day-book. The defendant did not examine any of the books, letters, and papers thus produced, but only looked cursorily at them, and ultimately agreed to purchase the house and take a share in the business for £1,600. Mr. Justice Fry came to the conclusion that if the letters and papers to which the plaintiff referred had been examined they would only have shown business to the amount of £5 or £6 a year. The defendant wished the written agreement to set out that the £1,600 was the consideration for the purchase both of the house and the share in the practice, but the plaintiff refused to assent to this, and an agreement was drawn up and signed on the 2d of March, 1880, by which the defendant agreed to purchase the house for £1,600, the practice not being referred to. The defendant paid a deposit of £100, and on the 17th of April, 1880, was let into possession of the house and removed thither with his family from Stroud; but finding, as he alleged, that the practice was utterly worthless, he gave up possession and refused to complete the purchase. The plaintiff, in June, 1880, commenced an action for specific performance of the written agreement to purchase the house.

The defendant by his statement of defense admitted the signature

of the agreement, but alleged that it was not binding on him for the reasons thereafter mentioned. He then (par. 2) stated the advertisement, and alleged (par. 3) that the defendant entered into correspondence with the plaintiff with reference to it, and that it was arranged between them that the plaintiff should receive the defendant as his partner, and transfer to him a moiety of a moderate law practice which the plaintiff stated that he possessed, together with the leasehold-house, the defendant agreeing to pay as consideration for the transfer both of the share in the practice and of the house the sum of £1,600; (par. 4) that the defendant requested the plaintiff that the facts stated in par. 3 should be set out in the written agreement between the parties in order that it might appear that the payment by the defendant of the £1,600 was a consideration for the transfer of the leasehold-house and the share in the law practice, but that the plaintiff refused, "and the defendant, for reasons appearing in the next paragraph, now alleges that in such refusal the plaintiff was actuated by a fraudulent intention." (5) "Shortly after the partnership between the plaintiff and the defendant had been entered into in pursuance of the agreement thereto the defendant discovered that the said law practice was utterly worthless, and that the representations made in regard thereto by the plaintiff were false; and the defendant says that the plaintiff made such false representations for the purpose of inducing him, the defendant, to enter into the contract for the purchase of the said partnership." The defendant then proceeded to allege that certain misrepresentations had been made to him about the house. He then proceeded: "By way of counterclaim the defendant relies upon the facts stated in his defense as though they were again repeated, and claims" to have the contract rescinded and the deposit of £100 returned to him, £100 damages for the defendant's loss and trouble in removing from Stroud to Birmingham, £200 damages for having given up his practice at Stroud, and for further relief.

The plaintiff by his reply submitted that the agreement for purchase was binding on the defendant wholly irrespective of any arrangement in reference to the partnership; and that even if that were not so the plaintiff had always been ready to carry out the agreement for a partnership, and that the allegations as to fraud and misrepresentation were untrue. He denied that the £1,600, or any part thereof, was a consideration for the transfer of the share in the law practice. He admitted that he refused to enter into an agreement by which the £1,600 should be in part a consideration for the purchase of a share in the law practice, and declined to sell the house for anything less than £1,600, but said that it was wholly untrue that

in such refusal he was actuated by any fraudulent intention. He denied having made any false representations as to his business.

The action came on for hearing before Mr. Justice Fry on the 14th of March, 1881.<sup>1</sup>

<sup>1</sup> FRY, J., after stating the nature of the contract and the defendant's allegations of misrepresentations made by the plaintiff, expressed his opinion on the evidence that a representation as to the water supply of the house was not proved to have been false, and that the defendant's case as to representations made by the plaintiff about the value of the house had also failed. His Lordship proceeded :

I then come to the third and last allegation, which has really created in my mind the only question in this litigation ; that is, that the plaintiff, in personal interviews with the defendant, repeatedly stated to him that his law practice brought him in about £300 a year, and that he had a very extensive connection. That is stated in the original advertisement which led to the negotiations between the parties, and it appears to me clear that "connection" used in that sense is contrasted with practice, because the representation made by the advertisement was that the plaintiff was "an elderly solicitor of moderate practice with extensive connections." According to the evidence of the plaintiff, although his practice was very moderate, his connection in and about Birmingham was large, and, therefore, although he had not many actual clients, he had, as he represented, many potential clients.

Did the plaintiff then represent that his practice brought him in about £300 a year ? On that question there has been a great conflict of evidence. I am bound to say that I attribute greater weight to the statements of the defendant and his wife than I do to the statement of the plaintiff in that particular, and I think that I must treat it as proved that such a statement was made on two occasions by the plaintiff to the defendant.

The next inquiry is, was that statement true ? In my judgment it clearly was not true. I do not believe that the plaintiff's business brought him in anything like £300 a year, and in fact the plaintiff when he was in the box did not say that it did.

But then there comes, in the second place, this very material inquiry : Did the defendant purchase the house and go on with the negotiations upon the footing and upon the faith of that representation so made by the plaintiff ? I have come to the conclusion that he did not. I think that the defendant's letter of the 14th of February is worthy of all the weight which has been attributed to it by the plaintiff's counsel. The defendant in that letter says in effect this : "While relying on your effort to extend the business among your connection, I feel I should like to have some idea as to the amount of business done at your office in the past three years, and the nature of the nucleus with which we should start."

Accordingly the defendant does, by the plaintiff's invitation, visit him on the 17th of February and, then and there, there are produced to the defendant by the plaintiff the papers which relate respectively to the years 1877, 1878, and 1879, which have been called sometimes bills of costs and sometimes estimates, and they show, roughly speaking, a gross amount of business done to the extent of about £200 a year. Then the common case of the plaintiff and the defendant is that, in answer to an inquiry by the defendant, the plaintiff said that there

The defendant appealed. The appeal came on to be heard on the 25th of November, 1881.

*Cookson*, Q.C., and *Ruegg* for the appellant.

*Rigby*, Q.C., and *Yate Lee*, *contra*.

JESSEL, M.R. This is an appeal from a decision of Mr. Justice Fry, granting specific performance of a contract by the defendant to buy a house from the plaintiff, and dismissing with costs a counter-claim by the defendant asking to rescind the contract, and also asking for damages on the ground of deceit practiced by the plaintiff in respect to the agreement.

As regards the defendant's counter-claim, we consider that it fails so far as damages are concerned, because he has not pleaded knowledge on the part of the plaintiff that the allegations made by the plaintiff were untrue, nor has he pleaded the allegations themselves in sufficient detail to found an action for deceit. It only remains to consider the claim of the plaintiff for specific performance, and so much of the counter-claim of the defendant as asks to have the contract rescinded.

Before going into the details of the case I wish to say something was other business which was not entered in those papers. I cannot attribute much weight to that other business, and for this reason, that, in my judgment, if the defendant had meant to rely upon this extraneous business, which was not mentioned in the papers, he would have made some inquiry about it. The conclusion to which I come to upon the evidence is, that the books were there before the defendant, and that, although he did not take the trouble to look into them, he had the opportunity of doing so. In my judgment, if he had intended to rely upon that parol representation of business beyond what appeared in the papers, having the materials before him, he would have made some inquiry into it. But he did nothing of the sort. I think the true result of the evidence is this, that the defendant thought that, if he could have even such a nucleus of business as those papers disclosed, he could, by the energy and skill which he possessed, make himself a good business in Birmingham, and that he was willing to take as the business of the plaintiff that which was represented in those papers.

There is no allegation that those papers are false, and in my judgment they are not false. Substantially I think they did truly represent the business done, and I think that there was some little, but very little, business beyond what was there represented; perhaps £5 or £6 a year would cover the additional business.

The defendant went down for the purpose, as he says, of gaining an idea as to the amount of business done in the office, and ascertaining the nature of the nucleus upon which they would start. He had the means of inquiring into it further than he did. He inquired into it to a certain extent, and if he did that carelessly and inefficiently it is his own fault. As in *Attwood v. Small*, 6 Cl. & F. 232, those directors and agents of the company, who made ineffectual inquiry into the business which was to be sold to the company, were nevertheless held

about my view of the law applicable to it, because in the text-books, and even in some observations of noble Lords in the House of Lords, there are remarks which I think, according to the course of modern decisions, are not well founded, and do not accurately state the law. As regards the rescission of a contract, there was no doubt a difference between the rules of courts of equity and the rules of courts of common law—a difference which, of course, has now disappeared by the operation of the Judicature act, which makes the rules of equity prevail. According to the decisions of courts of equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, “A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.” The other way of putting it was this:

by their investigation to have bound the company, so here I think that the defendant, who made a cursory investigation into the position of things on the 17th of February, must be taken to have accepted the statements which were in those papers.

It is very noteworthy that I can find no reference to any distinct reliance by the defendant on £300 a year at any time from the 17th of February, 1880, down to the answer to interrogatories which was filed in this action on the 2d of September, 1880, a period of more than six months. A letter which was written on the 5th of May by the defendant's solicitor no doubt contains vague and general statements of misrepresentation. But, if the defendant had at that time believed in his own mind that he had entered into this bargain upon the footing of a representation that the business would bring him in £300 a year, knowing what he knew on the 5th of May, it is, to my mind, incredible that he would not have said something of the sort. I think there was a floating and vague notion that representations had been made by the plaintiff to the defendant, and that the defendant really would have had a difficulty in saying in what respect he had been deceived (except in respect of the water supply) on the 5th of May.

I am bound to say that, in my judgment, great care is required in the investigation of these matters, that the court should not be led astray by thinking that representations have been relied upon when they have not. Persons who enter into contracts ought to bear in mind that they are entering into important engagements, and that solemn contracts are not lightly to be set aside on the ground of vague representations which really do not operate on the mind of the contracting party.

I hold, therefore, that the defendant has failed in his defense and in his counter-claim. I pronounce judgment for the plaintiff for the specific performance of this contract, with costs, and I dismiss the counter-claim, with costs.

“Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements.” The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of common law, there is no doubt it was not quite so wide. There were, indeed, cases in which, even at common law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care whether it was true or false, and not with the belief that it was true. But, as I have said, the doctrine in equity was settled beyond controversy, and it is enough to refer to the judgment of Lord Cairns in the *Reese River Silver Mining Company v. Smith*,<sup>1</sup> in which he lays it down in the way which I have stated.

There is another proposition of law of very great importance which I think it is necessary for me to state, because, with great deference to the very learned judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, “If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity and did not choose to avail yourself of them.” I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defense under the Statute of Limitations. That, of course, is quite a different thing. Under the statute delay deprives a man of his right to rescind on the ground of fraud, and the only question to be considered is from what time the delay is to be reckoned. It had been decided, and the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered. Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of

<sup>1</sup> Law Rep. 4 H. L. 64.

their remedy merely because they neglected to go and look at the contracts. Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, "You were not entitled to give credit to my statement." It is not sufficient, therefore, to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity. It has been apparently supposed by the learned judge in the court below that the case of *Attwood v. Small*<sup>1</sup> conflicts with that proposition. He says this: "He inquired into it to a certain extent, and if he did that carelessly and inefficiently it is his own fault. As in *Attwood v. Small*, those directors and agents of the company who made ineffectual inquiry into the business which was to be sold to the company were nevertheless held by their investigation to have bound the company, so here, I think, the defendant who made a cursory investigation into the position of things on the 17th of February must be taken to have accepted the statements which were in those papers." I think that those remarks are inaccurate in law, and are not borne out by the case to which the learned judge referred. Of course where you have five Lords giving independent reasons it is very difficult to ascertain with accuracy the ground upon which the House of Lords decided; but I think that in all such cases you must only look at the judgments of the majority who decided the case, for the reasons to be found in their judgments must be either wholly or to some extent the reasons which guided the House of Lords in coming to their conclusion. I therefore confine myself for this purpose to the opinions of the three Lords who decided the case in favor of the appellants. The first opinion is that of Earl Devon, who had been a Master in Chancery, and although of course his opinion is entitled to great respect, yet I do not attach so much importance to it as I do to that of Lord Cottenham. His Lordship says:<sup>2</sup> "The question is not as to waiver or acquiescence in fraud, but whether the parties have used that ordinary degree of vigilance and circumspection in order to protect themselves which the law has a right to expect from those who apply for its aid." In that sentence I think he is not quite correct as regards the law, but the ground of his judgment is this: "The whole course of the proceeding from its commencement to its close tends to show that the purchasers did not rely upon any statements made to them, but resolved

<sup>1</sup> 6 Cl. & F. 232.<sup>2</sup> 6 Cl. & F. 344.

to examine and judge for themselves." Now, that is a good ground if borne out by the evidence. It is a different ground from that taken by the other Lords, but it cannot be objected to in point of law.

I now turn to the judgment of Lord Chancellor Cottenham, who says:<sup>1</sup> "We are now trying two propositions by this evidence—first, whether fraud was practiced; and, secondly, whether that which is alleged as fraud, or rather the facts from which fraud is inferred, were not known to the plaintiffs, or to those by whose conduct and by whose knowledge they must be affected from the very commencement of this transaction. I have satisfied myself that both these propositions are in favor of the defendant." That is, he found not only no fraud, but he also found that all the material facts were known before they entered into the contract. "I do not find the fact of fraud made out, although undoubtedly it may be supposed that the bargain was a very good one for Mr. Attwood. That is not the matter in question, but that the fraud alleged, which alone can be resorted to for the purpose of supporting the plaintiff's case, is not made out in fact, and that the circumstances from which that fraud is endeavored to be inferred by the plaintiffs are, in my opinion, proved to have been known to them from the beginning." Those are the two grounds of his judgment, and neither of them is anything like the proposition to be found in the judgment of Mr. Justice Fry, that if cursory or ineffectual attempts are made by the agents of the person defrauded to discover the real facts he loses his right to complain of the fraud. There is a sentence in Earl Devon's judgment to that effect, but not in Lord Cottenham's.

The only other judgment which was in favor of the appeal was a very long judgment of Lord Brougham, which I shall not read through, but at p. 497 we find his conclusion: "My Lords, when we apply to this case the principles which I stated at the outset we find the facts are wanting; we find there is no misrepresentation which gave rise to the contract" (that is, he concurs with Lord Cottenham that there is no fraud—that is the first ground). "We find that the purchasers did not rely upon the representation, but said, We will inquire ourselves"—that is the second ground; it is the same as Lord Devon's ground, and also would be a good answer, though it was not taken by Lord Cottenham. Then he goes on: "From the 6th of June, 1825, downwards they constantly proceeded upon the plan of satisfying themselves, first by sending their agents, then by going down themselves, then by inquiring themselves, then even afterwards by sending other agents to inquire, and those agents reporting that the representation was true, and that those parties finding by their own inquiries" (not as Mr. Justice Fry puts it, "the imperfect inquiries of agents") "that the

<sup>1</sup> 6 Cl. & F. 393.



agents had reported accurately, and that the representation was corroborated by the result of the inquiry, and that even when their own interest, when everything in the commercial world was down, when shares were falling, when money was not to be had, when they were asking time for a prolongation of the term of payment to Mr. Attwood, and when it was their interest to discover a flaw in the contract, they then inquire again and send a new agent to inquire (Mr. Foster, an engineer), and they state to him their own opinion to be in favor of Mr. Attwood's representations; and Mr. Foster, in answer as late as the 26th of April, less than a month before the bill was put upon the file, reports in favor of Mr. Attwood's representations. Such being the facts, even if no observation arose as to the delay as to the adoption and affirmance of the contract, purging it of all objections which might be made, and supposing that they had come in time, instead of delaying so many months; then I ask myself this question, In these circumstances have these parties a right to be released from their contract by the interposition of a court of equity, according to those principles which I have stated? When I ask myself that question, upon which alone my judgment must turn, I am bound to say No." So that the two grounds taken by Lord Brougham are that there was no misrepresentation, and that the purchasers did not rely on the representations. He agreed in one with Lord Cottenham and in the other with Lord Devon. The three grounds taken by the three noble Lords, one of which grounds was taken by one only of the Lords and each of the others by two, were that there was no fraud—that there was actual knowledge of the facts before the contract, and that no reliance was placed upon the representation. In no way, as it appears to me, does the decision, or any of the grounds of decision in *Attwood v. Small*<sup>1</sup> support the proposition that it is a good defense to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud.

As regards the facts of this case, I agree with the conclusions of Mr. Justice Fry on every point but one, and my failure to agree with him in that one is the cause of my concurring in reversing his decision. What he finds in effect is that the defendant Hurd was induced to enter into the contract by a material misrepresentation made to him by the plaintiff Redgrave, but he comes to the conclusion that either he did not finally rely upon that representation, or that if he did rely upon it he made an inquiry which, although ineffectual and made, as he says, carelessly and inefficiently, bound him in a court of equity, and prevented him from saying that he relied on the representation. I have already dealt with

<sup>1</sup> 6 Cl. & F. 232.

that as a matter of law, and I will deal with it presently as a matter of fact, because I think there was an omission to notice a most material fact, or rather, I should say, an omission to give sufficient weight to it, for it is noticed in the judgment which is now appealed from.

Now, the facts to my mind are clear, and I am glad to say, with one exception, they are in writing. The plaintiff Redgrave advertised in the *Law Times* for a law partnership. The *Law Times* is not a publication in which people ordinarily advertise for the sale of a house, but is one in which they do advertise for partners in law partnerships. [His Lordship then read the advertisement.] That means this: "There is a moderate practice; I shall not take a premium for it if you will take my house off my hands"; that is, the purchase of the house is the consideration for giving him the partnership in a moderate business. A man issuing such an advertisement cannot be heard to say that he had no business worth mentioning to sell. I agree that his main object was to get rid of the house, and that he had little else to dispose of. It appears on his own evidence that his gross business was £200 a year; what its net value was I am unable to say, but I should think £100 a year a very high estimate of its net value. He says by the advertisement that he is elderly and has no successor, which implies that there is a succession to something of some value. He says it is "a moderate practice with extensive connection," which is not a truthful description of a practice such as I have mentioned, a practice which would give £50 a year net to each of the two partners. We start, then, with an advertisement containing a misrepresentation, and, as far as I can see, of facts within the advertiser's own knowledge, for he does not pretend to say that he did not know that his business had a gross value of only £200 a year; on the contrary, he says in his evidence that he told the defendant so.

Interviews then took place. The first interview was on the 12th of February. There is a conflict of evidence as to what passed at that interview, and the learned judge below gave credit to the evidence of Hurd and his wife that Redgrave stated his practice to be between £300 and £400 a year. Having regard to the advertisement, it is most probable that he did make some such statement, for he had made representations in the advertisement which were inconsistent with its amounting only to £200 a year. But I do not rely on that. The rule of the Court of Appeal is that when there is direct conflicting oral testimony, and the judge who has seen the witnesses believes one party and disbelieves the other, this court, not having seen the witnesses, cannot disturb that decision any more than it could disturb the verdict of a jury under similar circumstances. We must, therefore, take it as a fact that Redgrave represented to Hurd on the 12th of February that

his business was worth about £300 a year, or between £300 and £400 a year, it does not matter which.

Another interview took place between the plaintiff and the defendant on the 17th of February. Before proceeding to what is said by the learned judge as to what took place on the 17th of February, I will refer to the observations which he made just before. "Then comes, in the second place, this very material inquiry. Did the defendant purchase the house and go on with the negotiations upon the footing and upon the faith of that representation so made by the plaintiff" (that is, the representation made on the 12th of February)? "I have come to the conclusion that he did not. I think that the letter of the 14th of February is worthy of all the weight which has been attributed to it by the plaintiff's counsel. The defendant in that letter says this: 'While relying on your effort to extend the business among your connection, I feel I should like to have some idea of the amount of business done at your office during the past three years, and the nature of the nucleus with which we should start.'" Now, to my mind that means this: "You have told me you were making between £300 and £400 a year, but I should like to know what is the average of the past three years. What you are making for one year is not sufficient for me." Therefore the defendant does not rely exclusively on the statement of the £300 a year because he wants further information, but he does not give up the reliance on the statement. "Accepting your statement that you are making £300 a year, tell me what you made during the last three years." That that is the true meaning of the letter is, I think, shown by the nature of the documents produced on the 17th of February to the defendant by the plaintiff: "The defendant does, by the plaintiff's invitation, visit him on the 17th of February, and then and there are produced to the defendant by the plaintiff the papers which relate respectively to the years 1877, 1878, and 1879, which have sometimes been called bills of costs and sometimes called estimates, and they show, roughly speaking, a gross amount of business done to the extent of about £200 a year. Then the common case of the plaintiff and the defendant is that in answer to an inquiry from the defendant the plaintiff said there was other business which was not entered upon those papers." Now that inquiry, as I understand it, was this: "You were doing £300 a year; you show in those papers only £200 a year; where is the rest?" And the answer was, "Oh, there is a lot of papers here containing business which will account for the rest." Well, it appears to me that that being the common case of both parties, it shows that Hurd, though still relying on the representation that the business was at least £300 a year, when he found that the papers showed only a gross £200 a year, wanted to know where the business

was that made up £300 a year, and he is told, "Oh, there are a lot of papers there; I have not made out my bills of costs fully, but you will find the business if you look through those papers." But he did not look through them. The learned judge continues: "I cannot attribute much weight to that other business, and for this reason, that in my judgment if the defendant had meant to rely upon this extraneous business, which was not mentioned in the papers, he would have made some inquiry about it." I am sorry to say I differ from every word of that. The defendant did make an inquiry. All that the plaintiff had prepared for him were these summaries. He says, "Where is the rest of the business?" "Oh, it is in that parcel of papers." How could the defendant make out bills of costs from the parcel of papers? He could do nothing but rely on the plaintiff's statement that the parcel of papers did contain the business. Then the learned judge goes on to say: "According to the conclusion which I come to upon the evidence, the books were there before the defendant, and although he did not trouble to look into them, he had the opportunity of doing so. In my judgment, if he had intended to rely upon that parol representation of business beyond that which appeared in the papers, having the materials before him, he would have made some inquiry into it. But he did nothing of the sort." Now, in that respect I am sorry to say that the learned judge was not correct. There were no books which showed the business done. The plaintiff did not keep any such books, and had nothing but his diaries and some letter-books; and therefore it is a mistake to suppose that there were any books before the defendant which he could look into to ascertain the correctness of the statements made by the plaintiff; and the whole foundation of the judgment on this part of the case, even if it had been well founded in law, fails in fact, because the defendant was not guilty of negligence in not doing that which it was impossible to do, no books being in existence which would show the amount of business done. Then the learned judge continues: "He did nothing of the sort. I think the true result of the evidence is this, that the defendant thought that if he could have even such a nucleus of business as these papers disclosed, he could by the energy and skill which he possessed make himself a good business in Birmingham." Then that being so, the learned judge came to the conclusion either that the defendant did not rely on the statement, or that if he did rely upon it he had shown such negligence as to deprive him of his title to relief from this court. As I have already said, the latter proposition is, in my opinion, not founded in law, and the former part is not founded in fact; I think, also, it is not founded in law, for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that

contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation.<sup>1</sup> If you tell a man, "You may enter into partnership with me, my business is bringing in between £300 and £400 a year," the man who makes that representation must know that it is a material inducement to the other to enter into the partnership, and you cannot investigate as to whether it was more or less probable that the inducement would operate on the mind of the party to whom the representation was made. Where you have neither evidence that he knew facts to show that the statement was untrue, or that he said or did anything to show that he did not actually rely upon the statement, the inference remains that he did so rely, and the statement being a material statement, its being untrue is a sufficient ground for rescinding the contract. For these reasons I am of opinion that the judgment of the learned judge must be reversed and the appeal allowed.

As regards the form of the judgment, as the appellant succeeds on the counter-claim, I think it would be safer to make an order both in the action and the counter-claim, rescinding the contract and ordering

<sup>1</sup> I think that if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave v. Hurd* (2 Sm. L. C. 66, 73. 86, 8th ed.) the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that being a fair inference of fact it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that if convinced that there was such a material representation they ought to find that the plaintiff was induced by it, unless one of the things which the late Master of the Rolls specified was proved; nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference.—Lord Blackburn, *Smith v. Chadwick*, L. R. 9 Ap. Cas. 187, 196.—Ed.

the deposit to be returned. As I have already said, it is not a case in which damages should be given.

BAGGALLAY, L.J. Upon the hearing of this action Mr. Justice Fry held, as a conclusion of fact, from the evidence before him, that a misrepresentation was made by the plaintiff to the defendant as to the amount of his professional business. The learned judge had the opportunity of hearing and seeing the witnesses, and of observing the manner in which their evidence was given, and it must be a very strong case indeed in which the Court of Appeal, upon a question of fact entirely depending upon oral testimony, will dissent from the finding of the court below. Mr. Justice Fry also held that the defendant ought not to be considered as having been influenced by those misrepresentations to enter into the contract, but I am unable to concur in this conclusion. The facts from which that conclusion was drawn were partly proved by oral testimony and partly by written documents. As regards the oral testimony, according to the judgment of Mr. Justice Fry, it amounted to this: that opportunities were afforded to the defendant to ascertain the inaccuracy of the representation made to him, and that to some extent, at least, he had availed himself of those opportunities. The mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false is not sufficient to deprive him of his right to rely on a misrepresentation as a defense to an action for specific performance. The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, "You chose to believe me when you might have doubted me and gone further." The representation once made relieves the party from an investigation, even if the opportunity is afforded. I do not mean to say that there may not be certain circumstances of suspicion which might put a person upon inquiry and make it his duty to inquire, but under ordinary circumstances the mere fact that he does not avail himself of the opportunity of testing the accuracy of the representation made to him will not enable the opposing party to succeed on that ground. The case of *Rawlins v. Wickham*<sup>1</sup> is a very strong illustration of the application of that principle. There a person who had been induced by false representations to enter into a partnership continued in that partnership for four years, and then for the first time discovered the fraud which had been practiced upon him. He was held entitled to relief, though at any time during that period he might have investigated matters for himself. It is true that in the present case there was some investigation, but it was an investigation of a most cursory character, which could not have enabled the defendant to ascertain the truth or the falsity of the representations that had been made.

<sup>1</sup> 3 De G. & J. 304.

So far, therefore, as the conclusions arrived at by the learned judge upon consideration of the oral testimony on that second point are concerned I am unable to agree with him.

As regards the written testimony, it is all one way. Very different considerations apply to a case in which the testimony before the judge in the court below is written from those which apply where it is oral, for the judges of the Court of Appeal have as good an opportunity of judging of the value of written evidence as the judge before whom the case is originally brought. I need not enter into any of the details of the circumstances, as they have been treated of by the Master of the Rolls. The advertisement clearly was addressed to solicitors, and suggested that there was a favorable opening for such a person. And the correspondence which passed between the defendant and the plaintiff informed the plaintiff that the defendant was a gentleman who was seeking to establish himself in the business of a solicitor in some place to obtain a sufficient business to bring up his family, and particularly, among other things, with a view of introducing one of his own sons into the profession. The plaintiff must have known from this that the advantages suggested by him in connection with the business which he was about to surrender supplied an influential motive to the defendant in entering into the contract. It is quite true that the contract actually signed was limited to the purchase of the house, but it is impossible to say that the defendant was not mainly induced to enter into that contract by the prospect of establishing himself in a remunerative business. On these grounds I think that the decision of the court below ought to be reversed.

LUSH, L.J. I entirely agree with my learned brothers as to the propositions of law applicable to this case which have been laid down by the Master of the Rolls, and as they have been so clearly and pointedly expressed I do not think it at all necessary to repeat them, because I have not myself the least qualification to suggest as to those propositions. And so far they differ from one part of the judgment of the learned judge in the court below, in which he appears to hold that where a false representation has been made and papers are handed to the party to whom it is made from which if he chose he might detect the falsehood, and he does not do so, he is in the same position as if he had done so. I entirely differ from that view, and think what my learned brother said was the correct view of the law—that where a false representation has been made it lies on the party who makes it, if he wishes to escape its effect in avoiding the contract, to show that, although he made the false representation, the defendant, the other party, did not rely upon it. The *onus probandi* is on him to show that the other party waived it, and relied on his own knowledge. Nothing of

that kind appears here. On the question of fact, I regret to say, that I cannot follow the learned judge of the court below in the inference he draws from the facts which were before him. After stating his view of the law, that a party who has the opportunity of looking into the documents is put in the same position as if he had looked into them, the learned judge goes back to the question of fact. "I think," he says, "the true result of the evidence is this, that the defendant thought that if he could have even such a nucleus of business as those papers disclosed he could, by the energy and skill which he possessed, make himself a good business in Birmingham, and that he was willing to take as the business of the plaintiff that which was represented on those papers." Now, it is clear that the business represented in those papers was a business not exceeding £200 a year in any one of the three years to which those papers referred; therefore the learned judge finds as a matter of fact that the defendant, although the representation had been made that the business yielded from £300 to £400 a year, was content to buy a business bringing in only £200 a year. Though the learned judge lays down the proposition of law to which I have referred, he does not decide the case on that ground, but on the inference of fact that, although the representation had been made, the defendant relied on the future potential business which the plaintiff held out, gave up all reliance on that representation, and was content to take the business, though only bringing in £200 a year, as one which would suit him. Now, I do not find any evidence whatever which justifies that conclusion. The learned judge goes through the facts shortly, and, after balancing the evidence *pro* and *con.*, considers whether such a representation was originally made that the business yielded £300 a year, and comes to the conclusion that it was, and by that we are bound. [His Lordship then referred at length to the passages from the judgment of Fry, J., which had been commented on by the Master of the Rolls.]

The learned judge goes on to say that it was the common ground of both parties that, in answer to the inquiry from the defendant, the plaintiff said that there was other business which was not entered upon those papers, and the plaintiff himself says in his answers to his interrogatories, speaking of that interview: "I produced the said papers to the defendant, and stated to him, as the fact was, that the items of business mentioned therein did not represent all the business done for the years 1877, 1878, and 1879, but that I had done other items of business which I had not entered in the said bills." So far, in my judgment, from that sanctioning the idea that the defendant had agreed to accept what appeared in those papers as representing the amount of business done, it is an actual affirmance by the plaintiff of his original



representation as to the business being £300 a year or between £300 and £400. That being so, I entirely differ from the conclusion which the learned judge has drawn from those pieces of evidence. On another point the learned judge held what I think was perfectly right, that the contract for the house and for the purchase of the business was one entire contract, the one being the inducement to the other, and that the principal subject of that contract between the parties was the partnership which was to end in the sale of the business. The purchase of the house, although the value of the house was much larger than that of the goodwill of the business, was only an accessory to the acquisition of the business, for the defendant did not want the house near Birmingham unless he had a business at Birmingham. The misrepresentation as to the business, therefore, entitles the defendant to be discharged from his contract for the purchase of the house ; but I agree, for the reasons stated by the Master of the Rolls, that he is not entitled to damages.

Solicitor for plaintiff: *John Holder.*

Solicitor for defendant: *R. Biale.*

## SMITH v. LAND AND HOUSE PROPERTY CORPORATION.

IN THE COURT OF APPEAL, OCTOBER 27, 1884.

[*Reported in Law Reports, 28 Chancery Division 7.*]

THE plaintiffs, as mortgagees with a power of sale, advertised for sale by auction on the 4th of August, 1882, at the Auction Mart, London, a freehold hotel at Walton-on-the-Naze, which, in the title page of the particulars, was described as "now held by a very desirable tenant, Mr. Frederick Fleck, for an unexpired term of twenty-eight years at a rent of £400 per annum." In the body of the particulars it was stated that "the whole property is let to Mr. Frederick Fleck (a most desirable tenant), at a rental of £400 per annum (clear of rates, taxes, insurance, etc.), for an unexpired term of twenty-seven and a half years, thus offering a first-class investment."

The directors of the Land and House Property Corporation, having become aware that the property was being offered for sale, sent down their secretary to visit it, and report to the next committee.

The secretary, Mr. McLewin, reported as follows: "On Saturday I visited Walton-on-the-Naze with the view of inspecting the Marine Hotel. The hotel has been built over forty years, and up to a recent period enjoyed a high reputation as a respectable and thriving hotel. Mr. Fleck, the landlord, from the amount of business he is now

doing, can scarcely pay the amount of rent with rates and taxes. It seems to be a mystery in the town itself how Mr. Fleck, with his eyes open, could have been induced to take the hotel at the present rental. The only thing that I see that can be done with the hotel to make it pay as an investment would be to make the small theatre into a kind of music-hall, and to convert the billiard-room into a kind of casino. The town itself seems to be in the very last stage of decay from beginning to end. The old pier, wrecked on the 18th of January, 1881, has never been replaced. The landslip, which occurred on the above occasion, has never been made good."

This report was read at a meeting of the committee on the 1st of August, 1882, at which Alderman Knight, afterwards Lord Mayor of London, was in the chair. The committee passed a resolution instructing the secretary to bid up to £5,000. The secretary attended at the auction, but did not bid, and the property was bought in, the reserved bidding not having been reached. The secretary immediately afterwards made a proposal to purchase by private contract, and an agreement was signed on the same day for purchase at £4,700.

Fleck, in September, went into liquidation. The purchasers thereupon refused to complete, and in October the vendors brought this action for specific performance. The defendants, by their statement of defense, alleged (*inter alia*) that Fleck was not a desirable tenant, as stated in the particulars, but was quite unable to pay the rent of £400 a year. That such rent was in arrear at the time of the sale. That Fleck was insolvent, and shortly afterwards filed his petition for liquidation. The defendants, by counter-claim, claimed a return of the deposit, expenses of investigating the title, and cancellation of the contract, or, in the alternative, compensation for misdescription.

The misrepresentation on which the case turned was as to Fleck's character as a tenant. As to this the evidence was as follows: Fleck had been tenant from 1880, and there was no evidence as to the payment of his rent prior to January, 1882, when the plaintiffs gave him notice to pay rent to them. A quarter's rent became due at Lady Day, and it not having been paid the plaintiffs on the 1st of May threatened a distress. Fleck then wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide, and on the 6th of May Fleck paid £30 on account. On the 13th of June he paid £40 more on account, and the balance of £30 was paid some time before August, but on what day did not appear. At the time when the sale took place, the midsummer rent had been applied for, but no part of it had been paid. Fleck's references, when he had been accepted as tenant, were shown to

have been very good, and it was deposed to that he was an able manager of an hotel. The description of Fleck as a desirable tenant was inserted by the auctioneer, who had been at the place and seen Fleck. He said that he considered him a very proper person to be landlord of such an hotel; that he seemed to be in a flourishing condition, and there were no signs of insolvency about him or his hotel. The auctioneer had prepared the particulars, and inserted this description without any instructions on the subject.

As regards the question whether the contract had been entered into in reliance on the statement as to Fleck's being a most desirable tenant, Alderman Knight was orally examined before Mr. Justice Denman, who tried the action. He deposed that at the meeting when the secretary was directed to bid, the directors had no information about Fleck's position, except what was given in the particulars of sale, which were before them and were particularly referred to, especially on the point of the "desirable tenant." He was asked, "Was there anything which particularly directed your attention to that? A. Yes, certainly, that was the main security offered to us; it was the most important point of the whole particulars." "Q. Will you explain that a little further. Having regard to the secretary's report, did it have much bearing on your mind? A. Most assuredly. The secretary's report as regards the condition of Walton-on-the-Naze was of so unsatisfactory a character, that had it not been for the assurance that we had 'a desirable tenant' and 'a most desirable tenant,' I would not have purchased the property at all." "Q. Can you say whether that was the view of the other gentlemen who were present at the board? A. As far as I can say, that was the unanimous opinion of the whole board." . . . "Q. Did you at the time know that Fleck was on the eve of insolvency? A. At that time we knew nothing but that Fleck was described as 'a most desirable tenant.'" "Q. And you trusted to that statement? A. Assuredly. Had we had a hint that he was at all insolvent, or that there was any difficulty in paying his rent, I should not have bought the property, on account of the report of the bad surroundings."

There was some reference in the evidence to a conversation alleged to have taken place at the sale between the auctioneer and McLewin, from which it was to be inferred that the latter understood Fleck not to be in solvent circumstances, but whether there was, in fact, any conversation justifying that inference did not appear. The point is mentioned as the question whether McLewin's knowledge on that subject would have been material is dealt with in the judgments.

Mr. Justice Denman, sitting for Mr. Justice North, held that there

was a material misrepresentation, and that the contract had been entered into on the faith of it. His Lordship, therefore, dismissed the vendors' action and rescinded the contract. The vendors appealed, and the appeal was heard on the 27th of October, 1884.

*W. W. Karlake*, Q.C., and *Asquith* for the appeal.

FRY, L.J., referred to *Redgrave v. Hurd*.

*Davey*, Q.C., and *W. A. Raikes*, *contra*, were not called upon.

BAGGALLAY, L.J. On the 4th of May, 1882, the plaintiffs entered into a contract with the defendants for the sale to them of certain property described in particulars of sale. The property had been offered for sale by auction, but no sale was effected, and immediately afterwards this contract was entered into. The purchasers declined to complete, saying that they had been induced by misrepresentation to enter into the contract. Early in October, 1882, this action was commenced by the vendors for specific performance. It was met by a statement of defense, accompanied by a counter-claim for rescission of the contract or compensation. The foundation of the counter-claim is that the property was first described in the particulars as held by Fleck, "a very desirable tenant," and then again as "let to Mr. F. Fleck (a most desirable tenant), at a rental of £400 per annum, for an unexpired term of twenty-seven and a half years, thus offering a first-class investment." It is alleged that this was a false representation, for that it was not true that Fleck was a "very desirable" or a "most desirable" tenant. The vendors entered into receipt of the rents in January, 1882. We have no evidence as to the receipt of rent which accrued before Lady Day, 1882, but as to the quarter's rent which accrued on that day it is in evidence that it was not paid at once; that a distress was threatened, but not put in, and that the tenant paid £30 on the 6th of May, £40 on the 13th of June, and the balance of £30 some time before August, but at what precise time it does not appear. At the date of the auction, on the 4th of August, the midsummer rent had been applied for, but no part of it had been paid. Under this state of things the representation in question was made. It is said that these are words, of course, put in by the auctioneer, but I hold it to be the duty of a vendor to see that the property is not untruly described, and I cannot hold him to be excused because a description which the property will not bear has been inserted by the auctioneer without his instructions. Nor can the auctioneer excuse himself for inserting a false representation by saying that he did not know it to be untrue. I think that Mr. Justice Denman came to a correct conclusion as to there having been a material misrepresentation, for the vendors must have known perfectly well that the tenant did not pay his rent properly, and they,

therefore, were not justified in describing him as a very desirable tenant.

We have then to consider whether the representation materially influenced the defendants in coming to a conclusion to bid for the property. The evidence on this head is all one way. [His Lordship read the passages from the evidence of Alderman Knight which are given above.] This evidence is uncontradicted. It is true that in a case of this kind it would be very difficult to find any person who could contradict the evidence, and reliance was placed on the secretary's report. [His Lordship read the report.] I think that the expressions in this report as to Fleck, from the amount of business he was doing being hardly able to pay the rent, only meant to say that, according to the amount of business at present going on, it was difficult to see how Fleck could pay his rent and taxes out of the profits, and that these expressions do not at all tend to show that he was not a desirable tenant, for he might have means which would enable him to go on paying the rent till the business improved. Then Alderman Knight states most positively that having regard to the surroundings he should not have purchased but for the representation that Fleck was a very desirable tenant. It must then, in my opinion, be considered that the representation was relied on. Now a man who paid his rent so irregularly could not properly be represented as a desirable tenant. After the report had been considered by the directors, the secretary was authorized to attend at the auction and bid up to £5,000. The secretary no doubt saw that the biddings were going in such a way that he should have a chance of getting a better bargain by private contract. He did not bid, but immediately after the auction, the property not having been sold, he agreed to purchase for £4,700. Some observations were made on a conversation alleged to have taken place between the secretary and the auctioneer, tending to show that the former knew something to Fleck's disadvantage. But the secretary on this occasion was an agent for a particular purpose, being directed to buy the property if he could get it for a sum not exceeding £5,000, it was no part of his business to regulate his bidding by what he learnt about the tenant. What he may have heard or said on that occasion, when he was only sent as an agent for the purpose of buying on the best terms he could get not exceeding £5,000, cannot be evidence against the directors.

I need not say much as to the cases. In *Scott v. Hanson*,<sup>1</sup> and *Trower v. Newcome*,<sup>2</sup> the question was whether there was any misrepresentation or not. In *Trower v. Newcome* a living was described

<sup>1</sup> 1 Sim. 13; 1 Russ. & My. 128.

<sup>2</sup> 3 Mer. 704.

as likely to become vacant soon, and a statement was made orally that it would become vacant on the death of a person aged eighty-two. This did not amount to a representation that the incumbent's age was eighty-two. *Redgrave v. Hurd*<sup>1</sup> is in favor of the purchasers.

On the facts as found in the present case I think that Mr. Justice Denman came to a right conclusion.

BOWEN, L.J. I am of the same opinion. The action is by vendors for specific performance, and the purchasers allege that there is in the particulars a misrepresentation which disentitles the plaintiffs to specific performance. To sustain this defense the defendants must prove that there was a material misrepresentation, and that they entered into the contract on the faith of the representation.

Was there, then, a misrepresentation of a specific fact? This partly depends on the question, whether on the construction of the particulars, what they say as to Fleck is a representation of a specific fact, a question which the Court of Appeal has the same means of deciding as the judge in the court below. Whether the purchasers relied upon it is a question of fact which the judge of the court below had better means of deciding than we have, for he saw and heard the witnesses.

In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant; other persons either do not know them at all, or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors

<sup>1</sup> 20 Ch. D. 1.

state that the property is let to a most desirable tenant; what does that mean? I agree that it is not a guarantee that the tenant will go on paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that it was not. On the 25th of March a quarter's rent became due. On the 1st of May it was wholly unpaid, and a distress was threatened. The tenant wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, on the 13th of June £40, and the remaining £30 shortly before the auction. Now could it at the time of the auction be said that nothing had occurred to make Fleck an undesirable tenant? In my opinion, a tenant who had paid his last quarter's rent by dribbles under pressure must be regarded as an undesirable tenant.

Treating this then as a misrepresentation, did it induce the purchasers to buy? It appears to me that it is in every case a question of fact whether a person is induced to buy by a particular representation. We may obtain valuable hints from reported cases, but none of the cases appear to me to impugn the proposition that the question is one of fact to be decided on the circumstances of each particular case. A representation in the particulars must be taken as made for the purpose of influencing the purchaser's mind. Then, did the purchaser rely upon it? I cannot quite agree with the remark of the late Master of the Rolls in *Redgrave v. Hurd*,<sup>1</sup> that if a material representation calculated to induce a person to enter into a contract is made to him, it is an inference of law that he was induced by the representations to enter into it, and I think that probably His Lordship hardly intended to go so far as that, though there may be strong reason for drawing such an inference as an inference of fact. But here we are not left to inference. The chairman of the company was called and swore in the most distinct and positive way that it did influence him, and that but for the representation he would not have purchased. The judge was at liberty to disbelieve him, but I see no reason why he was bound so to do. His evidence was not shaken on cross-examination, and the judge believed him. He uses the very argument that the property had been examined on behalf of the company as strengthening the statement that the company relied on the representation, for he says the report of the secretary was so unfavorable that but for the representation as to the tenant they would not have bought. *Redgrave v. Hurd*<sup>2</sup> shows that a person who

<sup>1</sup> 20 Ch. D. 1, 21.

<sup>2</sup> *Ibid.*, 1.

has made a misrepresentation cannot escape by saying, "You had means of information, and if you had been careful you would not have been misled." It was urged that Alderman Knight would not have relied on the representation had he not put on it a construction that it will not bear, viz., that it was a guarantee that the tenant would go on paying the rent. I do not think that he understood it so. I think he merely understood it as a representation that, so far as the vendors knew, the tenant was likely to go on paying the rent for the rest of the term. If we had merely to deal with the evidence of Alderman Knight on paper, I should not feel quite satisfied that we ought to treat it as satisfactory, but as the judge who heard and saw him was satisfied, I think that we ought not to differ from his conclusion.

FRY, L.J. After the full discussion of this case by my learned brothers I have little to add. The first question is whether the stating Fleck to be a very desirable tenant was a misrepresentation. It seems to me that the vendors by describing him as such stated in substance that they knew no fact which showed him not to be a desirable tenant. The judge in the court below has found that they did know facts which showed him not to be a desirable tenant, and I see no reason to dissent from that conclusion.

The second question is whether the purchasers purchased on the faith of that representation. The learned judge has found that they did. On that question I feel the same difficulty as Lord Justice Bowen, and on the evidence as read before us I should have felt inclined to come to the conclusion that the contract was not induced by that representation; but as Mr. Justice Denman, who saw and heard Alderman Knight, was satisfied with his evidence, I cannot give my voice for reversing his decision.

Solicitors for plaintiffs: *R. S. Taylor, Son & Humbert.*

Solicitors for defendants: *Smythe & Brettell.*

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THOMAS KELLY, APPELLANT, v. CENTRAL PACIFIC RAILROAD COMPANY ET AL., RESPONDENTS.

IN THE SUPREME COURT OF CALIFORNIA, JANUARY 25, 1888.

[*Reported in 74 California Reports 557.*]

APPEAL from a judgment of the Superior Court of Placer County. The facts are stated in the opinion.

*J. M. Fulweiler* and *Hart & White* for appellant.

*A. P. Catlin* and *C. A. & F. P. Tuttle* for intervenor and respondent.



*Hale & Craig* for defendant and respondent.

HAYNE, C. Action for specific performance of a contract to convey land.

The Central Pacific Railroad Company, being the owner of large tracts of land acquired from the federal government, placed the disposition of the same in the hands of one of its officers, called its land agent. The finding in this regard is that "said railroad company, for the purpose of disposing of its lands, established a land department and appointed a land agent, who had power to issue and carry into effect the circulars hereinafter copied. Said land agent had full power to appoint subordinate agents, and to distribute to them the work of the land department."

In the exercise of his functions the land agent addressed a circular to the public inviting settlement upon its vacant lands, and stating, among other things, that "settlers and actual occupants who in good faith cultivate and improve lands belonging to either of the companies will generally be given preference of purchase at the regular price."

It appears that in the spring of 1881, one Menger, who was then in occupation of the south half of the northeast quarter of section 7, in township 13, range 9 east, Mount Diablo base and meridian, and of an adjoining piece, received the above-mentioned circular, and certain verbal assurances, and after several months sold and conveyed whatever rights he had to one Cole. Before making the purchase, Cole inquired of one Perkins, the deputy of the land agent, "whether, if he bought from Menger, he could get the title of the company" to the said south half of the northeast quarter, and the other land which Menger occupied. And Perkins "then gave him one of said circulars, and informed him that if he moved upon the land and improved it, he could safely buy of said Menger, and that the railroad company would give him the preference to buy the same at such price as it might fix; and said Cole made said purchase under said advice, and moved into said Menger's house immediately upon the purchase. . . . Said Cole moved upon said land, and continued to reside upon it and make improvements on it, relying upon said circulars, and what was said to him by said Perkins, believing that he would have the prior right to purchase from said railroad company said land at a price which it might fix." In December, 1881, he filed his application to purchase with the land agent; but no immediate action appears to have been taken thereon.

During all of this time the plaintiff, Kelly, had brought himself within the terms offered by said circular, as to certain adjoining land, but had never done so as to the land in controversy. It sufficiently

appears, we think, that Kelly had notice of Cole's equities. For he resided in the vicinity, and it is found that on one occasion he undertook to make an entry upon Cole's possession, and commenced to erect "a small board house" upon the land in controversy; but Cole ordered him off, and he left and moved his house away. He therefore knew that Cole had a claim to the land, and by inquiry he could easily have learned the nature of such claim.

Several weeks after this Kelly filed with the land agent an application to purchase certain lands, including the tract in controversy, and represented to the land agent that he, Kelly, had settled upon the same. The land agent, believing these representations, entered into a contract with Kelly for the conveyance to him of this and other tracts, and received from him the first payment therefor. These representations of Kelly were entirely false. The finding in this regard is as follows: "Kelly's said representations, made by himself and his witnesses to the land agent, were untrue, and he at the time knew that they were untrue, and they deceived the land agent, and induced him to award to said Kelly said south half of the northeast quarter; and the land agent, but for such deception, would not have awarded said south half of the northeast quarter to said Kelly, but would have awarded it to said Cole."

Upon becoming aware of the deception which had been practiced upon him, the land agent notified Kelly that he could not have the tract in controversy, and tendered him back the portion of the first payment which applied to that tract, but did not tender him back the money applying to the other lands mentioned in his contract. Kelly refused to receive the money, and brought this action to compel the conveyance to him of all the land mentioned in the contract. Cole intervened and prayed for the conveyance of the land in controversy to him. The court below decreed that the land be conveyed to Cole, and Kelly appeals. The evidence is not brought up—the appeal being from the judgment, and upon the judgment-roll alone.

The point made on Kelly's appeal is, that the false representation was not productive of injury to the railroad company. And the argument is that there was no injury, because, in the first place, it was under no obligation to convey to Cole—the promise contained in the circular being merely that "preference will generally be given to settlers," in which respect it differs from the promise contained in the circular considered in *Boyd v. Brinckin*; <sup>1</sup> and because, in the second place, the company was willing to convey and will convey the land to

<sup>1</sup> 55 Cal. 427.

Cole for the same price that it agreed to convey it to Kelly, and hence could not be injured pecuniarily.

It is deserving of serious consideration whether, admitting that *Boyd v. Brinckin* can be distinguished as contended, there was not sufficient part performance of the oral promise to Cole to take the case out of the Statute of Frauds and entitle him to a specific performance. But waiving this, we think there are two answers to the argument for the appellant.

1. Assuming the correctness of appellant's major proposition—viz., that in order to defeat a suit for specific performance on the ground of fraud, the fraud must be productive of injury—it is not necessary that the injury should result to the vendor. It is sufficient if it would result to third persons. It is upon this principle that the relief is refused where the thing to be done would operate as a fraud upon the public. Thus a court will refuse to decree specific performance of an agreement to publish a book purporting to be written by one person, but in fact written by another.<sup>1</sup> So upon the same principle the relief is refused where the agreement was in fraud of the rights of creditors,<sup>2</sup> or in fraud of the rights of other parties.<sup>3</sup> So it is refused where the act sought to be enforced would operate to the injury of interests in remainder,<sup>4</sup> or to a wife's right in a homestead,<sup>5</sup> or to subsequent purchasers from the same vendor.<sup>6</sup> The court will not make itself an instrument to carry out the fraud, whether the person to be injured be a party to the contract or not. It will not assist the plaintiff to get the benefit of the intervenor's labor and improvements upon the tract in controversy.

2. But we do not think that in order to defeat a suit for the specific performance of a contract to convey land, upon the ground of fraud, the fraud must be productive of damage either to the vendor or to third persons. If the misrepresentation was intentional, and made for the purpose of deceiving the vendor, and the vendor relies upon it, and was deceived by it, and would not have entered into the contract but for the fact that he was so deceived, then we think a court of equity will not enforce the contract, whether it be accompanied by damage or not. So far as this kind of suit is concerned,

<sup>1</sup> *Post v. Marsh*, L. R. 16 Ch. D. 406.

<sup>2</sup> *St. John v. Benedict*, 6 John Ch. 117; *Baldwin v. Campfield*, 8 N. J. Eq. 600; *Ryan v. Ryan*, 97 Ill. 40.

<sup>3</sup> *Kitchen v. Coffyn*, 4 Ind. 507.

<sup>4</sup> *Fry on Specific Performance* 141, § 304; *Thomas v. Dering*, 1 Keen 747, 748.

<sup>5</sup> *Phillips v. Stauch*, 20 Mich. 383.

<sup>6</sup> *Curran v. Holyoke*, 116 Mass. 90; and see *Pomeroy on Specific Performance*, § 181.

such a misrepresentation is material although not accompanied by damage.

The counsel for the appellant cite in this connection the case of *Morrison v. Lods*,<sup>1</sup> as affirming the contrary doctrine. The report of that case is somewhat obscure. It does not show what the representation was, nor whether it was intentionally false or a mere innocent misrepresentation. But if the court meant to decide that a court of equity will enforce a contract obtained solely through a false and fraudulent representation, then we think the decision is in violation of established principles. It is perfectly true, as stated in the opinion, that an action at law cannot be maintained for fraud unless accompanied by damage. It is also true, as stated in the opinion, that a court of equity will not set aside a contract obtained through fraud unless it be productive of injury.<sup>2</sup> But it is not true that this applies to suits for specific performance. It is well settled that a court of equity may refuse specific performance of a contract which it would not set aside.<sup>3</sup>

Although the court will refuse to destroy the contract, it will not further in any way the fraudulent design. In such cases, by an application of the maxim, that he who comes into equity must come with clean hands, the court is enabled to give greater effect to the principles of morality than can be done in ordinary cases. The leading text-writers are agreed in this view. Chancellor Kent, after stating the general rule that fraud must be accompanied by damage, and that "there are many duties that belong to the class of imperfect obligations, which are binding in conscience, but which human laws do not and cannot undertake directly to enforce," goes on to say: "But where the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway."<sup>4</sup> This statement is adopted by Story.<sup>5</sup> So Kerr, in his work on fraud and mistake, says: "Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. . . . Where a party calls for specific performance, he must, as to every part of the transaction, be free

<sup>1</sup> 39 Cal. 385.

<sup>2</sup> 1 Story's Eq. Jur., § 203.

<sup>3</sup> *Mortlock v. Buller*, 10 Ves. 308 ; *Cadman v. Horner*, 18 Ves. 11 ; *Seymour v. Delancy*, 6 Johns. Ch. 222 ; *Jackson v. Ashton*, 11 Pet. 248 ; *Barksdale v. Payne*, Riley 178 ; *Frisby v. Ballance*, 4 Scam. 299 ; *Clement v. Reid*, 17 Miss. 542, 543 ; *Taylor v. Merrill*, 55 Ill. 61 ; *Hilliard on Vendors* 445 ; *Fry on Specific Performance*, Am. ed., 192, § 427.

<sup>4</sup> 2 Kent's Com. 490.

<sup>5</sup> 1 Story's Eq. Jur., § 206.

from every imputation of fraud or deceit," and "must show that his conduct has been clear, honorable, and fair."<sup>1</sup> So Hovenden says: "Specific performance of an agreement is never compelled unless the case is clear of the imputation of any deception; the conduct of the party seeking it must be free from all blame."<sup>2</sup> This rule is embodied in section 3391 of the Civil Code, which provides that "Specific performance cannot be enforced against a party to a contract. . . . 3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due," etc.

And it is evident that such must be the rule. To say otherwise is to place suits for specific performance on the same level with actions at law, which is contrary to all the authorities. If, therefore, the case of *Morrison v. Lods* is to be construed as affirming any such doctrine, it does not state the law correctly. The case of *Board of Commissioners v. Younger*<sup>3</sup> was a suit to set aside a contract, and not for specific performance.

In the present case the false and fraudulent representation of plaintiff was the inducing cause of the contract. This is apparent from the fact that as soon as the company discovered the fraud which had been practiced upon it, it repudiated the contract. And it is expressly found that "the land agent, but for such deception, would not have awarded said south half of northeast quarter to said Kelly, but would have awarded it to said Cole."

This state of facts well illustrates the wisdom of the doctrine which does not insist upon measuring everything by the standard of damage, but so far as can be done allows parties to determine what is for their own interests, and to contract or to refuse to contract accordingly. It is evident from the circulars contained in the record that it was the policy of the company to encourage the settlement of its vast tracts of unoccupied land. To carry out this policy it offered special inducements to settlers. It ought to be allowed to fulfill its promises to those who have relied upon its good faith. It is not for one who falsely pretends to be entitled to the benefit of those promises to say that it is all the same to the company because he pays the same price as the other would. The case is one where the vendor has special motives for selling to one person at a price which it would not accept from another.<sup>4</sup>

<sup>1</sup> Kerr on Fraud and Mistake, Am. ed., 357, 358.

<sup>2</sup> 2 Hovenden on Fraud 4; see also Fry on Specific Performance, Am. ed., 204.

<sup>3</sup> 29 Cal. 172.

<sup>4</sup> See *dictum* of Lord Eldon in *Bonnett v. Sadler*, 14 Ves. 528.

It may be conceded in favor of appellant that the company did not take the proper course to rescind its contract with the plaintiff. Be that as it may, he cannot, for the reasons stated, have the aid of a court of equity to carry it out. His case against the company, therefore, fails. And this being so, he cannot inquire into the correctness of the decree directing the company to convey to the intervenor. For if he is not entitled to the specific thing, it is of no consequence to him what becomes of it, and he cannot concern himself with that question. We do not regard the case of *Taylor v. C. P. R. R. Co.*<sup>1</sup> as conflicting in any degree with the above positions.

We therefore advise that, upon the appeal of the plaintiff, the judgment be affirmed.

FOOTE, C., and BELCHER, C.C., concurred.

The COURT. For the reasons given in the foregoing opinion, in the appeal of the plaintiff, the judgment is affirmed.

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### WOOLLUMS v. HORSLEY.

IN THE COURT OF APPEALS OF KENTUCKY, DECEMBER 13, 1892.

[*Reported in 93 Kentucky Reports 582.*]

*W. M. Beckner* for appellant.

*Helm & Bruce* for appellee.

CHIEF JUSTICE HOLT delivered the opinion of the court.

In August, 1887, the appellant, John Woollums, was living upon his mountain farm of about two hundred acres in Bell County. He was then about sixty years old, uneducated, afflicted with disease disabling him from work, owned no other land, and but very little personal property. He knew but little of what was going on in the business world owing to his situation and circumstances in life. He moved in a small circle.

At this time the appellee, W. J. Horsley, who was then a man of large and varied experience in business, who was then buying mineral rights in that locality by the thousands of acres, and who was evidently familiar with all that was then going on and near at hand in the way of business and development in that section, through his agent entered into a contract with the appellant, which was signed by the latter only, by which he sold to Horsley all the oils, gases and minerals in his land, with customary mining privileges, for forty cents per acre, and obligated himself to convey the same by general war-

<sup>1</sup> 67 Cal. 615.

ranty deed, free of dower claim or other incumbrance, when the purchase-money was paid, to wit: one-half in three months and the balance in four months from the first payment, or as soon as the deed should be made, three dollars of it, however, being then paid.

It is suggestive upon the question of the then value of the purchase, and as regarded by Horsley, that his agent, who made it, was to get eighty dollars for his pay, or as much as Woollums was to receive for all he sold, and also that this agent does not testify in the case.

The purchase-money was not paid as stipulated, but the reason given is that it was a sale of the minerals by the acre, and the quantity of land was not known, and Woollums refused to survey it. Nothing appears to have transpired between the parties until the summer after the trade, when Horsley demanded a deed. He says he sent his agent to do so before that time, but it does not appear he did so.

In December, 1888, this suit was brought for a specific performance of the contract. The main defense is that it was procured through undue advantage, and under such circumstances that, in equity, its performance should not be decreed.

The answer also sets up inability to convey with contingent right of dower relinquished, as the wife refused to unite in the deed; but it is alleged, and not denied, that the husband induced this refusal by her, and the appellee offered to accept a conveyance without her relinquishment, a proper reduction of the purchase-money being allowed.<sup>1</sup>

The specific execution of the contract was ordered.

Considering all the circumstances, and the rule applicable in such a case, the judgment should not be upheld.

There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity, and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically, the party is left to his remedy at law.

Thus a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just as between the

<sup>1</sup> Pomeroy on Contracts, § 438.

parties, and it will allow a defendant to resist a decree, where the plaintiff will not always be allowed relief upon the same evidence.

A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance.

Story says: "Courts of equity will not proceed to decree a specific performance where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension; or where, from a change of circumstances or otherwise, it would be unconscientious to enforce it."<sup>1</sup>

Kent also says: "It is a rule in equity that all the material facts must be known to both parties to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted to suppress it and still call for a specific performance."<sup>2</sup>

It was held in *Patterson v. Bloomer*,<sup>3</sup> and the same rule has been announced in other cases, that an application for specific performance is addressed to the court's sound discretion, and will not be granted unless the contract is made according to legal requirements; is certain, reasonable, equitable, mutual, on sufficient consideration, consistent with public policy, and is free from gross misapprehension, fraud, surprise, or mistake.

The appellee testifies that he did not know anything as to the mineral value of this land when the contract was made, but it is evident he had a thorough knowledge of the value in this respect of lands generally in that section, and of the developments then in progress or near at hand.

All this was unknown to the appellant. It is evident his land was valuable almost altogether in a mineral point of view. While it is not shown what it was worth at the date of the contract, yet it is proven to have been worth in April, 1889, fifteen dollars an acre, and that this value arises almost altogether from its mineral worth, and yet the appellee is asking the enforcement of a contract by means of which he seeks to obtain all the oil, gas, and minerals, and the virtual control of the land, at forty cents an acre. The interest he claims under the contract is substantially the value of the land. Equity should not help out such a harsh bargain.

The appellee shows pretty plainly, by his own testimony, that when the contract was made he was advised of the probability of the building of a railroad in that locality in the near future. His agent, when

<sup>1</sup> 2 Story's Eq., § 750a.

<sup>2</sup> 2 Kent 491.

<sup>3</sup> 95 Am. Decisions 218.



the trade was made, assured the appellant that he would never be bothered by the contract during his lifetime. He was lulled in the belief that the Rip Van Winkle sleep of that locality in former days was to continue; and the grossly inadequate price of this purchase can only be accounted for upon the ground that the appellant was misled and acted under gross misapprehension.

The contract was not equitable or reasonable, or grounded upon sufficient consideration, and no interest has arisen in any third party. A court of equity should, therefore, refuse its specific enforcement, but the appellant should have what was in fact paid, with its interest; and when this is done his petition should be dismissed.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

## SECTION IV. (CONTINUED).

### (e) *Mistake.*

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#### MASON *v.* ARMITAGE.

IN CHANCERY, BEFORE LORD ERSKINE, C., JULY 25, 26, 1806.

[*Reported in 13 Vesey 25.*]

THE bill stated that the defendant Armitage put up to sale by auction at Norwich, on the 7th of August, 1802, a freehold and copyhold estate ; that there were several bidders ; and the plaintiff, being the highest bidder, at the sum of £8,000, the estate was knocked down to him at that sum, and he was declared the purchaser. The plaintiff, after the sale was concluded, tendered the deposit, and a moiety of the auction duty to the auctioneer, according to the conditions of sale, but the auctioneer declined to take the money, as the vendor seemed dissatisfied with the sale, and, as auctioneer and agent for the defendant, made and signed the following memorandum on the printed particulars and conditions of sale :

“Memorandum : Saturday, the 7th of August, 1802 ; attended at the Blue Bell on Hoghill, Norwich. Mr. Robert Mason was the highest bidder at the sum of £8,000 ; the deposit being 10 per cent. upon the purchase-money. Mr. Mason offered me £800 for the same, as well £100 for his moiety of the auction duty ; but the owner nor his attorney being present, I did not think proper to receive the same. R. Bacon, auctioneer.” Then, after the names of persons who were present,

“N.B.—There was a misunderstanding between the vendor and the person appointed by him to bid for the estate.”

The bill prayed a specific performance of the agreement and a conveyance, etc.

The circumstances upon which the bill was resisted, according to the evidence of the auctioneer and other persons present at the sale, were these :

Armitage in the usual way, by writing, appointed William Rising to make one bidding for him ; there was an interval of seventeen minutes between the time of Mason's last bidding and the time when the estate was knocked down to him. After that bidding the auctioneer laid a watch upon the table, and said if no farther bidding was made it would be necessary for him to call on the person appointed to bid for the owner to make his bidding if he thought proper. After waiting about seven minutes, the auctioneer inquired of the persons present if they were inclined to make any farther offer, addressing himself to each individual, to those who were known to him by name, and particularly to Rising, by pointedly looking at him, he being the person who was authorized to make the reverse bidding, and to bid once on the part of the owner ; and the auctioneer said, " It is with your free will and consent that the estate shall be knocked down at £8,000 to Mr. Mason " ; and Rising, who sat upon the same seat with Armitage, making no motion whatsoever, the auctioneer asked the company at large whether any one of them chose to make any farther advance on the last bidding ; observing, at the same time, that the seller had made no bidding ; but no farther offer being made by any person present, and Rising still taking no notice, after some farther pause the estate was knocked down. Immediately after the auction was finished Rising remonstrated with the auctioneer, insisting that he had no right to knock the estate down to the plaintiff, as he (Rising) expected to have been called upon by name, and said to the plaintiff that as he (Rising) had made this mistake he would give the plaintiff £100 out of his own pocket to relinquish the estate rather than the vendor should be a sufferer on his account. In the course of the sale the auctioneer being asked whether there were any setters in the room, answered not that he knew of ; but that the vendor had reserved one bidding for himself, and that the company should know when he made that bidding, and after that bidding any person making an advance of £10 should be the purchaser. The auctioneer being farther asked who was to bid for the vendor, said he was not at liberty to give up the name.

Rising, by his deposition, stated that great intimacy subsisted between the plaintiff and the defendant Armitage, and previously to the sale, on the same day, Armitage told the plaintiff he had appointed Rising to buy the estate in for him at £9,000, and would not take less, and that the plaintiff had better take the estate for his friend. The plaintiff replied that he had no money, and would have nothing to do with it either for himself or his friend. Rising also stated that he expected to be called upon by name, and did not conceive the general call upon the company to be addressed to him, otherwise he would have bid £9,000.

*Mr. Perceval and Mr. Cooke* for the plaintiff.

The *Solicitor-General* for the defendant Armitage ; *Mr. Fonblanque* and *Mr. Hall* for the purchaser from him.

THE LORD CHANCELLOR. But in this case I am not called upon to look at the statute. I admit there is nothing in this contract showing that anything was fraudulently obtained by the plaintiff, and if he had been declared the purchaser, and had got into possession, so that the defendant had been obliged to come into this court upon the head of fraud, there would not be sufficient ground to deprive the plaintiff of the benefit of his legal contract. But that is not this case. This plaintiff has got all the law can give him and applies here desiring more, and the question is, whether, under all the circumstances and upon the authorities and principles, this is a case for a specific performance.

As to the cases that were cited, independent of the authority of Lord Kenyon, I find a more ancient authority. The same rule is laid down by Lord Hardwicke, particularly in the case of *Underwood v. Hitchcox*.<sup>1</sup> A specific performance is so much matter of discretion that it is very rarely, at least, granted in the case of personal chattels. In the case<sup>2</sup> of a bill filed for the performance of an agreement to transfer stock at a given day and price in consideration of two guineas, the decree was made, but it was upon appeal reversed by Lord Parker, who said the plaintiff should go to law for damages, one man's stock being the same as another's. It is not necessary that fraud should be made out. Though from want of attention, misrepresentation, and mistake, a party may have acquired a right at law, this court will not, especially if upon other circumstances the case is hard, decree a specific performance, but the law is open to him.<sup>3</sup> Upon this subject the court is governed by a sound, not a capricious and arbitrary discretion.

In this case, I cannot say, the plaintiff has acted so as to be an example, though his conduct does not come up to fraud, so that I could have dealt with it as such if he had obtained possession. It is plain, he had talked of purchasing it for his friend, and his answer to the offer made to him that he would have nothing to do with it is rather against him, the defendant on that account not looking to him as a purchaser. Having thus put the defendant off his guard, the plaintiff went into the room, and was considered by every one as a puffer. This is not a damp upon the sale by a circumstance over which the man had no control, as in *Twining v. Morrice*.<sup>4</sup> This arises from his own act. Upon the suspicion that the plaintiff was a puffer, the question was put whether any puffers were present, and then a fair account is given by the auctioneer, that the defendant had reserved one bidding, and any one who would advance £10 upon that should have the estate. This was not private,

<sup>1</sup> 1 Ves. 279. ;

<sup>3</sup> *Joyne v. Statham*, 3 Atk. 388.

<sup>2</sup> *Cud v. Rutter*, 1 P. Will. 570.

<sup>4</sup> 2 Bro. C. C. 326.

but a public conventional option not to let the estate go at a particular bidding. The result of the evidence is plain misapprehension and mistake, not an after-thought by the defendant, satisfied at the moment with the sum of £8,000. There is no difficulty as to the evidence, which is embodied upon the written memorandum, stating clearly that there was a misunderstanding. If, however, the plaintiff thinks he has a case which the statute will not meet, upon which I do not give any opinion, he is not injured by this decision. There is nothing to show that this land is of any peculiar value to him, as, if it was contiguous to his own estate, or purchased with a view to set up a manufacture. Therefore, Lord Parker's observation as to stock is applicable, and as the plaintiff declared he did not intend to make this purchase, and he has obtained an advantage through a mistake, a court of equity will not give him any assistance in that.

Dismiss the bill without costs.

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MALINS v. FREEMAN.

IN CHANCERY, BEFORE LORD LANGDALE, M.R., DECEMBER 6, 1836,  
JANUARY 14, 1837.

[*Reported in 2 Keen 25.*]

THE plaintiff, William Malins, being the owner of an estate, partly freehold and partly copyhold, called "The Rookery," and situate at Woodford, in the county of Essex, caused the same to be put up for sale by action, in five lots, on the 8th of May, 1834. Richard Ellis the elder acted as auctioneer, and among the conditions of sale which were read previously to the commencement of the sale, it was stipulated that the purchaser of each lot should pay down a deposit of 20 per cent. in part of the purchase-money, and sign an agreement for the payment of the remainder of the purchase-money, with the amount of the timber, fixtures, etc., on or before the 30th of August, 1834.

The defendant, James Freeman, attended the sale, and was declared the highest bidder for and the purchaser of lot 3 at the sum of £1,400; and, upon the lot being knocked down to him, he handed in his card to Richard Ellis the younger, who acted as clerk to his father, and wrote down the name and address of the defendant on a copy of the conditions and particulars of sale. There was a reserved bidding on the other lots of the plaintiff's estate, none of which were actually sold. A copyhold estate belonging to one Davies was afterwards put up for sale, but was also bought in under a reserved bidding. At the close of the auction the defendant was called upon to pay the deposit of 20 per

cent. upon the price of lot 3, and to sign an agreement for the payment of the remainder of the purchase-money in pursuance of the conditions of sale, when he declared that he had made a great mistake in bidding for lot 3 of the plaintiff's estate, having, in fact, been employed only to bid up to a protecting price for Davies's estate, and he refused to sign the contract or pay the deposit. The bill was filed against the defendant for a specific performance of the agreement; it charged that the property, comprised in lot 3, consisting of a piece of land which was described and commented upon by the auctioneer at the time of the sale, differed entirely from the property of Robert Davies, which was put up in a single lot, and consisted of a house and grounds, and that the alleged mistake was a mere after-thought of the defendant, set up by him in consequence of his having repented of his purchase. The bill further charged, that the person employed to bid up to a protecting price for Davies's estate was not the defendant, but a person of the name of Cole.

The defendant, by his answer, stated that he was appointed to bid for Davies's property up to a protecting price, and that having entered the auction room while lot 2 of the plaintiff's property was in the course of sale, he supposed and believed that the next property offered for sale would be Davies's, and under that impression he bid for lot 3 of the plaintiff's property, without any knowledge or consideration of the value thereof, and that the price at which the same was knocked down to him was a most exorbitant and unreasonable one. That at the conclusion of the sale he explained the mistake to the auctioneer, and requested him to extricate him from the difficulty in which it had placed him. The defendant further submitted and insisted that there was no sufficient contract in writing, within the statute, signed by the defendant or his agent so as to be binding on the defendant, and that there was no real bidder for lot 3, but that the plaintiff's solicitor was the only bidder besides the defendant, and that such solicitor acted as a puffer for the vendor, and did, in fact, bid several times against the defendant, and run the lot up to an exorbitant price.

By the evidence of Cole, it appeared that both Cole and the defendant were employed by Davies to bid up to a protecting price for his property, and that in a conversation which took place between Cole and the defendant, after lot 3 of the plaintiff's property had been knocked down to the defendant, Cole informed the defendant of his mistake, and advised him to speak to the auctioneer about it at once, but the defendant declined doing so until the sale was over.

*Mr. Kindersley, Mr. Sidebottom, and Mr. Malins* for the plaintiff.

*Mr. Pemberton and Mr. Rogers.*

The MASTER OF THE ROLLS. The plaintiff being entitled to an

estate called The Rookery, at Woodford in Essex, employed Richard Ellis and son as auctioneers to sell the same by auction, in five lots, on the 8th day of May, 1834; and the same auctioneers were employed by a Mr. Davies to sell for him an estate at Layton on the same day and at the same place, Garraway's Coffee-House.

The defendant, Freeman, who was acquainted with Davies, met Davies on the day preceding the sale, and offered to go and bid for him. Davies having accepted his offer, a meeting between them was appointed to take place at the auctioneer's on the day of sale at twelve o'clock. The object of Davies in appointing this meeting was, that the defendant should receive his instructions from the auctioneer; but the defendant, not having kept his appointment, joined Davies at Lloyd's Coffee-House between one and two o'clock, and was in a hurry to proceed to the sale, fearing that he might be too late to bid for Davies's estate. Davies gave him his own instructions, and the defendant hurried away to Garraway's Coffee-House.

The auctioneer's arrangement was to sell the several lots of the plaintiff's estate first, and then to sell Davies's estate, and it appeared that the defendant arrived at the auction-room when the second lot of the plaintiff's estate was under sale. He placed himself near enough to the auctioneer, for a person not deficient in hearing, to hear what the auctioneer said. Lot 2 of the plaintiff's estate was brought in, and the auctioneer, having described lot 3 in terms wholly applicable to Davies's estate, offered that lot for sale. The defendant began to bid for it, and kept bidding in a hasty and inconsiderate manner till the price was raised to £1,400. The lot was then knocked to him, and the auctioneer declared the property to be absolutely sold. The defendant was not at that moment called upon to sign the contract, but he handed in his card, showing his name as purchaser. About the same time, Mr. Cole, another person employed by Mr. Davies to bid for him, asked the defendant what had induced him to purchase the lot, to which he observed, "Why, it is Davies's property, is it not?" Mr. Cole having told him that it was not, but that he had bought part of Malins's property at Woodford, the defendant seemed much flurried, and said he would speak to the auctioneer. Cole advised him to do so at once, but he said he would wait till the sale was over; and, after the sale was over, being called upon to pay the deposit and sign the contract, he said he had made a great mistake in bidding for lot 3 of the plaintiff's estate, having, in fact, only intended to bid for Davies's, and he refused to sign the contract or pay the deposit.

The auctioneer wrote the defendant's name, as purchaser, on a copy of the conditions and particulars of sale, in such a manner as the plaintiff alleges is sufficient to make the contract binding on the defendant,

and, therefore, he insists that he is entitled to a specific performance of the agreement.

Upon the facts proved, some questions are raised as to the validity of the contract; but supposing the contract to be valid, the defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it.

Certainly, if the defendant did fall into any mistake, it cannot be ascribed to the conduct of the plaintiff. The plaintiff and his agents in no respect contributed to it, and, if the defendant by his carelessness has caused any injury or loss to the plaintiff, he is accountable for it.

But the defendant may be answerable for damages at law without being liable to a specific performance in this court. In cases of specific performance the court exercises a discretion, and, knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not in all cases decree a specific performance; as in cases of intoxication, although the party may not have been drawn in to drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the court will relieve, for the court is not here called upon to relieve the defendant from his legal liability, but whether, if the mistake be proved, the court will enforce a specific performance, leaving the defendant to his legal liability. And I think that, if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed; and after giving to the evidence the best consideration in my power, I am of opinion that the defendant never did intend to bid for this estate. He was hurried and inconsiderate, and, when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that by his conduct he occasioned some loss to the plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law. Let the bill, therefore, be dismissed without costs.



THE WESTERN RAILROAD CORPORATION v. ABEL  
BABCOCK.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER  
TERM, 1843.*[Reported in 6 Metcalf 346.]*

BILL in equity, filed on the 4th of May, 1842, praying for a decree for the specific performance of a contract.

The bill alleged that the defendant executed and delivered to the plaintiffs an instrument in writing, in the following words: "To all people to whom these presents shall come. Whereas the Western Railroad Corporation have caused surveys to be made, to ascertain the best route for the road authorized by their act of incorporation, and other routes are about to be surveyed, some of which pass, or may pass, over or through lands owned by me, or in which I have an interest; therefore know ye, that I, Abel Babcock, of Chester, in the county of Hampden, in consideration of one dollar paid to me, and for the further consideration hereinafter expressed, that said railroad be located through or over lands situated in Chester, on the west side of the west branch of Westfield River, on or near the locating line lately run by John Child, engineer of said corporation, do hereby, for myself and my heirs, executors, administrators and assigns, grant, assign, transfer and convey to the said corporation, and for the use thereof, and their successors and assigns, full and free license and authority to locate, construct, repair, and forever maintain and use, the said railroad upon, through and over my said lands, in such places and courses as the said corporation may judge necessary and convenient, and to take therefor my said lands, to the extent authorized by their charter, and within the following described limits: On the west side of said river, on or near the said western line run by said Child. And I do, for myself, my heirs, executors, administrators and assigns, covenant and agree with the said corporation, that when said railroad is definitely located, I will, for the consideration hereinafter expressed, on demand, execute and deliver to said corporation, and their assigns, a deed of release and quit-claim of my said lands, taken as above specified, conditioned to be void, whenever said railroad shall cease and be discontinued; and will give such other assurances as may be necessary to carry into effect the object of these presents. Provided, however, that said corporation shall, when said railroad is definitely located, and my said lands taken therefor, pay me at the rate of fifty dollars an acre for all the land, which shall be taken for said road, now used as mowing, and fifty dollars an

acre for the plough-land so taken as aforesaid, and eight dollars an acre for pasture-land so taken as aforesaid, and ten dollars an acre for woodland so taken as aforesaid, and at the rate of one dollar for each rod in length through which said road shall run through my aforesaid lands, for the purpose of fencing the same, where a fence shall be absolutely necessary; provided, however, that where no fencing is necessary, then the same shall not be accounted anything in the computation for fencing; and where only one side of said road shall require fencing, one half the amount per rod of the aforesaid sum for fencing shall be computed. Reserving, however, a right to cross said railroad, to get to my other lands, in some reasonable place, doing as little damage to said road as may be; or, in case the said corporation shall choose to pay me four hundred and twenty dollars, as a gross amount of damages and fencing, I agree to release as aforesaid. In testimony whereof, I have hereunto set my hand and seal, this twentieth day of October in the year of our Lord one thousand eight hundred and thirty-six. Abel Babcock (seal)."

The bill then averred that the plaintiffs afterwards definitely located their road, according to the terms of their act of incorporation, and constructed the same over the defendant's lands, according to the terms specified in his contract above set forth [describing the course, distance, etc., across said lands], and that soon after said road had been definitely located, the plaintiffs demanded of the defendant that he should execute and deliver to them a deed of release and quit-claim of the lands, taken as above, conditioned as in the defendant's said contract was stipulated, and were ready, and offered, to pay the defendant, as a consideration therefor, at the rate and in the manner provided in said contract; and that the plaintiffs, on the 27th of April, 1842, tendered to the defendant \$500, as and for the gross damages in said contract mentioned, and whatever interest might, under any circumstances, be due thereon, and demanded of him that he should execute and deliver to them a deed of release and quit-claim of said lands, taken by the plaintiffs, and at the same time tendered to him, for his signature and execution, the proper form of a deed; but that the defendant, at the several times above mentioned, refused to execute and deliver any deed of quit-claim of said lands, and had, at all times afterwards, so refused, although the plaintiffs had ever been, and still were, ready to pay to him the sum due to him by virtue of said contract.

The defendant, in his answer, admitted that he executed and delivered the contract set forth in the bill; but he averred that the same was not read by him, at the time of its execution, and that it was obtained from him either by fraud and misrepresentation, or mistake; that the said Child, mentioned in said contract as the plaintiffs' engineer,

run and superintended the running of the lines across the defendant's lands; that one of said lines ran on the north side of said river, and near to the defendant's house; that another of said lines ran on the south side of said river, and crossed it near the head of an island therein, which belonged to the defendant, and was near to his saw-mill; that said last-mentioned line was run on the defendant's land about 160 rods; that at the time of the execution of said contract, the defendant was given to understand, and did understand, from the representations of Richard D. Morris, the agent of the plaintiffs, and who made the contract in their behalf, that the line last aforesaid had been adopted by the plaintiffs, and for which he wished to procure a release; and that as an inducement to the defendant to execute said contract, said Morris then and there represented that the plaintiffs would have to erect a bridge across said river, and that the defendant might use the same, in passing and repassing said river to and from his adjacent lands; and that it was in consequence of this inducement, and of the advantages so held out to him, and of these representations, that he executed the said contract.

The defendant further averred, that when said contract was executed, he was, and ever since has been, seized and possessed of two lots of land in Chester, lying upon a mountain, containing about 200 acres, covered with valuable timber, which can be obtained for profitable use only by running it down the mountain to a certain road of the defendant, which he constructed, at great expense, for the purpose of procuring said timber, and along which to draw it to his saw-mill, for use; that his saw-mill is adjacent to said lots, "and was valuable for the purpose of manufacturing timber." That the plaintiffs located, constructed and used their railroad, in the courses, etc., mentioned in their bill; but that such location and construction were made over and above the aforesaid road of the defendant, and along the northerly parts of said lots, in such a manner as to prevent him from getting down his timber from said lots, or getting it to his saw-mill, without very great and unwarrantable expense: That a part of said location and construction was made within the bed of said river, so as to obstruct the water, and endanger and render useless the defendant's saw-mill: That the damage sustained by the defendant, in consequence of said location and construction, exceeds \$2,500; and that, when said contract was executed, he had no knowledge that said Child had run any such locating line as that where said railroad is constructed, or any line near to the same, and that he now believes that no such line had then been run, or that anything was said to him by said Morris, at the time of the execution of said contract, as to such line; that he did not understand the line, mentioned in said contract, to be the one now occupied by the plain-

tiffs; and that, if he had so understood it, he should not have executed said contract.

The defendant admitted that the plaintiffs made a tender to him, on the 27th of April, 1842, as alleged in the bill, and that he then refused to execute a deed of release; but he denied that the plaintiffs had, at any other time, demanded any other deed, or that they ever made to him any other tender of payment of damages, or that he ever refused to execute any other deed.

The plaintiffs filed a general replication, and evidence was taken by both parties.

This case was argued at the last September term, principally upon the evidence. The defendant's counsel, however, contended, as matter of law, that specific performance should not be decreed, where the plaintiff has any other adequate remedy:<sup>1</sup> That the plaintiffs in this case might apply to the county commissioners to assess the defendant's damages, and that they held the land by virtue of their act of incorporation and the laying out and construction of the railroad. That specific performance was not a matter of right in the party seeking it, but of discretion in the court, and should not be decreed where it is not strictly equitable, or where the bargain is hard, or made under a mistake, or where there has been a great change, after the contract was made, in the property which is the subject of the contract.<sup>2</sup> And that there was such a want of mutuality in the contract set forth in the bill, as would induce the court to withhold the decree sought by the plaintiffs, even if there were no other objection to such a decree.<sup>3</sup>

*R. A. Chapman* for the plaintiffs.

*Wells & W. G. Bates* for the defendant.

The opinion of the court was made known at an adjourned term held in Hampden County, in January, 1843.

SHAW, C.J. This is a case in equity, in which the Western Railroad Corporation seek the specific performance of a contract made by them with the defendant, previously to the definitive location of their road, by which he stipulated to convey to them in fee, on certain conditions, as much of his land as would be necessary to their railroad, at rates therein specified. The bill sets forth the agreement by which he stipulated to receive compensation at certain specified rates per acre, for the different kinds of land which the railroad might traverse, and a provisional allowance for fencing. Proof was offered of the execution

<sup>1</sup> 2 Story on Eq. 23, 24.

<sup>2</sup> 1 Sugd. Vend. (Amer. ed. of 1836) 245-248; 2 Story on Eq. 47, 53, 79-81; *Mechanics Bank of Alexandria v. Lynn*, 1 Pet. 376; *King v. Hamilton*, 4 Pet. 328; *Daniel v. Mitchell*, 1 Story R. 172; *Mortlock v. Buller*, 10 Ves. 305.

<sup>3</sup> 2 Pow. Con. 233, 234; Story on Eq. 53.

of the contract, as also of the final location of the road, passing, to a considerable extent, over the defendant's land, as also of the tender of the money, and demand of a deed conforming to the agreement.

The ground of defense is, that the defendant was deceived or mistaken, and led to execute an agreement different from that which he supposed he was executing; that he did not understand where the line was, as described in the agreement, but supposed the line contemplated to be adopted to be a different line from the one, over which the railroad was in fact located, and one the adoption of which would have done him less damage.

This is mainly a question of fact upon the evidence, and has been so argued by the counsel, and considered by the court.

The court, in the main, accede to the principles of law, stated by the defendant's counsel as those upon which the defense is placed. In an application to a court of equity for a specific performance, a decree for such performance is not a matter of strict right, on proof of the agreement, but may be rebutted by showing that to require such an execution would be inequitable. A defendant, therefore, may not only show that the agreement is void, by proof of fraud or duress, which would avoid it at law; but he may also show that, without any gross laches of his own, he was led into a mistake, by any uncertainty or obscurity in the descriptive part of the agreement, by which he, in fact, mistook one line or one monument for another, though not misled by any representation of the other party, so that the agreement applied to a different subject from that which he understood at the time; or that the bargain was hard, unequal and oppressive, and would operate in a manner different from that which was in the contemplation of the parties, when it was executed. In either of these cases equity will refuse to interfere, and will leave the claimant to his remedy at law.

But, to establish either of these grounds of defense, the burden of proof is plainly on the defendant; and to bring his case within the former, he must show such mistake on his part, or some misrepresentation on that of the complainant, or his agent, seeking to enforce the performance of the contract. In doing this, it is not competent for the defendant merely to aver that he was under a mistake as to the description of the route, or other subject matter of agreement, or, when the description was precise and clear, that he signed the agreement without reading or hearing it, where he had the means offered him of doing so. He must show an honest mistake not imputable to his own gross negligence.

One other consideration, which we think applicable to such a case, is this: that where a man has stipulated, for a certain consideration, to permit a company to construct a road over his land, by any one of two

or more routes, at their option, it is not competent for him afterwards to resist the performance of his agreement, by showing that he was induced to believe, either by his own notions, or by the representation of others, as to the preference of one over the other, that a particular one was adopted, which he did not expect; nor would this result be affected, if the other party, or their agents, had made such representation, as to the probability of their adopting one route in preference to the other, or of the relative advantages of each. Having, by the terms of the contract, stipulated for the right to adopt either and stipulated to pay a consideration for such right of choice, all representations respecting the probability of their adopting one rather than the other, must be considered as merged in the agreement; and if, in fact, the one route would cause more damage, and the land owner intends to claim larger compensation in one case than in the other, the alternative must be stipulated for in the agreement itself.

With these considerations in view, the court have considered the subject as one of fact upon the evidence. There is considerable conflict of evidence, especially as to what took place at the defendant's house, when the agreement was executed. Without stating the evidence at large, which is quite voluminous, the conclusions which we have come to are these: That there was no fraud or false representation on the part of the company's agent; that the route described in the agreement was clearly and definitely stated as the west line, or Child's line, and was known to, or might easily have been known to, Babcock, the defendant, and was at least as well known to him as to the agent; that this was the line ultimately adopted by company as the route of their road; that the agreement was read over to the defendant, before he executed it, with an honest purpose to enable him fully to understand it; that there was no mistake on the part of the defendant as to the route expressed in the agreement; and that, if he was induced, from any cause, to suppose that the company would not pursue the route they did, but adopt another, which he supposed would be more beneficial to them, and better for him, it is not a mistake into which he was led by the company's agent, nor one which affects this agreement.

And the result of the opinion of the court is, that the agreement is valid in law, that the defendant has shown no sufficient grounds to excuse him from a performance in a court of equity, and therefore that the complainants are entitled to a decree for such specific performance.<sup>1</sup>

<sup>1</sup> A portion of this opinion and also the opinion of the court on a rehearing adhering to the conclusion that the plaintiff was entitled to specific performance have been omitted.—ED.

## BAXENDALE v. SEALE.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JANUARY 16, 1855.

*[Reported in 19 Beavan 601.]*

IN October, 1852, the defendant, Sir Henry Paul Seale, and his trustees put up for sale by auction certain real estate in the county of Devon, in three lots, according to certain particulars and conditions of sale.

The description of lot 2 was as follows: "The manor of Stoke Fleming lies contiguous to Little Dartmouth (lot 1), an extensive parish, with the right of free warren, etc., affording, in a delightful and healthy country, with all the advantages and pleasures derivable from a magnificent sea coast, a fine range of sporting extending over about 3,000 acres, embracing nearly the whole parish of Stoke Fleming, with the exception of certain lands the property of and reserved by Sir Henry Seale, Bart., as attached to his domain of Mount Boone and Norton Dawney. With the manor will be included all the lord's rights in the soil and timber, of the wastes, minerals, estrays, wrecks, fines, quit-rents, and other emoluments, privileges, and appurtenances, except in and over the lands reserved by the said Sir Henry Seale, Bart. A mansion house, on a moderate, comfortable scale, with stabling, pleasure grounds, paddocks, etc., within the manor may be rented."

The 13th condition of sale was in these words: "That the vendors shall not be required or bound to set out or define the boundary of the manor described in lot 2, and if any mistake be made in the description of the property, or any error whatsoever shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be allowed or given to the vendors or purchasers, as the case may require, such compensation to be settled by two referees, or their umpire, in manner following" [stating it]; "but this is not to apply to the admeasurement of the lands, which, having been taken from actual survey, are to be deemed and taken as correct by both parties."

Joseph Baxendale, the plaintiff, became the purchaser of the three lots at an aggregate price of £20,000, lot 2, as to which alone any question had arisen, being sold to him for the sum of £800. The purchase of lots 1 and 3 had been completed, and for the purposes of this suit it was agreed that the matter was to be treated as if lot 2 alone had been the subject of the contract, and the question between the parties to this suit had related exclusively to this lot.

At the time of the sale the defendant, it would appear, supposed the manor to be nearly co-extensive with the parish of Stoke Fleming, and

not to extend beyond it, and the description of lot 2, in the particular of sale, though apparently including the whole manor, would seem to bear out that supposition. Both plaintiff and defendant, however, at the time of the sale were ignorant of the limits of the boundaries of the manor and of what was included in it. But the defendant, in his evidence, stated that before the sale he explained to the plaintiff, generally, that nothing was included in lot 2 except the roadside pieces or strips of land or wastes, containing about eleven acres, and the right of sporting over all the lands within the manor. This the plaintiff expressly denied, but, in his cross-examination he admitted that he bought lot 2 "entirely on the defendant's representation"; that "the defendant pressed on him that the manor was valuable in consequence of the right of sporting," and that "it was not represented that any particular lands formed part of the manor." The auctioneer stated, in his affidavit, that "he produced and offered for the inspection of intending purchasers a paper or list which contained an enumeration of all the waste lands which the vendors believed then to belong to the manor, including as well those intended or offered to be sold as part of lot 2, as also those which in the particulars were excepted and not intended or offered to be sold, and that he expressly explained that lot 2, notwithstanding its general description, could only be calculated upon as comprising the right of sporting, and such of the said wastes as were not excepted," the whole, excepted and not excepted, being about twelve acres. The plaintiff said he did not remember the production of the list or paper by the auctioneer, nor any statement by him as to lot 2, though it might have been made.

The contract was performed as to lots 1 and 3, and the purchase-money paid on the 2d of August, 1853; but as to lot 2, of which an abstract of title, including a copy of the list of wastes and a plan showing their situation, was delivered to the plaintiff's solicitors, the plaintiff discovered, as he alleged, that the rights of free warren and sporting were disputed by some of the owners of the lands over which such rights were to be exercised, and could not be asserted without litigation, and on the 26th of May, 1853, his solicitors wrote to the defendant's solicitors for further evidence and information as to lot 2, in addition to requisitions made in March previously. Several letters then passed between the parties, in which the plaintiff's solicitors admitted that "the contract was a simple purchase of the right of sporting," and that "the right of shooting over 3,000 acres was the main inducement" to the purchase.

The plaintiff not being satisfied with the defendant's explanations as to the right of sporting, and the strips of waste included in the list, and the other rights referred to in the particulars of sale, such as estrays,



wrecks, fines, quit-rents, and other emoluments, privileges, and appurtenances, being of merely nominal value and producing nothing, the plaintiff's solicitors, by letter dated the 21st of June, 1853, applied to the defendant's solicitors for leave to rescind the contract, but the application was refused.

The defendant then took active steps to determine the boundaries of the manor for the satisfaction of the plaintiff, and found, for the first time, that the manor of Stoke Fleming extended beyond the bounds of the parish, and included within its boundaries various pieces of waste land, and a mudbank at a place called Warfleet, of considerable value, and which could not properly be included in the terms of the exception of land reserved to the defendant "as attached to his domain of Mount Boone and Norton Dawney," as the plaintiff alleged, and as the defendant's conduct in seeking to except it specially from the property conveyed implied. Accordingly, on the 23d of July, 1853, the defendant's solicitors proposed to alter the description, in order to exclude the latter strips of waste from the conveyance. The plaintiff thereupon became as eager to complete the contract as he had been a little before to rescind it, and he claimed to have a conveyance in the general terms of the description and particulars of sale, that is, in fact, including the pieces of waste just discovered to be within the manor, but he offered an increase of price, to be fixed by arbitration. This being refused, the plaintiff filed his bill for specific performance of the contract, and a conveyance which should include the strips of land in dispute.

*Mr. Lloyd and Mr. Pryor* for the plaintiff.

*Mr. R. Palmer and Mr. Wickens* for the defendant.

THE MASTER OF THE ROLLS. The question is how much is included in lot 2, purchased by the plaintiff from the defendant. The description is in these words—[His Honor read it.] This description is not very definite, and apparently it would include the whole manor, except over the reserved lands, and it would also seem to indicate that the manor was merely co-extensive with the parish, but that it did not extend beyond it.

That an obscurity existed respecting the boundaries of the manor is made still more evident by the thirteenth condition of sale, which is in these words, "That," etc. The manor, as now ascertained, extends beyond the parish of Stoke Fleming, and includes within its boundaries various pieces of waste land and a mudbank at Warfleet of considerable value, and which could not be properly included in the terms of the exception of lands "reserved by Sir Henry Seale, as attached to his domain of Mount Boone and Norton Dawney," at least I assume such to be the case; such is asserted to be the fact by the plaintiff and the defendant,

although he does not admit that these parcels form part of the manor, admits that a sufficient doubt exists on the subject to make it essential for his interest that they should be excluded, either by more accurately defining what is included within the boundaries of the manor or by specially excepting them from the property conveyed.

On the part of the plaintiff, it is contended that the description of lot 2, in the particulars of sale, and the thirteenth condition of sale, which I have read, and also the evidence given in the cause, show that the defendant was selling and that the plaintiff was purchasing an uncertain thing, the exact extent and value of which was unknown to both ; that it was, in fact, a purchase of a speculative nature, which might turn out to be worth much or nothing, and that the defendant cannot now resist the purchase, because the chance has turned out unfavorable to him. The defendant, on the other hand, contends that this is the case of a mere mistake, that he agreed to sell and that the plaintiff agreed to buy a manor, believed at the time, by both, not to extend beyond the limits of the parish of Stoke Fleming, and that the right of sporting and certain strips of roadside land were all that either he intended to sell or that the plaintiff expected to buy. In my opinion, the question between the parties, in this case, is one to be determined by the evidence, and the rules of law are easy of application when the facts have once been ascertained.

If the result of the evidence be that the sale and purchase of lot 2 was a sale and purchase of an uncertain thing, I am of opinion that such a contract is good, and that neither party can resist the completion of it, because the reality has turned out to be different from what he anticipated. But if, on the other hand, it appears by the evidence that something different from what is now claimed by the plaintiff was intended to be sold by the defendant, then I think that this court will not compel him specifically to perform what, in substance though not in terms, is really a different contract from that which he entered into. It was for the purpose of carefully perusing the evidence, in conjunction with my note and recollection of the comments made by counsel thereon, that I postponed my decision in this case. This I have now done, and will state shortly the result at which I have arrived.

In the first place, I am of opinion that, at the time of the sale, both the plaintiff and the defendant were ignorant of what were the limits of the boundaries of the manor and what was included in it. This observation has, to some extent, an influence both ways, but on the whole is, I think, most in favor of the plaintiff.

The defendant in his evidence says that, in substance and effect, he explained to the plaintiff before the sale that nothing was included in lot 2 except the pieces of roadside strips and the right of sporting. This is

expressly denied by the plaintiff, and the allegation of the defendant, even if uncontradicted, is somewhat too vague to found much upon it in his favor. Up to this point also, that is up to the time of the sale, the evidence derived from the description contained in the particulars and the conditions of sale are in favor of the plaintiff, and if the case rested here, and if the plaintiff had all along contended for that, and now asked a simple conveyance of the manor of Stoke Fleming, excepting the parts reserved or attached to Mount Boone and Norton Dawney, and not requiring the limits of the manor to be ascertained or defined, it might have been difficult for the defendant, successfully, to resist the specific performance of such a contract, and the execution of a conveyance in such terms as the plaintiff now asks for it. At least, very clear evidence of mistake of the defendant would have been necessary.

But at this point the evidence in favor of the plaintiff ceases, and what subsequently to the sale by auction has occurred between these parties or their solicitors satisfies me, that the contract was not for the purchase of an uncertain speculative property, which might turn out favorably or unfavorably to either party, but that the plaintiff bought something which, although the boundaries were not, as he supposed, and probably could not be precisely ascertained, was nevertheless capable of being described with tolerable accuracy in the deed of conveyance, and that the property so purchased was the manor of Stoke Fleming, included within the limits of the parish of that name. Accordingly, on the 10th of May, 1853, the plaintiff's solicitors write that he is not satisfied with the information he possesses, as to the extent of the manor and the right mentioned in the particulars as belonging thereto, and they ask for further information on this subject. In the course of the correspondence it turns out that the right of sporting is contested, and that the other rights referred to in the particulars of sale, as estrays, wrecks, fines, quit-rents, etc., are merely nominal and produce nothing. Thereupon, on the 21st of June, 1853, the plaintiff's solicitors finding that lot 2 turns out, on their then information, to be (except the strips of land which appear to be worth little or nothing) a mere right of sporting over the lands of others, and likely to be productive of litigation and contention with neighbors, suggest that the contract for lot 2 ought to be cancelled.

This proceeding appears to me inconsistent with the only ground on which the plaintiff's right to the specific performance of this agreement, as he seeks to have it enforced, could be maintained, viz., the purchase of a doubtful thing of uncertain value, inasmuch as when he believes that it turns out to be worthless, he submits that this is not what he agreed to buy, and seeks to have the agreement cancelled. This proposal is resisted by the defendant, who insists upon having the contract

performed in his view of it, and contends that he explained to the plaintiff before the sale that this was all that he was to get, in which view of the case, as I have already stated, he fails to satisfy me.

Immediately after this letter the tables are turned in a very striking manner. In consequence, apparently of the pressure of the plaintiff's solicitors to have the boundaries of the manor defined, the defendant, by his solicitors, takes steps for this purpose, and finds, as I believe, to his and their surprise, and then for the first time, that the manor of Stoke Fleming probably includes valuable waste lands and mudbanks, which could not properly be reserved as "attached to his domain of Mount Boone and Norton Dawney"; and his solicitor, on the 23d of July, 1853, proposes to alter the description, in order to exclude the conveyance of these lands. The plaintiff is then willing to complete the purchase, which a month before he wished to cancel, and offers to have the price of the lot increased by a sum to be fixed by arbitration. This offer was, in my opinion, a very fair and liberal offer, but it is quite inconsistent with the idea, that the plaintiff had contracted to buy an uncertain thing, which, if worth nothing, he must still take and pay for, and which, if worth much more than the purchase-money, he was still entitled to have conveyed to him, without any additional money being paid for it. This offer is declined, and the defendant, on his part, proposed to cancel the contract relating to lot 2, which is declined, in his turn, on the part of the plaintiff.

In this state of things, although the uncertainty whether these waste lands and the Warfleet mudbank do or do not fall within the boundaries of manor, tell rather in favor of the plaintiff's contention than for the defendant, yet a careful consideration of the whole evidence and correspondence, particularly with regard to the points to which I have referred, but which evidence and correspondence I abstain from commenting upon in detail, satisfy me: First, that neither party intended to sell or buy a mere doubtful matter, the extent and value of which was understood to be unknown to both, and which might turn out to be an advantageous or disadvantageous purchase, without affecting the contract. Secondly, that both parties, when they entered into the contract relative to lot 2, considered and believed that it included something different from that which would now be conveyed to the plaintiff, if the deed of conveyance were executed in the terms in which he claims now to be entitled to have it made to him. I wish, however, to guard myself against being supposed to mean that I consider that the plaintiff thought that he was buying what the defendant alone intended to sell.

This, therefore, appeared to me to be a case where the terms of the contract are ambiguous, and where, by adopting the construction put upon them by the plaintiff, they would have an effect not contemplated

by the defendant, but would compel him to include in the conveyance property not intended or believed by him to come within the terms of the contract.

I am, therefore, compelled to say that this is a case in which, in my opinion, equity will not enforce the specific performance of the contract, in the manner in which the plaintiff seeks to have it executed. On the other hand, the plaintiff is not desirous, but refuses to have the contract executed in the manner and to the extent only to which the defendant is willing to complete it. In this state of circumstances, therefore, I am of opinion that the plaintiff's bill must be dismissed, but certainly without costs.

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MORLEY v. CLAVERING.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., NOVEMBER 7,  
1860.

[*Reported in 29 Beavan 84.*]

THE plaintiffs, being possessed of three leasehold houses in Pimlico, instructed an auctioneer to sell them. On the 25th of November, 1859, the defendant, Mr. Clavering, offered to purchase them. The leases were examined on the 8th of December by the clerk of the defendant's solicitor, who took notes of the contents, and on the same day the defendant's solicitor wrote to the auctioneer that "on looking over the lease he found the contents of so special a nature that he could not advise his client to take the premises, and that he had written for instructions."

On the 13th of December the defendant's solicitor himself inspected the leases, and he afterwards signed an agreement on behalf of the defendant to purchase the leases for £600. On the 24th of December the defendant declined to complete, because the covenants "were most restrictive and against the trades which would be carried on on the premises."

The vendors filed their bill in February, 1860, for the specific performance of the contract.

The defendant resisted the performance. He said that the premises had been taken for the purpose of opening an establishment for lectures on dancing and music, and as a place of public amusement, similar to St. James Hall, Piccadilly, under the title of "St. James Hall and Restaurant."

That the partition between the three houses had been taken down for the purpose of uniting them into one, and that the landlord had

given notice to reinstate them, and to put the premises into repair ; and that if not done before the 25th of March an eviction would take place, and the leases be forfeited.

He said that the covenants in the leases entirely prevented the premises being used for the purposes of the establishment intended (meaning used for the trade of a victualler).

The defendant attempted to make out that the auctioneer and the plaintiffs knew that the defendant made the purchase with the intention of carrying on the restaurant, which was prohibited by the lease ; they, however, said that they understood it was to be used as "a dancing academy and concert room." The court, however, decided on the assumption of their knowledge.<sup>1</sup>

*Mr. R. Palmer* and *Mr. C. C. Barber* for the plaintiffs.

*Mr. Selwyn* and *Mr. Hetherington* for the defendant.

THE MASTER OF THE ROLLS. I think there is no defense to this suit, and that the plaintiff is entitled to a decree for specific performance. The case is this : Three leases of three houses in Pimlico were advertised to be sold by the plaintiff. The purchaser, by his agent, carefully inspected all the leases, knew what the covenants were, and the amount of knowledge in this respect was common to both parties. Knowing the contents of the leases, the defendant, by his solicitor, executes a contract for purchasing them, and now he asks that he may not be compelled to perform his contract, on the ground that the covenants of the leases are different from what he thought, and do not enable him to effect the object he had in view, and that the vendor knew to what purpose it was his intention of using the premises.

Suppose this to be so, still both parties were on an equal footing, each knew the contents of the deeds and the effect of the covenants contained in them. It is not the duty of the vendor to say to the purchaser, "You will not be able under these covenants to effect your object ; it is for the purchaser to ascertain for himself whether what he purchases will answer his purpose. It is impossible to get out of a contract by saying, "I told the vendor what my intention was, and he failed to give me his opinion, derived from information which was common to both, that I could not carry my intention into effect. In every case, a purchaser has some private reason for purchasing and also for changing his mind afterwards, when he does so."

The purchaser says that he may be prevented carrying his intentions into effect, by reason of being compelled to build party walls, which will prevent the premises being used for purposes he intended. He knew, when he entered into the contract, that he might be called on at any time to do so ; it is just as remote at present as it was then, and it

<sup>1</sup> See *post* 86.

is probable that if the rent be paid and the premises put in repair, he will not be interfered with. It is impossible to say, "I misunderstood the matter," he may have made a mistake in law, but if he has, it will not affect his liability to perform his contract.

He says that one covenant prohibits the sale of provisions as a victualler, but his own solicitor himself examines the leases, and after that he enters into contract. *Flight v. Barton* and the other cases, where the purchaser did not inspect the deed, but relied on the statement of strangers, have, therefore, no application. I am of opinion that the plaintiff is entitled to a decree for specific performance.

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On a motion to add to the decree, on the 24th of January, 1861, it was ordered that the assignment of the leases should bear date the 10th of January, 1860, the day on which, according to the terms of the contract, it ought to have been completed.<sup>1</sup>

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### DAY v. WELLS.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JUNE 5, 6, 1861.

[*Reported in 30 Beavan 220.*]

THE defendant was the owner of four freehold cottages, which he had mortgaged for £120. Being under some pressure for money, he put them up for sale by auction on the 15th of December, 1859. On that occasion Mr. Berry acted as auctioneer and Mr. Hooper as his solicitor. At the sale the property was knocked down to the plaintiff Mr. Day for £162, and a contract was signed by the plaintiff, and also by Mr. Berry and Mr. Hooper.

The defendant was at once dissatisfied with the sale; he repudiated and refused to ratify it. After some disputes and communications, the purchaser, in November, 1860, instituted this suit against the vendor to compel a specific performance of the contract.

The defense was that the property had been sold at an under-value, and under a mistake. The evidence was very contradictory, but the circumstances were in substance as follows:

The defendant seemed to have determined that the property should not be sold for less than £240, and he had arranged with a friend, Mobbs, to attend the sale, and bid on his behalf to that extent. They accordingly went to the sale together and saw Mr. Berry and Mr. Hooper.

<sup>1</sup> See *Rankin v. Lay*, 6 Jur. (N. S.) 685.

The defendant, in his evidence, stated that he told them he had brought a friend to buy the cottages in if they did not fetch £240, but Hooper represented that he told them he had brought Mobbs "to run up the property, or what is usually termed puff the sale."

Hooper, being informed that Mobbs was known, said, "It will stop the sale; they won't bid if you let Mobbs bid." He also stated to the defendant that the expenses of the sale would be £20, which would be thrown away.

"I gave (said Hooper in his deposition) the defendant, as my advice, 'to leave the matter in the hands of the auctioneer.'" He said, "Very well." I said, of course, he will not give them away, but in a little matter like this the expenses of a second sale would eat up the balance, and if any one bids near the sum it will be well to let them go. He said, "Very well, then, I will tell Mobbs not to bid."

The defendant, evidently under the impression that there was to be some sort of reserved bidding, directed Mobbs not to bid, and in his evidence he said that he believed "that the auctioneer would manage it so that either the money would be made, or there would be no sale."

The auctioneer, on the contrary, said that the defendant instructed him that the sale was to be an absolute sale, and that no reserved price was mentioned. He said "the matter was left to me, and for me to exercise my own discretion, and I did so, to the best of my judgment and ability."

*Mr. Follett* and *Mr. Osborne*, for the plaintiff, argued that there was an undisputed authority to sell by auction, and an express contract fairly entered into, and that, therefore, this court would direct its performance. That it was no answer to say, that at an open sale by public auction the vendor was dissatisfied at, and disappointed with, the price obtained; for a purchaser was not to be mixed up with disputes between the vendor and his agent. That here there was no positive statement of the defendant of any reserved price having been mentioned or fixed between them, but it appeared that the vendor had relied on the discretion of the auctioneer, which had been fairly exercised. Lastly, that the price obtained was its real value.

*Mr. Selwyn* and *Mr. Hardy*, for the defendant, argued that as specific performance was a matter of discretion, this court would not make a decree in favor of the plaintiff in a case like the present; for it was evident that the sale had taken place, if not contrary to the defendant's instructions, at least under circumstances of mistake and misapprehension. That the defendant had trusted and relied on the auctioneer's not allowing the property to go under the amount mentioned in the conversation between them, and that he had refrained in consequence from interposing or allowing Mobbs to bid as he had originally intended.



That it was also proved, that after the lots had been knocked down, but before the contract had been signed, the defendant had repudiated the sale and revoked the authority of his agents, and that, therefore, their subsequent signature to the contract was unavailing.

They also relied on the circumstance of the sale being at an under-value, and on the laches and delay of the plaintiff, who had not filed his bill until eleven months after the contract had been expressly repudiated by the defendant. *Blagden v. Bradbear*,<sup>1</sup> *Watson v. Reed*,<sup>2</sup> *Mason v. Armitage*,<sup>3</sup> *Malins v. Freeman*,<sup>4</sup> were cited.

THE MASTER OF THE ROLLS. I wish you to confine your reply to the question of mistake and ignorance and whether the defendant was not induced thereby to forego making a reserved bidding.

I shall not trouble you on the proposition, which, in the absence of authority, I should not like to hold: that upon a sale by auction, under ordinary circumstances, the vendor can say, after a lot has been knocked down, "I am not satisfied with the price, and I withdraw the authority given to the auctioneer."

*Mr. Follett* in reply.

THE MASTER OF THE ROLLS. The perusal of the evidence in this case confirms me that very unintentionally and without any blame a mistake was committed with respect to the authority which the defendant supposed he had given Mr. Berry the auctioneer, and which Berry exercised.

[His Honor stated shortly the result of the evidence, and continued :]

The defendant, relying on the statement of Hooper that Berry would not throw away the property, and thinking that Berry had considerable discretion to buy in the property, refrained from employing Mobbs for that purpose. On the other hand, Berry does not seem to have considered that he had any authority at all to buy it in, or to make any reserved bidding. The defendant expected to get £240, and it was sold for £162.

I think that the case comes within *Mason v. Armitage*,<sup>3</sup> and that there was that species of mistake as to the authority given to the auctioneer, and which the auctioneer conceived he had, which would induce this court to abstain from granting specific performance of the contract. The court exercises its discretion in these cases, but subject to fixed rules, which are laid down in *Mason v. Armitage* and other cases, of which that is a leading authority on the subject.

It is clear that the plaintiff was not at all to blame, and I should not think of giving costs in a case where the mistake has been produced by the defendant.

<sup>1</sup> 12 Ves. 466.

<sup>3</sup> 13 Ves. 25.

<sup>2</sup> 1 Russ & Myl. 236.

<sup>4</sup> 2 Keen 25.

I do not go into any other question, but I do not affirm any such proposition as this : that a person having given an unlimited authority to an auctioneer may, when dissatisfied with the price at which it is sold, revoke his authority. That is not my opinion at all.

It is true that no fixed sum or reserved bidding was mentioned to the auctioneer, but there must be some limit in such cases. The defendant gave, or he thought he gave, a discretion to auctioneer to sell, but not to let the property go under a reasonable sum ; and in consequence of such belief, he abstained from allowing his friend to bid for him.

I must dismiss the bill without costs.

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WEBSTER v. CECIL.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JUNE 21, 1861.

[*Reported in 30 Beavan 62.*]

THIS was a suit by a purchaser for the specific performance of a contract entered into under the following circumstances : After some negotiations between the plaintiff and defendant, the defendant wrote the plaintiff a letter dated the 22d of October, 1860, in which he said : "The twenty-one acres of land in question I will sell for £1,100, and put Moor Cottage into the bargain, the furniture of which you may take too at a valuation if you like. I have only one £10 ground rent left, but will sell you that, also, if you like (with the rest) for £150."

On the 25th of October, 1860, the plaintiff wrote to the defendant in reply as follows :

"As you wish for an immediate answer, I write by return to say I accept your offer to sell twenty-one acres of freehold, together with Moor Cottage, for £1,100, and a ground rent of £10 for £150, making £1,250 (twelve hundred and fifty) as the total purchase-money for the whole. I have no wish to be encumbered with any furniture, but if you will name a sum for the furniture I will see if I can find you a purchaser. A valuation would be objected to.

"I have written by this post to Messrs. Townsend, Ridley & Jackson, solicitors, of Liverpool and Birkenhead, to say that I have agreed to purchase the land, cottage, and ground rent of you for £1,250, and to request that they will prepare the necessary and usual contract and documents as my solicitors, and you would do well to employ them also."

On receiving this letter the defendant became aware that he had made a mistake as to the price asked, and which had occurred in the following way :

Previously to writing his offer the defendant had made a calculation upon a piece of paper of the value of each parcel of land called "the twenty-one acres of land in question." The calculation was produced and was as follows :

Moor Ground.....	}	£450
The Moor.....		
Broad Close.....		600
Withy Field.....	}	300
Hearn's Piece.....		
Bridge Mead.....		500
		<hr/>
		£1,850
Moor Cottage.....		250
		<hr/>
		£1,100

"Told him put M. Cottage into bargain at that price and he may have the £10 ground rent for £150."

It will be observed that the value of the lands and cottage, if correctly added up, amounted to £2,100, but through inadvertence and in his hurry to save the post the defendant added them up as amounting to the sum of £1,100, and without reflection inserted that sum in the letter. The property offered for £1,100 produced an annual return of £90, and was mortgaged for sums amounting in the aggregate to £1,800, and the defendant had already refused to sell it to the plaintiff's agent for £2,000.

Upon the receipt and perusal of the plaintiff's letter of the 25th of October, 1860, the defendant became aware of the mistake he had made in his letter of the 22d of October, 1860. and he immediately went to the office of Messrs. Townsend, Ridley & Jackson and informed them of such mistake, and requested them not to take any steps with a view to the preparation of a contract, and on the 31st of October, 1860, the defendant wrote to the plaintiff informing him of the error.

The plaintiff, on the 1st of December, 1860, filed this bill for specific performance.

*Mr. Selwyn* and *Mr. Henry M. Jackson* for the plaintiff.

*Mr. R. Palmer* and *Mr. Melville*, for the defendant, were not called on.

*Wood v. Scarth*<sup>1</sup> and *Neap v. Abbott*<sup>2</sup> were referred to.

The MASTER OF THE ROLLS was of opinion that the mistake had

<sup>1</sup> 2 Kay & J. 33.

<sup>2</sup> C. P. Cooper 333.

been clearly proved, and that the defendant had immediately given notice of it, and he said that in that state of the case the court could not grant specific performance and compel a person to sell property for much less than its real value and for £1,000 less than he intended. The plaintiff, he said, might bring such action at law as he might be advised.

The bill was dismissed without costs.

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CHARLES G. PATTERSON v. ELISHER BLOOMER.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, FEBRUARY TERM, 1868.

[*Reported in 35 Connecticut Reports 57.*]

BILL IN EQUITY to compel the specific performance of a contract to convey a quarry and personal estate connected with it, brought to the Superior Court in Middlesex County, and tried before Carpenter, J. The contract was as follows :

"This agreement made this 20th day of August, 1867, between Elisha Bloomer, of the county of Westchester and State of New York, of the first part, and Charles G. Patterson, of the city of New York, of the second part, witnesseth,

"That said party of the first part, in consideration of one dollar to him paid by said party of the second part, the receipt whereof is hereby acknowledged, and of the covenants hereinafter contained on the part of said party of the second part, hath agreed, and doth hereby agree, to sell and convey unto said party of the second part the following described property, to wit, all that certain stone quarry situated at Cromwell, Connecticut, known as the North Middlesex Quarry, consisting of twenty-one acres of land, more or less, together with all the appurtenances thereto belonging, including all tools, machinery, engine, boiler, cattle, horses, harness, wagons, carts, and all other goods, chattels, and property now belonging to or connected with said quarry and the working thereof, wheresoever the same may be ; and also all the stone now raised from said quarry and on the surface ; all outstanding contracts for the sale of the stone therefrom, together with all contracts that may be made therefor after the execution of this agreement and before the sale of said quarry is consummated ; and also all the proceeds now due or coming due from all sales of stone from said quarry made by said party of the first part, since August 10, 1867, except as hereinafter provided, whether the same may have been delivered or not, to-

gether with all his right and interest in and to all dock privileges and water-fronts now belonging to or claimed by said party of the first part, in connection with said quarry, for the price of \$55,000, payable as follows, viz: \$5,000 within ten days after the execution and delivery of this agreement, \$25,000 in three months thereafter, and the remainder in four months thereafter, as hereinafter provided; the payment thereof, and the execution of the covenants herein provided on the part of the party of the second part, to be secured by a purchase-money bond and mortgage for that amount without interest, such mortgage to contain a clause permitting the same to be paid off by installments as hereinafter provided, and the usual insurance clause. And said party of the second part doth hereby covenant and agree to purchase said premises and chattels for the price aforesaid, and to pay the said sum of \$5,000 and to execute and deliver said bond and mortgage for \$50,000 to said party of the first part, within ten days after the execution and delivery hereof, on receiving from him the conveyances of the premises and chattels herein agreed to be conveyed as hereinafter set forth; and also that he will, after the execution of said mortgage, pay over to said party of the first part, at the end of every month, all amounts remaining in his hands derived from sales of stone from said quarry, after deducting therefrom the amount paid by him for the labor performed during said month, known as the "current monthly pay-roll," as a payment on account of said mortgage; also that he will permit the said party of the first part, or his duly authorized representative, to have access at all reasonable times to the books and papers connected with the business of said quarry, for the purpose of verifying such payments; also that he will pay all the working expenses and all bills for the purchase of material for the use of said quarry contracted since the 1st day of August, 1867, or which may hereafter be contracted, and will keep said quarry in good working order during the existence of said mortgage, it being understood that the amount paid by him for so much of the pay-roll for workmen and officers connected with and employed by said quarry which may have accrued for services rendered between and including the 1st and 10th days of August, 1867, shall be accounted for to said party of the first part and shall be credited by him as payment on said mortgage to that amount. And said party of the second part doth further covenant, that he will furnish the balance of the stone contracted for or ordered from said quarry by St. Ann's Church, Philadelphia, and by the Colt Church, Hartford, up to and including the 10th day of August, 1867, it being understood that the proceeds of such stone are to belong to and to be collected by said Bloomer, but are to form no payment on this agreement; it being further understood that any contracts for or sales of stone to either of these churches made or executed

after said 10th day of August, 1867, shall belong to and become the property of said Patterson, subject to the terms of this agreement, and shall be executed for his benefit. Said Patterson also agrees to complete any monuments which may have been ordered from said quarry on or before said 10th day of August, 1867, the proceeds thereof to belong to said Bloomer, and also to furnish the stone for a monument for said Bloomer's own use, such as he may select out of said quarry, with coping and posts for the same. It is further agreed that a certain contract made at Cromwell, April 24, 1867, between S. N. Hall, of Portland, and said Elisha Bloomer, shall be assumed by said Patterson in the stead of said Bloomer from August 1, 1867, with all its advantages and responsibilities; and said party of the second part agrees that he will hold said Bloomer harmless from all liability on the contracts above mentioned, or on any other contract connected with said quarry and purchased by him.

“And the said party of the first part doth hereby covenant and agree, to and with said party of the second part, his heirs or assigns, that he will, on the payment of said sum of \$5,000 and the delivery of said bond and mortgage at the time and in the manner above set forth, execute and deliver to said party of the second part, at his own expense, a good and sufficient conveyance of the premises, chattels, contracts and other property above described, the same to contain the usual full covenants and warranty, except as to said dock privileges and water front, which shall be conveyed without covenants of title, and will thereupon deliver up possession thereof to said party of the second part.

“And it is expressly understood and agreed that if the aforesaid payments or any part thereof shall not be made or the said covenants not carried out at the times and in the manner herein prescribed, then the sum of \$5,000 paid by said party of the second part on the consummation of the sale of said quarry, as herein provided, shall be forfeited to said party of the first part as liquidated damages for such breach, and shall not be considered as a payment on said mortgage, the whole amount of fifty-five thousand dollars whereof shall upon such default become due and payable, less any sum (over and above said sum of \$5,000) which may have been paid thereon by said party of the second part.”

The respondent in his answer alleged the mistake under which the agreement was made, in respect to the validity of the chattel mortgage agreed for under the laws of this State without a retention of possession by the respondent, and averred that the petitioner obtained the contract by false representations as to his character and credit, and as to his pecuniary means.

The court found the following facts: At the time of the execution

of the contract the parties were ignorant of the laws of this State in respect to chattel mortgages, but supposed that they were substantially like the laws of the State of New York on that subject, and the contract was drawn and executed upon that supposition, and with the expectation that if, by the laws of Connecticut, a chattel mortgage was not a good and valid security, while the mortgagor remained in possession of the chattels mortgaged, such other and further security should be given by the petitioner as should secure to the respondent the payment of the purchase-money ; but there was no express agreement to that effect and no understanding as to the nature of such further assurance. By the laws of the State of New York a chattel mortgage is required to be recorded, and when so recorded the mortgagee need not take possession of the chattels, as the record is notice to all the world and equivalent to possession ; and in case of default by the mortgagor, the property passes to the mortgagee, who may forthwith take possession without legal process.

On the 20th of August, 1867, the day on which said contract was executed, the petitioner executed and delivered to the respondent the following writing : " C. G. Patterson is to pay for horses, \$383, for Jack, \$58.50, and all bills at quarry since August 1, 1867, on day of possession, when the \$5,000 is also to be paid. August 20, 1867. C. G. Patterson." The petitioner on the same day entered into a contract in writing with the respondent, by which he agreed to employ in his service at the quarry John A. Bloomer, a son of the respondent, for the period of four months.

To induce the respondent to enter into the contract the petitioner falsely and fraudulently represented to him that he was a man of large pecuniary means, of high character, and of good credit and standing in business circles, which representations were believed and relied upon in part by the respondent. The petitioner was in fact at that time, and ever since has been, not only a man of small means, but deeply insolvent, and at that time had and now has a petition for the benefit of the bankrupt laws of the United States pending before the District Court for the Southern District of New York.

The respondent offered evidence to prove the following allegations in his answer : " And the respondent avers that the said Patterson was and is not a man of strict business integrity, nor of good business reputation, but on the contrary thereof is known by all with whom he is acquainted to be a man engaged in no legitimate business, and for a long time past to have maintained a bad reputation among all business men with whom he is acquainted and has had business dealings."

To the admission of this evidence the petitioner objected, but the

court admitted it, and upon such evidence found the allegations to be true.

The personal property contemplated to be mortgaged in the contract and pledged to the respondent was of about the value of \$25,000.

On said 20th of August, 1867, there was a subsisting written contract between Bloomer and S. N. Hall, by which Hall agreed to serve Bloomer for one year from April 1, 1867, in superintending and managing affairs at the quarry, and Bloomer agreed to pay him therefor, in semi-monthly payments, at the rate of \$1,500 per year, and to furnish him house rent, not exceeding in value \$100. The bills contracted and expenses incurred at the quarry from August 1 to August 28, inclusive, including the pay-roll, amounted to \$5,280.

The tender made by the petitioner did not embrace an offer to pay the expenses of working the quarry, nor did the petitioner offer to indemnify the respondent in respect to the contract with said Hall, except so far as the mortgage contemplated would operate as security for the performance of the agreement. The respondent had informed himself of the character, standing and circumstances of the petitioner before the tender was made, but made no objection to the performance of the contract on that account, nor for the reason that the petitioner did not offer to indemnify him in respect to the contract with said Hall, nor on the ground that no tender was made of the expenses incurred at the quarry.

On the 15th of September, 1867, the petitioner proposed to pay the respondent the sum of \$15,000 in cash on the contract, and to secure the balance of the purchase-money by a mortgage of the property, and on the 25th of the same month proposed to raise the cash payment to \$25,000, but both propositions were rejected by the respondent.

There is now in the hands of the receiver appointed by the judge who granted a temporary injunction in the case about the sum of \$9,000, being the profits of working the quarry from the 1st day of August, 1867, to the time of the trial.

The petitioner had, and has, no means of his own with which to pay for the quarry, and carry on the business thereat, but he has the ability to influence capital, and would, in the opinion of the court, have been able to make the down payments in cash, as proposed by him; and had he succeeded in obtaining the title to the property he would probably have organized a joint stock company and have realized large profits from the sale of the stock, as he had been engaged in business transactions of that kind to a considerable extent during the last few years; but the profits so realized would have been at the expense of the purchasers of the stock.

The court on these facts dismissed the bill. The petitioner there-



upon moved for a new trial, on the ground of sundry rulings of the court, with regard to the admission of evidence as to the character, standing and financial ability of the petitioner, and as to his fraudulent conduct.

*C. R. Ingersoll and Culver* in support of the motion.

*H. B. Harrison and Warner, contra.*

BUTLER, J. Applications of this character are addressed to the discretion of the court, and will not be granted unless the contract is made according to the requirements of the law, and is fair, equitable reasonable, certain, mutual, on good consideration, consistent with policy, and free from fraud, surprise or mistake.

The agreement set forth by the petitioner is made according to the forms of law, and is apparently fair, equitable, certain and mutual, consistent with policy, and made on good consideration, and if there were nothing more in the case the petitioner would be entitled to the relief sought.

But the respondent sets up in his answer fraud and mistake, and justifies refusal to execute the contract on those grounds; and the parties were at issue upon the question whether there was either fraud or mistake to justify the refusal. The court found both and dismissed the bill.

The questions here are raised upon the motion for a new trial. That motion sets forth certain rulings of the court in relation to the admission of evidence offered to prove the allegation of fraud. In respect to the ground of mistake, although alleged in the answer and found by the court, the motion is silent. It is obvious that if the mistake set up and found was a material one, the respondent was justified in his refusal to execute the agreement, and that a new trial can be of no service to the petitioner, and a consideration of the alleged erroneous rulings of the court in the admission of evidence is necessary. We cannot doubt the materiality of that mistake.

The parties were both residents of the State of New York, and unacquainted with our laws. The respondent was selling a very large property, valued at more than fifty thousand dollars, on time. Twenty-five thousand dollars worth of that property was personal. There were also engagements for the fulfilling of contracts, upon which, if unfulfilled, the respondent would be liable for considerable damages. The cash down payment was small, and for the performance of the contract by the petitioner he stipulated for no other security than a mortgage upon the property sold. The respondent was entitled by the agreement to no security for the safety of the large amount of personal property, or the performance of the contracts which he had made with others, except a chattel mortgage upon that personal property, and the agreement was

made upon the supposition that such a mortgage would be valid. The parties were mistaken ; such a mortgage would be worthless unless possession was retained by the vendor. It is too clear for doubt that the respondent never would have entered into that agreement but for the mistaken supposition that in the execution of it he was to have the protection of a valid mortgage on twenty-five thousand dollars worth of personal property, and it is equally clear that such a mistake is a most material one, and that it was the right and the duty of the respondent to refuse to execute the agreement upon discovering the mistake. It would be grossly inequitable and unjust to compel him to perform it.

Certain circumstances are relied upon by the petitioner to relieve the case from the operation of this mistake. It is found by the court that "there was an expectation that, if by the laws of Connecticut the chattel mortgage was not a good and valid security, while the mortgagor remained in possession of the chattels mortgaged, such other and further security should be given by the petitioner as should secure to the respondent the payment of the purchase-money, but there was no express agreement to that effect, and no understanding as to the nature of such further assurance."

But this cannot aid the petitioner. It was an expectation merely, not a part of the agreement relied upon, nor of any subsequent or further agreement, nor was there any offer of other and different security made or tendered at the time when the tender of the five thousand dollars was made, and a deed demanded, or at any other time. Offers of payment are found to have been subsequently made, but they were not tenders, and were subsequent and inadequate.

And in this connection we cannot avoid looking at the false representations made by the petitioner, and the facts found in relation to his character. Whether they do or do not show an attempted fraud, they most certainly do show that the respondent as a prudent man ought not to have fulfilled this contract at the time when demand was made upon him, without the most ample and undoubted security. Such security he could not have under the agreement, and equivalent and adequate security was never tendered him.

A consideration of the other questions in the case is unnecessary. A new trial must be denied.

In this opinion the other judges concurred, except PARK, J., who dissented.

## BASKCOMB v. BECKWITH.

IN CHANCERY, BEFORE LORD ROMILLY, M.R., MAY 5, 25, 1869.

*[Reported in Law Reports, 8 Equity Cases 100.]*


THIS was a vendor's suit for specific performance.

In 1867 the plaintiff, G. H. Baskcomb, was the owner in fee of an estate at Chislehurst, in Kent, consisting of a large house called "The Manor House," a smaller house called Elm Villa, and about thirty-five acres of land. In May, 1867, the whole of this property, except a small piece of land containing about a rood (called in this report "the reserved plot"), was put up for sale by auction in seventy-four lots. Lot 1 comprised the Manor House and grounds (seven and a half acres); lot 2 comprised Elm Villa and ground (about half an acre), and the rest of the property was divided into small building plots. The particulars of sale and the plan described the property as "the Manor House estate"; on the plan all the lots were colored, and the lands of the adjoining proprietors were left uncolored; but the names, viz., Lord Sydney, Chislehurst Common, Lord Cavendish, and the Rector of Chislehurst, were inserted; the reserved plot, which was bounded on two sides by roads, on the third side by Lord Sydney's property, and on the fourth side by lot 74, was not colored and no name was printed on it.

The 11th condition of sale was as follows:

"Each of the respective purchasers of the building land at this sale shall, in the deeds of conveyance to them respectively, enter into covenants with the vendor not to build thereon otherwise than in conformity with the plan annexed to the particulars, and for the observance and performance of such conditions relative to the erection of fences, modes of building on and using such lots as are mentioned in the 'General Stipulations as to Building Land' annexed to the particulars."


Among these general stipulations were the following:

"On the parts of the properties, where there are not at present any fences between the lots, division lines have been drawn, and are marked with the mark  on the annexed plan, to indicate where such division fences are to be made, and by whom to be made and maintained, and it is hereby expressly stipulated that on whatever lot such marks appear the purchaser of that lot shall, at his own expense, within one calendar month after the completion of the purchase, make a good park fence of oak posts, rails and pales, of not less than 5 ft. 6 in. high, and such purchaser shall also, at his own expense, forever maintain the same; and if any purchaser shall neglect to make such divisional fence within the said month, then the owner of the adjoining lot shall, if he please, make it where required, and the purchaser neglecting shall pay

him the expense on demand, and every such purchaser shall, if required, in his conveyance, at his own expense, covenant with the vendors to make and forever maintain such fence.

"No purchaser to erect more than one single house, or two semi-detached, on his or their lot, nor at a less value than £800 for the one and £1,200 for the two.

"No house shall be used as a public-house or place of business or trade, and no business, trade, or manufacture shall be carried on on the property."

Lots 73 and 74 and the reserved plot formed one field, separated from the road by a continuous iron fence, and from Lord Sydney's land by a hedge and ditch. The reserved plot was about 325 feet from the manor house. Upon the plan a line was marked between the reserved plot and Lord Sydney's land, and a dotted line between it and lot 74 with the mark  against the line on lot 74.

The property was not sold at the auction. On the 15th of April, 1868, the defendant, who had been for some time negotiating for the purchase of the manor house, wrote to his surveyor a letter containing the following passages :

"I now authorize you to offer £8,000 for lot 1 less the kitchen garden. . . . I understand, of course, that the conditions are the same as in the sale particulars—that there is to be no public-house on the estate and no private-house under a fixed value." A correspondence ensued, upon which the plaintiff relied as constituting a contract to purchase lot 1, and in May, 1868, he instituted a suit against the defendant for specific performance. The defendant did not defend the suit, and on the 11th of June, 1868, he signed a formal agreement for the purchase of lot 1 (except the kitchen garden) for £8,000, "according to the conditions of sale, so far as they were applicable to a sale by private contract."

The defendant's solicitors accepted the title, and prepared the draft of a conveyance containing restrictive covenants by the plaintiff, in the terms of the stipulations as to building land, making these covenants extend not only to the land included in the sale, but also to the reserved plot. Considerable discussion followed as to the form of the covenants, which was at length agreed upon ; but on the 5th of August, 1868, the plaintiff's solicitor having, for the first time, observed that the covenants were made to include the reserved plot, required that the draft should be altered so as to limit the covenants to the property included in the particulars of sale. The defendant having refused to complete the purchase unless the plaintiff would execute the conveyance containing restrictive covenants as to the reserved plot, the plaintiff instituted this suit.

The defendant, by his answer, stated that he had no idea from the inspection of the particulars and plan that the reserved plot belonged to the plaintiff; that during the whole of the negotiations neither the plaintiff nor his solicitors or agents ever mentioned to him or his surveyor or solicitors that he intended to exempt any land from the restrictive covenants; that he had bought the manor house for the purpose of a residence, and that he would not have bought it had he known that there was any possibility of a public-house being erected on any part of the plaintiff's estate, and that he knew very well that neither Lord Sydney nor any of the adjoining owners of land would be likely to build or allow any property of that nature to be built on the adjoining lands.

The plaintiff deposed that on one occasion in April, 1868, when he was going over the grounds of the manor house with the defendant and his surveyor, he told them that the whole of the land opposite (lots 73, 74, and the reserved plot) belonged to him.

Mr. Clark, the auctioneer who prepared the plan annexed to the particulars of sale, and two other eminent auctioneers, deposed that it was a frequent occurrence to reserve a few plots on the sale of a building estate, that they might be free from building stipulations or restrictive covenants, and that it was not the usual practice of surveyors to mark the name of the vendor on every piece of land reserved from a sale.

*Sir R. Baggallay, Q.C., and Mr. Jason Smith* for the plaintiff.

*Mr. H. M. Jackson* (with him *Mr. Jessel, Q.C.*) for the defendant.

May 25. LORD ROMILLY, M.R. This is a suit by the vendor for the specific performance of a contract, and the question resolves itself into this, whether the vendor is entitled to build a public-house or carry on any trade on a plot of land belonging to him which is situated about 100 yards from the entrance gate of the messuage bought by the defendant.

The facts are these: In 1867 the plaintiff was the owner of the Manor House estate, consisting of about thirty-five acres, situate in Kent, at no great distance from London. He put this up for sale by auction, divided into seventy-four lots, lot 1 containing the residence and garden and lot 2 a small adjoining villa; the rest of the property was divided into distinct lots for building purposes. The following were parts of the conditions of sale and the general stipulations as to the building land: [His Lordship read the 11th condition and the stipulations above set out.] Apparently the whole property was included in the sale. It is always called in the particulars "the estate" and treated as a whole. There was, in fact, though it did not so appear on the conditions or particulars, a slight but important exception. This exception was a small plot consisting of about a quarter of an acre at the union

of three roads, one leading to the Crays, another leading to Bromley and Croydon, and a third leading to Greenwich and London. This piece was not colored on the plan accompanying the conditions and particulars of sale, nor had it upon it the name of any proprietor, but it was colorless, like the adjoining property, which had on it the name of Lord Sydney. To a person who looked casually at the map it would appear that this small piece of ground belonged to that nobleman. On a closer inspection it would appear to form part of a field divided into three lots, two of which were put up for sale, which two were to be offered, in the first instance, to the purchasers of the opposite messuages, lots 1 and 2. The defendant says that he had no idea from the inspection of the plan that the piece of land now referred to belonged to the plaintiff. The contract bears date the 11th of June, 1868. The title was accepted, the draft conveyance was sent, and, after some discussion, was settled and approved, and, as settled, contained the necessary covenants affecting the whole property. What took place afterwards is thus narrated in the 25th paragraph of the defendant's answer: "On the 5th of August last one of the plaintiff's solicitors called upon Mr. Pownall, my solicitor, and stated that the draft as settled on my behalf would do with a slight alteration, as they had overlooked one point, and that a few words must be inserted limiting the covenants to the property in the sale plan, and on referring to the said plan the said Mr. Taylor pointed out the said piece of land not colored to the east of the said lot 74. The said Mr. Pownall then, for the first time, observed that the piece of land adjoining lot 74 on the said plan belonged to the plaintiff, and learned that it had been purposely reserved by him out of the sale. The said Mr. Taylor at the same time informed Mr. Pownall that the said piece of land had been reserved, as the plaintiff had always looked upon it when the building on the estate commenced as a capital site for a public-house, and in answer to an inquiry by Mr. Pownall whether the plaintiff, after so much discussion, really insisted upon the point, as the land was not large enough for a public-house, the said Mr. Taylor stated that the plaintiff had purchased an adjoining piece of waste from Lord Sydney, and had arranged with him to remove the pound of the waste from that spot so as to give sufficient room for his purposes. The said Mr. Pownall merely stated that the consequences of conceding to the plaintiff's wishes were so serious that he must see counsel and take my instructions."

The question which is thus brought to a distinct issue is this: Is the defendant bound to complete the contract, leaving the plaintiff at liberty to erect any buildings he pleases on this plot of ground or use it for any purpose whatever? I think that the defendant is not so bound. I am of opinion on the evidence that he bought the property

in the firm belief that no public-house, or noxious or injurious trade, could be built or carried on upon any part of the plaintiff's estate. One or two matters I may refer to which, in my opinion, confirm the oath of the defendant to this effect. In the first place, the plaintiff, before this contract of June, 1868, was entered into, sought to establish against the defendant that the correspondence relative to the property had constituted a sufficient contract within the Statute of Frauds to bind him, and a bill was filed in May, 1868, to enforce this agreement. That suit was compromised, and ended in the contract of the 11th of June, 1868. One of these letters, dated the 15th of April, 1868, contained these words: "I understand, of course, that the conditions are the same as in the sale particulars, that there is to be no public-house on the estate, and no private-house under a fixed value." This shows clearly that at that time the defendant laid great stress on the fact that there was to be no public-house on the estate, and as on all sides the estate was bounded by Chislehurst Common, the estates of Lord Sydney and Lord Cavendish, and the glebe of the rector of Chislehurst, it was reasonably certain that no public-house could be placed with any injurious proximity to the residence of the defendant if it were not on the plaintiff's estate. In the next place, no intimation was given to the defendant that the covenants would not include everything till August, 1868. It is said on behalf of the plaintiff that the premises were inspected and that the opposite field was seen and made the subject of inquiry and discussion; that it was seen to be one inclosure, and that any one who looked at it must have perceived that the plot which was excepted from the sale formed part of that field, and that it formed no part of the property put up to auction. This, however, does not, in my opinion, remove the fact which is sworn to by the defendant, and which all the progress of the settling of the draft conveyance shows, that up to August, 1868, the defendant and his advisers believed that the covenants would override the whole property of the plaintiff. Another circumstance which has great weight with me is the fact that in the plan nothing in the shape of color, or of the name of the proprietor, appears on this unsold plot to mark that it was part of the estate belonging to the vendor. Messrs. Clarke, Fox, and Driver state that it is a frequent occurrence to reserve a few plots on the sale of a building estate in order that they may be free from the building covenants, and that it is not the usual practice of surveyors to mark the name of the vendor on every piece of land reserved from a sale. Strictly and literally I have no doubt of the truth of this evidence, but I have no evidence before me nor do I remember ever to have seen a case establishing the practice that when the vendor professes to print the names of the adjoining proprietors he omits to print his own name on an ad-

joining plot, or to point out by the color that it forms part of the estate belonging to the vendor, though not included in the sale.

It is obvious that it would, comparatively speaking, be a slight matter to the defendant if a public-house were built at the other extremity of the property, distant, according to the plan, about a third of a mile in a straight line and probably half a mile by any road, and yet this distant part of the property is carefully included in and governed by the covenants, while on the high road, which passes in front of his house at the distance of 100 yards, a public-house might be established, in a neighborhood where obviously there cannot be many, and on a spot which seems to be admirably situated for that purpose, at the junction of three roads, and which, therefore, would probably become a place of great and constant resort. If it had been expressly stated on the conditions of the sale that the vendor reserved this plot for the purpose of erecting there a public-house, I cannot doubt but that it would have had a very injurious effect on the sale of all the lots in the immediate vicinity of it, and would have seriously diminished the prices bid for them. I think the defendant bought lot 1 in the firm persuasion that no such use was to be made of this plot of ground, and that the acts of the plaintiff's agents in framing the conditions of sale as if including the whole estate without any reservation, and so framing and coloring the plan as to contribute to that belief, are such that the plaintiff cannot now compel the defendant to execute the contract, if he insists on retaining this plot free from any restrictive covenants whatsoever. I think, however, that the defendant cannot prevent the plaintiff from so retaining and so using this plot of ground, but that, if he does so, he cannot compel the defendant to complete the contract. I think the plaintiff is entitled, at his option, either to a decree for specific performance, with a covenant including this reserved plot, or to have his bill dismissed. In both cases he will, in my opinion, have to pay the costs of the suit, as the error has, in a great measure, been the consequence of the peculiar manner in which the plan and conditions of sale were drawn up. It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly.

Solicitors for the plaintiff: *Messrs. R. S. Taylor & Son.*

Solicitors for the defendant: *Messrs. Pownall, Son, Cross & Knott.*



## DENNY v. HANCOCK.

IN THE COURT OF APPEAL IN CHANCERY, NOVEMBER 9, 10, 1870.

*[Reported in Law Reports, 6 Chancery Appeals 1.]*

THIS was an appeal by a purchaser from a decree for specific performance made by Vice-Chancellor Malins at the suit of the vendors, who were trustees for sale and executors under the will of G. Denny.

The property was a freehold house and grounds suited for a gentleman's residence, and described in the particulars as comprising "about two acres and three-quarters." The eighth condition was: "The quantity stated in the particulars shall be assumed to be correct, the same being taken from a recent survey of the property, and no objection is to be made on the ground of any discrepancy between such quantity and any of the quantities stated in the abstract, and misdescription in any other respect shall not annul the sale, but a compensation for such misdescription shall be given or taken, as the case may require, such compensation to be settled by, etc."

Annexed to the particulars was a plan of the property. The ground may, with sufficient accuracy for the present purpose, be described as triangular, the house being at the northwest corner, the front looking in a northeasterly direction across a road, and the back in nearly a southwest direction upon a lawn and meadow. The western boundary was marked by a distinct straight line, and a foot path in the grounds was delineated as running parallel to it along its whole length, the intervening space, shown upon the plan as about ten feet wide, being filled up with a rough delineation of small trees or shrubs so as to represent a shrubbery, without any indication of there being any very large trees there. In the meadow, which formed the south-westerly part of the property, four separate trees were drawn in a way directing attention to them as prominent objects, and in one of the two kitchen-gardens twelve separate trees were drawn, and six in the other.

The defendant, on the 29th of April, 1868, became the purchaser by auction for £3,800. On the 2d of May the abstract was delivered. On the 11th of May requisitions were sent in, which were answered on the 15th. On the 18th of June the draft conveyance was sent with some further requisitions. Answers were sent to these requisitions on the 22d, and the draft was returned approved on the 24th. After this a will, the production of a copy of which was called for by one of the requisitions, was inspected, and counsel's opinion taken upon it. The result was that on the 3d of July, 1868, the purchaser

took the objection that the vendors were not competent to give a receipt for a sum of £2,800 due on mortgage of the property, and forming part of the estate of Miss Bell. It appeared that the testator, who was the surviving trustee and executor of Miss Bell's will, had invested £2,800, part of her personal estate, on securities which were considered improper, had taken them to himself, and, in order to secure the money to her estate had executed a mortgage of the property now in question to a Mr. W. E. Denny for £2,800. The vendors contended that they, being the personal representatives of Miss Bell, could give a discharge for this sum, but the purchaser insisted that new trustees of her will must be appointed before an effectual discharge could be given. After some correspondence the purchaser's solicitor, on the 20th of July, wrote to the solicitor of the vendors, stating that for reasons which he would give he was advised that the purchaser was in a position to rescind, but that before acting on this the two solicitors had better meet. An interview accordingly took place, when the purchaser's solicitor stated objections which the vendors' solicitor treated as untenable, and pressed for completion of the purchase. On the 6th of August, in reply to a letter from the vendors' solicitor, the purchaser's solicitor wrote him a letter adverting to the question as to the £2,800, and to the circumstance that the purchaser had been misled as to the three trees, which will presently be mentioned, stating that it was a question whether the purchaser was not entitled to be relieved from his bargain on the ground of misrepresentation, but offering to give £200 to be released from it. The vendors refusing these terms, the defendant's solicitor, on the 14th of August, gave a written notice that the defendant rescinded the contract on the above grounds, and on the 25th of August an action for the deposit was commenced.

The objection as to the three trees was as follows: The apparent outer boundary of the shrubbery along the western side of the property was an iron fence, which included three very large elm trees. The fact, however, was, that this iron fence was on the glebe land adjoining the vendors' property, the boundary being only marked out by some stumps within the shrubbery, and the three elms stood almost wholly on the glebe.

The material evidence relating to the trees and boundary was as follows:

The defendant, by his answer, said: "At and previously to the time of sale the visible boundary of the property on the west side, as it appeared to any person visiting it, was an iron fence outside of a belt of shrubs varying from about eleven to about fourteen feet in width, containing in it some trees of an enormous size and of great beauty, affording

ornament and shelter to the residence on that side, and constituting the most attractive features of the property. At the time of sale the property appeared to any person going, as I did, as a stranger, to inspect it with the plan in my hand, and looking at the apparent and visible boundaries thereof, to comprise within its limits the whole of the said belt of shrubs on the west side thereof, with the ornamental trees therein up to the line of the iron fence outside the said belt of shrubs as the boundary fence on that side. Having visited the property with the plan in my hand, I was, in fact, led by the plan, verified by my own inspection, to believe, and I did believe, that the whole of the said belt of shrubs, with the ornamental trees therein on the west side thereof, formed part of, and were comprised in, the property then about to be submitted to sale, and in that belief I attended at the said auction, and bid for the said property."

The surveyor of the defendant, in his affidavit, said: "At the time when I first visited the property in May, 1868, the only visible and apparent boundary thereof on the western side, as it appeared to me, was an iron fence outside the belt of shrubs, which belt varied from about eleven to about fourteen feet in width, and contained in it some trees of enormous size and great beauty, affording ornament and shelter to the residence on that side, and constituting, in my opinion, one of the most attractive features of the property. The plan annexed to the said particulars, professing to show the property, apparently depicted the whole of the belt of shrubs on the western side as included in it, and forming part of the property, and the trees growing in the said belt of shrubs were, in my opinion, the main features upon which the property depended for its picturesque appearance, and tended to make it, as it is described in the said particulars, a most comfortable and enjoyable abode. When I so visited the property with the plan in my hand I was led by the plan, confirmed by my own inspection, to conclude, and I did conclude, and was under the impression, that the whole of the said belt of shrubs, with the ornamental trees thereon on the west side thereof, formed part of, and were comprised in the property sold; and, speaking practically as a surveyor with very considerable experience, I say that the plan was so made as to lead not only the general public, but persons who, like myself, have practical experience of mapping and planning of estates, to the impression that the whole of the belt of shrubs was within the boundary of the property shown on the plan as being the property intended for sale." He went on to say that in such a case both the true and visible boundaries ought to have been shown and distinguished on the plan.

It appeared on the evidence that the purchaser was not aware until July that the purchased property did not extend up to the iron fence.

The precise time when he first became aware of it was not shown, but the court considered that he was not shown to have become acquainted with the fact earlier than the 10th of July.

The auctioneer at the sale gave evidence on behalf of the plaintiffs, and in his affidavit stated that before the sale he went over the property with Adams, who was to make the plan, pointed out to him the true boundary (which had been shown to himself by the vendors), and the fact that the elm trees were beyond it, and told him to be particular to measure from the true boundary shown by the stumps. He further said that at the auction no mention was made of the trees, and that, in his opinion, it would have enhanced the value of the property if the trees were included, and that if they had been, reference would have been made to them in the particulars and at the sale.

Adams, who described himself as a bailiff, gave the same account as the auctioneer as to the directions he received, and stated that he had measured from the true boundary, and excluded the trees from the plan. He stated that if the trees had been included in the sale he should have been particular to show them distinctly on the plan. On cross-examination he said that he did not call himself a skilled surveyor. He said that there was no shrubbery between the boundary and the wire fence, but there might be a bush or a briar; that the boundary stumps were shrouded by the shrubbery, and you would have to look for them, and they would not catch your eye readily, but you might see them if you had a quick eye. On re-examination, he said that the three elm trees were very much larger than the four trees which appeared in the meadow.

It appeared that before the end of June, 1868, the defendant was contemplating re-selling the property; and it was sworn to by a witness on behalf of the plaintiffs, and not denied in the evidence of the defendant, that the defendant had stated that he wished to dispose of it because his wife objected to it as a residence.

Vice-Chancellor Malins made a decree for specific performance with costs.<sup>1</sup>

<sup>1</sup> March 15, 1870. SIR R. MALINS, V.C. The objections taken by the purchaser in this case are only three: First, that there is such a misdescription of the property as entitles him to be relieved; secondly, that there is an objection to title, as to which I stated my opinion yesterday that it is not a question of title at all, but a mere question of conveyance; and thirdly, that there is a deficiency of quantity.

Now, first, as to the misdescription of the property. The whole question has turned upon the representation of the western boundary in the sale plan—the north is towards a person looking at the plan, and therefore the west is to the right hand. Anybody looking at the plan would see that it was prepared with considerable care, and it is impossible not to observe that there is an anxiety to depict every tree that is on the property. It is a small property, two acres and three-

*Sir Roundell Palmer, Q.C., Mr. Fooks, Q.C., and Mr. Locock Webb* for the appellant.

*Mr. Cole, Q.C., and Mr. Macnaghten* for the plaintiffs.

SIR W. M. JAMES, L.J. I regret that I am unable to agree in the conclusion at which the Vice-Chancellor arrived on that part of the case on which alone we are now going to pronounce our judgment. His Honor appears to me to have been influenced by a suspicion that

quarters, or rather less. All the trees in the kitchen-garden are marked, three trees in one corner of the meadow are marked, another at the top of the meadow is marked, and here is a clump of trees at the corner of the lawn all marked. There are two kitchen-gardens. I see there are trees on both which are marked. The great subject of discussion has been that there are three magnificent elm trees on the western boundary which the vendor says are planted in the glebe, because this property is bounded upon the west by the glebe land. It appears, upon the evidence, that these three trees were originally planted in the glebe, but in the course of a century while they have been growing the roots have extended into the plaintiff's estate which is the subject of the sale. Now, the defendant says, "I considered that I was entitled to those elm trees"; and, of course, if he was entitled to the trees, he would be entitled to the land upon which they grew. How does he make this out? He says: "I looked at the property with the plan in my hand. I saw these three elm trees, they are beautiful objects, they are desirable for shelter, and without these three elm trees the place is comparatively valueless to me." Now, it certainly is a very remarkable thing if he thought he was entitled to have these three elm trees, that when he saw all the other trees marked he should not have said at the auction to the auctioneer, "How does it happen that the three elm trees, which are the finest and most magnificent objects and most attractive upon the property, are not marked at all"? If he had asked that question, what would have been the answer? "It is not intended to sell them they do not belong to the property, they belong to the glebe." He would have said, "I saw an iron fence, they are inside the iron fence." The answer would have been, "That iron fence is not the boundary of the property. It is merely put up by the rector or vicar to keep cattle from the plantation. The boundary is defined by the posts, the elm trees are beyond." Considering the nature of this plan, it is impossible that any rational man, if he thought he was entitled to have the trees as part of his purchase, would not have remarked upon the total absence of them from the plan. The purchaser made no inquiry, and, in my opinion, he was bound to make inquiry. The case that was cited by Mr. Cole, of *White v. Bradshaw*, 16 Jur. 738, is certainly, I think, a remarkably strong case, where a man without going to look at the property buys a house described as 39 Regency Square, Brighton. It turned out it was so called, but it formed no part of the square, being situate in a street between it and the adjoining square. In one sense the house was not in the square, but in another sense it was, being called part of the square. But His Honor did not rest his view of the case upon that fact. The house was known by the name of 39 Regency Square. The defendant went to the auction and bought it by that name without inquiry, and Sir James Parker considered that he could not object to perform the agreement. Here the case is much stronger, because there the purchaser had not seen the property; here the defendant had gone down, as I have said, and looked at the property with the plan in his hand,

the objection was taken only because the defendant, who had intended to purchase the property, had changed his mind, and sought out objections solely with the view of getting rid of a contract which was originally agreeable to him, but which afterwards, for reasons quite independent of the objection, had become disagreeable to him. I do not think it is the business of the Court of Chancery thus to inquire into motives. Of course, if the case depended upon the defendant's own evidence we

had seen the trees were not depicted, and by omission to make that inquiry I consider that he is absolutely bound not to require the trees as part of the property. I should have been of that opinion apart from what took place after the sale, but when I consider that the defendant goes on negotiating as to the completion of the purchase, that he writes a letter by his solicitor on the 6th of July, expressing his anxiety to complete the purchase, the draft conveyance for which he had forwarded on the 18th of June preceding, I say, even if the objection had been one which he was entitled originally to sustain, he must be taken to have clearly abandoned it by his subsequent conduct. What is it he has bought? I quite agree with the statement of the law by the learned counsel for the defendant, that if there was any material misdescription by the vendor, that would prevent him from calling upon this court to interfere in his favor in the way of specific performance. Nothing can be more important than that all vendors of property should honestly and faithfully describe what they have to sell, and if, whether intentionally or unintentionally, mistakes are made, if the purchaser has been led into the belief he is to have something which it turns out he cannot have, that is a sufficient ground for the court refusing to interfere in favor of the vendor. Many cases were cited to me during the argument in support of that proposition, and they clearly establish it. If, therefore, in the present case there had been any misrepresentation, innocently made or not, which misled the purchaser, and it turned out he had been misled by it, I should have thought it fatal to the contract. I am certain that there was nothing calculated to mislead the purchaser who took the precautions he did. I am certain he was not misled by it—at all events by ordinary inquiry he might have learnt the real state of the case; and his own subsequent conduct shows conclusively that he was not misled. On that part of the case in my opinion he entirely fails. I also think that there is another strong argument against the defendant, that practically he will have all the advantage that he contemplated having from these trees. They are stated to be a century old; probably they will last one or two centuries more; they are fine elm trees, they are on glebe land, and the clergymen will have no right to fell them; and I am satisfied that for all practical purposes this gentleman will have as much pleasure in looking at the trees, if he resides in the house, and have the shade of them, as if he were the actual owner. The objection, therefore, in my opinion, is one of the most frivolous and trivial character under the circumstances of the case that was ever brought forward as a means of endeavoring to get out of a contract, but when I come to the two other objections, they are, if possible, still more frivolous and trivial.

The next is an objection to title. I must say the pertinacity with which this was urged upon me as an objection to title which was no objection to title whatever has surprised me. The title has been accepted. There is no question of title, but it turns out, as stated by the fourth paragraph of this bill, that there are two mortgages on the property, and I need not say that a man who buys an

should look at the motive as affecting the value of that evidence ; but apart from that we have only to consider whether, according to the rules of this court, he was entitled to be relieved from this contract, or from specific performance of it, at the time when he gave the notice to rescind. I see no ground whatever for saying that after he had ascertained the fact upon which he now relies he in any way allowed the negotiation to proceed in such a way as to mislead the vendors, or to alter the rela-

estate free from incumbrances must have it free from incumbrance. This property is subject to a mortgage for £1,000 to the trustees of the settlement of Mr. George Denny, who is the testator in the cause, the plaintiffs being trustees under his will, and this mortgage has not been discharged effectually. There is also a mortgage of £2,800 of part of the estate of a Mrs. Bell. Those are the only incumbrances upon the property, and of course the necessary parties to free it from those two mortgage debts must concur in the conveyance. This is not a question of title. It was urged upon me, it was impossible it could be freed from those two mortgages. Am I to allow a bill to be dismissed upon the ground that it is impossible to allow of a discharge of two mortgages existing upon the property, one being payable to the trustees of the testator's marriage settlement, and the other to the trustees of Mrs. Bell's will? As regards the latter, the testator himself, being the surviving executor of her will, had invested a sum of £2,800, part of her estate, upon investments which he did not think authorized ; he desired therefore to adopt them for himself and give a good security for the £2,800 on this property. He could not mortgage the property to himself, so he conveyed to a brother or a relative of his of the name of Denny, upon trust to secure £2,800 to Mrs. Bell's estate. What is the consequence? Here is an admission that it formed part of Mr. Bell's estate. It is said on the part of the plaintiff that the surviving executors of Mrs. Bell can give a discharge. I do not give any opinion on that question. It may turn out that they may not be the proper parties to give the discharge, or it may turn out that they are. Either the legal personal representatives of Mrs. Bell, or the trustees of her will, jointly or severally, can give a discharge, and nobody can pretend that this trust fund cannot be discharged by being paid to her trustees with the concurrence or without the concurrence of the legal personal representative. At all events the legal personal representative or the trustees of the will can give a discharge for the £2,800.

Then with regard to the £1,000 that is due to the trustees of the marriage settlement of Mr. George Denny, the testator himself. His wife is dead, and the children of the marriage no doubt are the *cestuis que trust* ; there is somebody no doubt who will be able to give a discharge. That is purely a question of conveyance, and nothing can justify the attempt that has been made to turn that into a question of title which is a mere question of conveyance. It must be referred to Chambers to settle the conveyance by all necessary parties. If it turns out there is insuperable difficulty in obtaining a release, and these mortgage debts cannot be discharged, the fact that the plaintiffs cannot procure the concurrence of all necessary parties will be as fatal to this contract as if there had been a reference as to title, and it was found that a good title could not be made out. That, therefore, disposes of the only objection he has made as to title. [His Honor then proceeded to give his reasons for holding the objection as to deficiency of quantity to be precluded by the conditions.]

tive positions of the vendors and himself. I therefore do not think that the delay which occurred between the 10th of July and the notice given on the 14th of August, coupled as it was with the intermediate notice to the vendors' solicitor, enables the plaintiffs to resist the defendant's contention, if that contention upon the facts was well founded.

Now, when we come to examine the evidence, I am bound to say, with all deference to the Vice-Chancellor's judgment in this matter, that the case is clear in favor of the defendant. The defendant tells just the sort of story that I myself should have told if I had been an intending purchaser, and had gone to inspect the property with the plan in my hand. [His Lordship read the passages of the defendant's answer which are set out above.] He has not been cross-examined, and I must say I have no doubt whatever that if I had done exactly what this gentleman did, and taken that plan in my hand, and gone through the property, and found a shrubbery, or ground covered partly with shrubs and partly with thorns, with an iron fence outside, I should have arrived at exactly the same conclusion as this gentleman did, and I should have gone to the sale and bid in the belief that I was buying the belt up to the iron fence with those trees upon it. Then the defendant's surveyor, who says he has been for twenty years in the profession says: [His Lordship read the above extract from the surveyor's evidence.] This gentleman, again, has not been cross-examined, and there really is not, in my judgment, a shadow of evidence in reply to his evidence that the plan was so made as to lead not only the general public, but persons who, like himself, had practical experience in mapping and planning, to the conclusion that the whole of the belt of shrubs up to the iron fence was included in the sale. [His Lordship then stated the effect of the plaintiffs' evidence given above, and continued.]

There is no denial in evidence of this fact, that the plan produced was calculated to induce anybody to believe that the whole of the belt, or shrubbery, or whatever you may call it, was included in the property sold. It is urged, however, that the defendant was negligent. The substance of the argument seems to be this, that if he had looked at the plan very minutely he would have seen that the trees in the meadows and in the garden were marked, but these three fine trees, which added so much to the value of the property, were not marked; and it is urged that the absence of these remarkable trees from the plan is a thing calculated to put a man so completely on his guard that he ought not to have been misled, and is not to be believed when he says he was misled. But it seems to me that it never would occur to a person who entertained no doubt whatever about what the thing was that had been sold to him, to make any inquiry about the omission of two or three trees in that which appeared on the plan to be a mass of wood. If



this gentleman did as he says, buy it under a mistake as to the property, such mistake was caused by the plan which was presented to him, drawn by the vendors' agent, and also caused by this fact, which alone might have been enough to mislead him, that there was on the ground an apparent visible boundary, quite distinct from the almost invisible real boundary. I think that, independently of the plan, and on this latter ground alone, it would have required great consideration before a court of equity would have fixed the purchaser with this contract, which he swears he entered into in the belief that the property extended to its apparent boundary; but coupling the state of the property with the representation made by the plan, I am of opinion that it would not be according to the established principles of this court to compel the purchaser to complete his contract. I am also of opinion that the mistake was occasioned by at least *crassa negligentia* on the part of the vendors in respect to what they sent out to the public. I am, therefore, unable to agree with the Vice-Chancellor, and am of opinion that he ought to have dismissed this bill with costs.

I have confined myself entirely to this one point, because the determination of it in favor of the defendant disposes of the case. At the same time I wish it to be understood that I am not prepared—I will say no more than that—I am not prepared to concur in the judgment of the Vice-Chancellor with respect to the second objection. Assuming the question to be merely a question of conveyance and not of title, the defendant having insisted upon certain trustees joining in the conveyance for the purpose of giving him a receipt for his money, and the issue having been distinctly raised before suit whether he was right in so insisting—if after this the court had come to the conclusion that we was right in his contention (and I think that the court ought at the hearing to have come to a conclusion one way or other on this point), I should require to be satisfied that the court would still hold the plaintiff entitled to specific performance. In a case where the plaintiff has refused to complete the sale on the footing on which he was bound to complete it, and the defendant gives notice that if a proper conveyance is not given him he will rescind the contract, I am not prepared to say that the purchaser is to be held to his bargain after a delay of months, which has been occasioned by the ill-founded contention of the vendor. I have not heard the plaintiffs upon this point, and I therefore give no opinion upon it. I simply wish to guard myself against being supposed to concur in some principles which seem to be laid down in the judgment of the Vice-Chancellor, which I should reserve for further consideration before I should agree with them.

SIR G. MELLISH, L.J. I am of the same opinion. It appears to me

that in a property like this—a villa residence with a little more than a couple of acres of land, in the immediate neighborhood of London—any person going to look at it, whether he carried a plan with him or not, would naturally assume, as a matter of course, the existence of some fixed boundary, some fence apparently separating the property he was going to purchase from the neighboring one, and that, therefore, when a gentleman went to inspect this property with the plan in his hand, and walked round the footpath going near the boundary, and on looking through the shrubs saw an iron fence, and no other fence of any sort or kind visibly bounding the property, he would naturally come to the conclusion that this iron fence was the boundary, and he never would think that anything else could be the boundary, nor would he be likely to feel any such doubt as would induce him to ask a question about it. Then it turns out that *de facto* the iron fence is not the boundary. There has, therefore, been a mistake between the parties as to what the property purchased really consists of; and it is admitted on all hands that it is a material mistake, because the surveyor on the part of the vendor, no doubt with another object, states that these trees, if included, would have enhanced the value of the property; and it is sworn to, and is not contradicted, that the purchaser was *de facto* deceived. Nor is there anything to throw any doubt upon it.

Then the only question is, whether the plan and particulars were naturally calculated to deceive. I cannot but think that they were. It appears to me that when a surveyor is employed by a vendor to draw up a description of a property of this kind, and he goes to survey for the purpose of it, sees that the real boundary is almost invisible, and that there is a fence beyond it forming an apparent boundary, he ought, as a reasonably cautious man, to conclude that unless the plan and conditions are carefully prepared purchasers will be almost certain to fall into a mistake. I therefore should think it necessary not only to show on the plan the relative situations of the real and apparent boundaries, but also to insert in the particulars express words describing the real boundary, as that boundary did not describe itself to people who went to look at the property. It really almost requires to my mind some charity—though I will have the charity—to suppose that he did not prepare his plan with the view of leading a purchaser to suppose the trees to be included, and omit these particular trees, in order that he might be able to say afterwards, “These were not intended to pass.” It is remarkable that, according to the plaintiffs’ own evidence, the auctioneer, when instructing the surveyor, did not tell him to go to the place and frame his own description, but he took him round and pointed out the real boundary. It appears to me very clear that the purchaser has been deceived by the plan and the particulars respecting a material

point, and that under such circumstances he certainly cannot be compelled to complete the purchase, the mistake having arisen, to say the least of it, through the negligence of the vendors' agents.

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TAMPLIN v. JAMES.

IN THE COURT OF APPEAL, JULY 12, 13, 1879.

[*Reported in Law Reports, 15 Chancery Division 215.*]

THIS was an action by vendors for specific performance.

On the 25th of July the plaintiffs, who were the trustees of a will, put up certain parts of their testator's property for sale in lots. Lot 1 was described as follows :

"All that well-accustomed inn, with the brewhouse, outbuildings, and premises known as The Ship, together with the messuage, saddler's shop, and premises adjoining thereto, situate at Newerne, in the same parish, No. 454 and 455 on the said tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs. Knowles and Mr. S. Merrick,

"This lot is situate close to the Lydney Town station, on the Severn and Wye Railway, and abuts on other premises of the vendors, on the canal, and on lands now or late of the Rev. W. H. Bathurst."

Lot 1 was not sold at the auction, but immediately afterwards the defendant, who had been present at the auction, made an offer for it which was accepted, and signed a contract for purchase according to the conditions of sale at the price of £750.

At the back of lot 1, and of the house adjoining it, lay three plots of garden ground, which had formerly belonged to the Rev. W. H. Bathurst, but had since been purchased by the railway company. One of these pieces of ground was in the occupation of the tenant of the messuage and saddler's shop, and the other in the occupation of the tenant of The Ship Inn. The tenants each held his house and the garden ground at one rent, which was paid to the vendor's agent, who accounted to the owners of the garden ground for their proportions of the rent. The origin of this arrangement, which had been acted upon for many years, did not appear. The rent paid for the gardens was 10s. a year each. Each of these two pieces, which together contained about twenty perches, was partially divided by a fence from the premises with which it was occupied, but there was no boundary of such a nature as to suggest that it belonged to a different owner.

It appeared that at the auction two plans of lot 1 were lying on the table, and the auctioneer called the attention of the persons present to them. One of them was a tracing from the tithe map, the other was a

tracing on a much larger scale from a map belonging to the railway company. On this latter plan the pieces of garden ground were marked as belonging to the railway company, and in each plan the property forming lot 1 was colored, so as to distinguish it from the adjoining property. It was correctly described as being 454 and 455 on the tithe map, and included the whole of the closes so numbered.

The defendant deposed that he had not seen the plans, and was not aware of there being any plans in the room; that he had known the property from a boy, and knew that the two plots of garden ground had all along been occupied with The Ship Inn and the saddler's shop respectively; and that he bought in the full belief that he was buying all that was in the occupation of the tenants, and he declined to complete unless the gardens were conveyed to him.

The hearing took place before Lord Justice Baggallay, in consequence of the illness of Vice-Chancellor Malins, on the 17th and 18th of March, 1879.

*J. Pearson, Q.C., and Cozens-Hardy* for the plaintiffs.

*Higgins, Q.C., and W. Barber* for the defendant.

1879. March 20. BAGGALLAY, L.J., after stating the leading facts, continued:

The defendant insists in his statement of defense that he signed the memorandum in the reasonable belief that the property comprised therein included the whole of the premises in the occupation of Mrs. Knowles and of Mr. Samuel Merrick, and not merely the messuages and hereditaments which the plaintiffs allege to be the only property comprised therein, and that such his belief was induced and confirmed by the acts and words of the auctioneer at the sale. The defendant has sworn positively that he had such a belief at the time he signed the memorandum, and I see no reason to doubt the statement so made by him; but was such a belief a reasonable belief?

It is doubtless well established that a court of equity will refuse specific performance of an agreement when the defendant has entered into it under a mistake, and where injustice would be done to him were performance to be enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional misrepresentation on the part of the plaintiff (I am not now referring to cases of intentional misrepresentation which would fall rather under the category of fraud), or where from the ambiguity of the agreement different meanings have been given to it by the different parties. The case of *Manser v. Back*<sup>1</sup> is a well-known illustration of this. It is true also that specific performance has been refused in cases not coming under either of these heads, as in *Malins v. Freeman*.<sup>2</sup>

<sup>1</sup> 6 Hare 443.

<sup>2</sup> 2 Keen 25.

But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous. I think that the law is correctly stated by Lord Romilly in *Swaisland v. Dearsley*<sup>1</sup>: "The principle on which the court proceeds in cases of mistake is this—If it appears upon the evidence that there was in the description of the property a matter on which a person might *bona fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this court cannot enforce the specific performance against him. If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about." The observations of Vice-Chancellor Wigram in *Manser v. Back*<sup>2</sup> seem to me to tend in the same direction.

Now does it appear, or can it safely be held in this case that the defendant reasonably entertained a belief that the gardens were included in the property purchased by him? I will consider first the terms of the contract itself, and then the allegations as to the acts and words of the auctioneer and other agents of the plaintiffs, for it is possible that although the terms of the agreement taken *per se* may have been free from doubt, enough may have been said or done by the plaintiffs' agents to lead the defendant to attribute a different meaning to its terms.

Mr. Pearson admitted, and I think he could not well have avoided admitting, that if the vendors had merely referred to the property as being in the occupation of Mrs. Knowles and Mr. Merrick without more, there would have been at any rate such an amount of ambiguity that the defendant might reasonably have understood that he was purchasing the whole of the property in their occupation. But the particulars go on to state that the property sold is Nos. 454 and 455 on the tithe map and contains twenty perches. The additional land which the defendant claims to have included is about twenty perches more. Therefore, if he is right in his contention, he would be entitled to double the amount which the printed particulars state the lot to contain. There, no doubt, is force in the argument that a person unaccustomed to measuring would not know whether a property contained twenty perches or forty perches, but that does not get rid of the effect of the reference to the tithe map. The defendant appears to have purchased in reliance upon his knowledge of the occupation of the

<sup>1</sup> 29 Beav. 430, 433.

<sup>2</sup> 6 Hare 443, 448.

premises without looking at the plans, and probably without paying any attention to the details of the particulars of lot 1, but is a person justified in relying upon knowledge of that kind when he has the means of ascertaining what he buys? I think not. I think that he is not entitled to say to any effectual purpose that he was under a mistake, when he did not think it worth while to read the particulars and look at the plans. If that were to be allowed, a person might always escape from completing a contract by swearing that he was mistaken as to what he bought, and great temptation to perjury would be offered. Here the description of the property is accurate and free from ambiguity, and the case is wholly unaffected by *Manser v. Back*<sup>1</sup> and the other cases in which the defendant has escaped from performance of a contract on the ground of its ambiguity.

[His Lordship then entered into an examination of what passed at the sale, and stated his reasons for coming to the conclusion that nothing had been said or done by the vendors' agents which could lead the purchaser to misconstrue the particulars.]

A decree for specific performance was therefore made.

From this decision the defendant appealed. The appeal came on to be heard on the 12th of July, 1880.

*Higgins*, Q.C., and *W. Barber* for the appellant :

The court will not enforce specific performance where there is a clear mistake on the part of the defendant, even though the plaintiff is in no way responsible for it.<sup>2</sup>

[BRETT, L.J. If the defendant relied on his knowledge of the property and misled himself without any fault of the vendors, can he be let off?]

Yes; the other party need not have contributed to the mistake.<sup>3</sup>

[JAMES, L.J. Do you say that if a purchaser says, "I thought the property contained 100 acres and it only contains eighty," he must be let off?

No; a reasonable ground for mistake must be shown. Here the vendors framed their description in such a way that the purchaser might reasonably suppose that he was buying all that was in the occupation of the tenants, there being no visible boundary. They ought to have stated that other property was comprised in the holdings for which rent was paid to some one else. This is much more misleading than anything in *Denny v. Hancock*,<sup>4</sup> *Weston v. Bird*,<sup>5</sup> *Neap v. Abbott*,<sup>6</sup>

<sup>1</sup> 6 Hare 443.

<sup>2</sup> Fry on Specific Performance 214; *Wycombe Railway Co. v. Donnington Hospital*, Law Rep. 1 Ch. 268; *Malins v. Freeman*, 2 Keen 25.

<sup>3</sup> *Webster v. Cecil*, 30 Beav. 62.

<sup>4</sup> Law Rep. 6 Ch. 1.

<sup>5</sup> 2 W. R. 145.

<sup>6</sup> C. P. Coop. 333.

or *Moxey v. Bigwood*,<sup>1</sup> in all which cases specific performance was refused. The defendant was not bound to look at the plans, and his not looking at them does not fix him with notice of what he might have learned by doing so. The action ought to be dismissed.

*J. Pearson, Q.C., and Cozens-Hardy, contra*, were not called upon.

JAMES, L.J. In my opinion, the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defense on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, "I thought the farm sold contained twelve fields which I knew, and I find it does not include them all," or, "I thought it contained 100 acres and it only contains eighty." It would open the door to fraud if such a defense was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. *Webster v. Cecil* <sup>2</sup> is a good instance of that, being a case where a person snapped at an offer which he must have perfectly well known to be made by mistake, and the only fault I find with the case is that, in my opinion, the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of the defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse he ought to be held to his bargain.

BRETT, L.J. It would be dangerous to attempt an exhaustive definition of the cases in which the court will refuse specific performance. The jurisdiction is a delicate one, and the more so since the fusion of law and equity, for if the court refuses specific performance it must now, in my opinion, consider the question of damages. Here the property

<sup>1</sup> 8 Jur. (N.S.) 803; S. C. 10 Jur. (N.S.) 597, in D. P.

<sup>2</sup> 30 Beav. 62.

was put up for sale by a description which could not mislead anybody who took reasonable care, for it is defined by reference to the numbers on the tithe map, what follows being only a further description of what is included in the two specified closes on the tithe map. According to the finding of Lord Justice Baggallay, the defendant bought under a mistake, but it was a mistake into which he was led solely by his not taking reasonable care. The defendant therefore has to support the proposition that although there is nothing misleading in the particulars, and his mistake was not on a point of vital importance, and arose entirely from his own negligence, he is to be relieved. I think that such a proposition cannot be maintained. In *Webster v. Cecil*<sup>1</sup> the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake.

COTTON, L.J. It has been urged that if specific performance is refused the action must simply be dismissed. But in my judgment—and I believe the Lord Justice James is of the same opinion—as both legal and equitable remedies are now given by the same court, and this is a case where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action, we should, if we were to refuse specific performance, be bound to consider the question of damages.

But in my opinion the decision of Lord Justice Baggallay is right. I will not attempt to define the cases in which the court will refuse specific performance on the ground of mistake. The circumstances of each case have to be considered. Here in the particulars there is no specific reference to gardens, but there is a specific reference to the closes 454, 455, on the tithe map as comprising the property. The defendant says, “I was under a mistake, and believed that my purchase comprised something not included in those closes.” He had no right to make such a mistake, and though he knew that the gardens had for years been occupied and held together with these tenements, he was bound to take notice of the description. In one sense he was not bound to look at it, but he cannot abstain from looking at it and say that he bought under a reasonable belief that he was buying something not included in it. There is no injustice in holding a man to a contract which specifically describes the property sold in a way not calculated to mislead.

JAMES, L.J. I also am of opinion that where an action is brought for specific performance, and specific performance is refused on the sole ground of a mistake by the defendant, the court ought to give the same damages as would, under the old practice, have been given in an action at law.

<sup>1</sup> 30 Beav. 62.



## PRESTON v. LUCK.

IN THE COURT OF APPEAL, AUGUST 8, 1884.

*[Reported in Law Reports, 27 Chancery Division 497.]*

IN January, 1884, the defendant Luck was the patentee in England of an invention for "improvements in apparatus for the gelatinization or conversion of unmalted grain." He had also an interest in patents granted in several foreign countries for the same invention.

On the 25th of January, 1884, Luck, in reply to a letter of inquiry from the plaintiffs, wrote: "I beg to say that the unsold patent rights consist of the sole right to sell or license to use the converting apparatus to brewers in the United Kingdom, or to license or prohibit any one to make the same in England, and also 15 per cent. of the profits of the patent or apparatus in America, Canada, Germany, France, Belgium, India, and one or two more places." . . . "The sum I am willing to take is £750."

On the 9th of February the plaintiffs wrote to Luck: "Would you be disposed to accept £500 for your rights in the patent as enumerated in your favor of the 25th ult., subject to the approval of our solicitor?"

On the 11th of February Luck replied: "If you will make me a decided offer by return of post or telegram of £500 for all my rights in the English patent, 'apparatus for the gelatinization or conversion of unmalted grain,' No. 3881, and will at your option pay the fees for renewal or prolongation of the patent as they fall due, I will accept such offer. I also transfer to you all my interest in the foreign patents for the same invention as enumerated in my letter dated the 25th of January." . . . "I mentioned that Captain William Turner had the option of purchase at a higher sum up to the 27th March. If you close with me now, of course you would occupy the same position as I now hold, and would receive any money paid by Captain Turner in exercising his right of purchase by the 27th March proxo."

On the 12th of February, telegram from plaintiff to Luck: "We do not quite understand. Has Captain Turner your offer for England as well as the Continent until March? or are you perfectly free to negotiate for England?" On the same day Luck replied by telegram: "Captain Turner has the option of purchase of the whole of the patents, including England. Option terminates March 27th." On the same day Luck wrote to the plaintiffs: "A telegram from you just received, and reply sent off. I have by a written agreement given to Captain Turner the option of purchasing the English and foreign patents, always reserving your rights in the English patent" (the plaintiffs were

licensees) "and ditto for vinegar-making purposes in England, and subject to such option, I can sell all my unreserved rights as quoted by me in my last communication to you. If you decide to purchase you acquire all my rights and interests in the foreign and English patents, and take all profits derivable therefrom which would otherwise be due to me."

On the same day the plaintiffs replied by telegram: "We cannot see any advantage to us in your offer. Had Captain Turner no option in the English portion of the patent then we would negotiate. We do not care about the Continent. Should Captain Turner decide not to accept, let us know."

On the 20th of February the plaintiffs wrote: "Please inform us if you are disposed to sell the sole use of the patent for producing saccharine in the United Kingdom, and for what consideration."

On the 21st of February Luck replied: "Since writing you last the agreement between Mr. W. Turner and myself has been somewhat modified, and if he does not exercise his option of purchase by the 19th of March I shall be pleased to offer the sale of my patent for conversion of raw grain to you as explained in my former letter, viz., only retaining the right to use for vinegar making. I should have written before, but was waiting to act upon the desire expressed in your last letter, *i. e.*, to write you upon learning whether Mr. Turner would purchase or not. My terms to sell would be the same as quoted in response to your question as to whether I would accept an offer of £500 for the patent. Terms of payment as suggested by yourselves."

On the 25th of March Luck wrote to the plaintiffs: "I beg to inform you that the option of purchase vested by me in parties before named will expire on Thursday, the 27th instant, and if your intentions are unaltered, I shall have pleasure in completing the sale of my English patent for using unmalted grains (reserving, as explained in previous letters, the right to make and use the apparatus for vinegar making)." "P. S.—The terms and conditions of sale I have given in former letters after the receipt of your telegram."

On the 31st of March the plaintiffs replied by telegram: "We accept your offer, subject to approval of our solicitors, as to your rights in patent. Please reply if this is acceptable to you," and wrote in the same terms on the same day.

On the same day Luck replied: "I am in receipt of your telegram, and on the terms before stated I receive your acceptance of the offer of my English patent for the conversion of unmalted grain, viz., your acceptance for £500, and you to pay stamp fees for extension of patent, or allow it to lapse at your option, I retaining the right to make and use the apparatus for vinegar making."

The plaintiffs at once placed the papers in the hands of their solicitors, who wrote to Luck to ask for particulars of the foreign and colonial patents. Luck replied that the plaintiffs had not purchased them. A correspondence ensued on this subject, the plaintiffs' solicitors throughout insisting that their clients had purchased both the British and foreign patents, and Luck's solicitors insisting that the agreement only extended to the British patent.

Pending this correspondence Turner wrote to the plaintiffs, stating that his option to purchase was subsisting, and on the 22d of April Luck's solicitors wrote to the plaintiffs' solicitors that Turner had given Luck notice that he would purchase, and by a subsequent letter stated that as Turner's option had been exercised Luck had no power to sell to the plaintiffs.

On the 1st of May the plaintiffs issued their writ in this action against Luck, claiming specific performance of an agreement for sale to them of the English patent and of the defendant's share and interest in the foreign patents for the same invention in France, Belgium and other countries therein mentioned, and for an injunction to prevent Luck from disposing of or parting with his interest in the English and foreign patents, and for a receiver.

The plaintiffs, on the 22d of May, moved before Mr. Justice Kay for an injunction. Luck, by an affidavit, deposed that since the plaintiffs' letter of the 20th of February he never intended to sell his interest in the foreign patents along with the English patent, but considered that he was negotiating for the sale of the English patent alone, and that he was advised that in consequence of the subject-matter of the alleged agreement having never been concluded between the plaintiffs and himself, there was no binding agreement. He further stated the facts relating to Turner, and deposed that he was advised that he was bound to transfer his interest in the English patent to Turner. Leave was given to amend by making Turner a party, which was forthwith done, and the motion was brought on again on the 12th of June. It appeared from Luck's affidavit that the patent had been assigned to Turner for certain purposes which had failed, but he had not re-assigned it to Luck, so that it was at law vested in Turner.

*Hastings, Q.C., and F. Thompson* for the plaintiffs.

The agreement on its true construction includes the foreign patents, and that was how the plaintiffs understood it. But if the court is against us on that, we are content to ask an injunction in respect of the English patent only.

*Robinson, Q.C., and Lawson* for Luck.

*W. Pearson, Q.C., and Ingpen* for Turner.

[The cases cited are referred to in the judgment.]

KAY, J., after referring to the dealings with Turner, and stating the material parts of the correspondence, proceeded as follows :

It seems to me that on the true construction of this correspondence there clearly was no contract in respect of the foreign patents.

Then it is contended on behalf of the plaintiffs that, even if they put a wrong construction on the correspondence, they are entitled, although their writ and their notice of motion refer not merely to the English patent but to the foreign patents, to say now at the bar, "If we are wrong the court is bound to put a construction on the correspondence, and will give us relief according to the construction it puts on it." I tried to illustrate that argument by putting an analogous case. Suppose a man sold "all that my estate in the county of so and so," which, *prima facie*, would make a perfectly good contract, because by ascertaining what estate he had in the county, you may render certain that which on the face of the contract is uncertain, but it turned out that the parties were never at one, and that one meant one estate, and the other meant another estate, could it possibly be said that there was a contract? Or again, supposing, to put a case rather nearer to this, it was "all my field in the parish of A.," and there were two closes, and the plaintiff said "By 'field' I meant both closes," but the defendant said, "No, the field that was meant was one of those closes alone," and the correspondence was in favor of the defendant's contention that by "field" was meant one of the closes alone, can the plaintiff come forward and say, "I insist on specific performance and I insist on having both fields, and yet if the court is of opinion that the contract means only one field, then I will insist on having one field."

A contract means *consensus ad idem*. Lord Westbury, than whom very few people had greater command of language, puts it thus in the case of *Chinnock v. Marchioness of Ely* :<sup>1</sup> "An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial." If I may respectfully say so, I concur in every word of that definition, and think it as good a definition of contract as I know of. It is plain to my mind that in this case there never was any *consensus*. If the plaintiffs' evidence is to be believed, and I do not wish for a moment to cast any discredit upon it, the plaintiffs understood that they were bargaining for the English and foreign patents; the defendant Luck understood (and as it seems to me with very much more reason, because that I hold to be the construction of these letters) that he was contracting to sell not the foreign patents but the English patent only. How is it possible for the plaintiffs to say that there was a *consensus*?

<sup>1</sup> 4 D. J. & S. 638, 643.

Reliance is placed on some words of Lord Eldon, which seem to me to be entirely misapplied. In *Kennedy v. Lee*<sup>1</sup> Lord Eldon said (and that was a case of correspondence from which a contract was sought to be made out), "The court will, in all such cases, regard, not the form of the agreement, but the substance, whether or not, in point of fact, such an agreement has been entered into." Then he goes on thus, "It must be understood, however, that the party seeking specific performance of such an agreement is bound to find in the correspondence not merely a treaty—still less a proposal—for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party, but of both. It follows that he is bound to point out to the court upon the face of the correspondence a clear description of the subject-matter, relative to which the contract was in fact made and entered into." Then come the words on which comment has been made, "I do not mean (because the cases which have been decided would not bear me out in going so far) that I am to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto*, arises out of the terms of the correspondence." It is clear that by those words Lord Eldon meant nothing more than this, that if there is written evidence of a contract, and the meaning on the face of it is quite plain, a party cannot defend himself by saying "I did not mean precisely that, I meant something a little different." If the words used are words which, if you read them with a mind desirous of understanding them, are intelligible, a slight difference or a slight mistake will not prevent there being a contract; but where a mistake goes to the greater part of the subject-matter, as here the whole interest in these foreign patents numbering ten, you cannot say that it is a slight mistake. The plaintiffs come here saying, "We understood this contract to be not for the English patent alone, but for ten foreign patents into the bargain, and we claim all those ten patents." If the court should hold that to be a claim which the written evidence of the agreement does not warrant, it is impossible for the plaintiffs at the bar to fall back on that which is the true construction of the agreement, and say, "There is a contract between us for that lesser thing which up to this moment we have utterly repudiated."

There is another reason why it seems to me impossible that the plaintiffs should succeed. Suppose this contract were ambiguous, it is settled by a series of cases, one of the last of which is *Tamplin v. James*,<sup>2</sup> that where there is a mistake contributed to by the plaintiff, it is impossible that the plaintiff can obtain specific performance. Now,

<sup>1</sup> 3 Mer. 441, 450.

<sup>2</sup> 15 Cn. D. 215.

if there was a mistake here, whose fault was it? I do not think there was any mistake on the part of Luck; but if there had been, the fault of that mistake is absolutely the plaintiffs' own, because, after having said, "We do not want to have anything to do with the foreign patents," they commence a new negotiation for the English patent only, and I cannot conceive anything more likely to mislead as to what the intention of the plaintiffs was than the telegram and the later letters which I have read. Therefore, even if I thought that this correspondence could be construed according to the plaintiffs' view, I should say that the mistake on the part of Luck would have been contributed to, if not induced or caused by, the telegram and letters of the plaintiffs, which pointed to a negotiation for the English patent only. It is said that hereafter there may be an amendment. The plaintiffs may make such amendment as they like, but certainly I shall deal with this matter before me now on the footing of the case which they have set up in their affidavits, and by the indorsement on their writ, and by their notice of motion. I hold that that case fails entirely, and I therefore refuse this motion with costs.

*Hastings, Q.C.* : Your Lordship understood me as asking for liberty to amend my writ at the present moment, and pray in the alternative?

KAY, J. Quite so.

The plaintiffs appealed, and the appeal was heard on the 8th of August, 1884.

*Hastings, Q.C.*, and *F. Thompson* for the plaintiffs.

*Robinson, Q.C.*, and *Lawson* for Luck.

*W. Pearson, Q.C.*, and *Ingpen* for Turner.

BAGGALLAY, L.J. This is an appeal against the refusal of Mr. Justice Kay to grant an injunction restraining the dealing with or assigning certain letters patent. Were it not for the great experience of the learned judge, who heard this case at considerable length, and came to the conclusion that the application to him should be refused, I should have thought it very clear that an interim injunction ought to be granted. I intend to go as little into the circumstances of the case as possible; but at the same time I must to some extent refer to them for the purpose of explaining my reasons for arriving at that conclusion. [His Lordship then shortly stated the facts, and proceeded as follows:]

Mr. Justice Kay's view of the case appears to have been that there was a correspondence of such a nature as, on the face of it, would amount to a contract; but that, inasmuch as Mr. Luck only considered himself to be selling the English patent, and the plaintiffs considered that they were buying both the English and foreign patents, there had not been that *consensus ad idem* which is necessary to make a binding contract between the parties, and that therefore the plaintiffs had not got a contract which they could enforce. With all respect to Mr. Jus-

tice Kay, I think he was in error in proceeding upon that ground, because, after the affidavit of Mr. Luck had been put in, and when the matter was before the learned judge for his decision, the plaintiff waived all claim to an injunction as to the foreign patents, and adopting the view of the defendant, Mr. Luck, that the agreement had reference to the English patent only, he was prepared to ask for an injunction restraining dealing with the English patent alone. Now, so far as the matter rested on the ground on which the learned judge proceeded, it appears to me that the proper course to have pursued would have been to have allowed an amendment of the writ, so as to limit the action to the alleged sale of the English patent, and then to have granted an injunction restraining parting with that patent until the hearing of the action.

[His Lordship then went into the part of the case relating to Captain Turner's alleged right of pre-emption, and stated his view to be that there was a grave question to be decided at the hearing, and that until then matters ought to be kept in *statu quo*.]

COTTON, L.J. I am of the same opinion. This is an application only for an interlocutory injunction, the object of which is to keep things in *statu quo*, so that, if at the hearing the plaintiffs obtain a judgment in their favor, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual. Of course, in order to entitle the plaintiffs to an interlocutory injunction, though the court is not called upon to decide finally on the right of the parties, it is necessary that the court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief. I shall express no final opinion on the question whether there was a concluded contract between the plaintiffs and Luck. It may be that when the letters are scanned more narrowly and critically there is no concluded agreement, but my present impression is that there was an offer and an acceptance, though, as is very often the case when a contract has to be made out from letters, the case is not perfectly plain. But what Mr. Justice Kay decided was this, that as the plaintiffs came here contending that what they were to buy, and the defendant Luck was to sell, were the English and the foreign patents, and the letters on which the contract is sought to be made out referred only in his Lordship's opinion to the English patent, there was no *consensus ad idem* which is essential to a contract. Now, where parties enter into a written contract, what they have agreed to must depend on the construction of that contract. It is very true that in some cases, if the party against whom specific performance is sought to be obtained, satisfies the court by clear evidence that what he on the terms of the contract appears to

have contracted for was not in his mind the thing in respect of which he was bargaining, the court will refuse specific performance, but that is only because in cases of specific performance the court does not grant that special equitable relief if it finds, for any reason, that it would be what is called a hardship or unreasonable to compel the defendant specifically to perform the contract. If here the position of the parties were reversed, and the present plaintiffs could satisfy the court that although upon the true construction of these letters the English patent alone was the subject of the agreement, they never intended to offer £500 for the English patent alone, but for the English and foreign patents together, the court would probably refuse specific performance against them. But if the letters themselves make a concluded agreement in writing, then, in my opinion, the mere fact that down to the time when the parties were before Mr. Justice Kay, the plaintiffs were contending that on the true construction of those letters they included something more than he has now decided they did include, is no reason for saying that there is not any agreement enforceable in equity against the defendant, who says that from the very first he intended this to be a contract for the British patent. If the plaintiffs were to bring their action to a hearing, asking for specific performance of the agreement for an assignment of the English and foreign patents, and the court decided that they were entitled only to take the English patent, they might say, Then we will have our action dismissed. But the plaintiffs are ready to amend their writ and confine the relief asked to a specific performance of the contract as regards the English patent. That, in my opinion, if we grant an injunction, they ought to undertake to do, but the mere fact that they put an erroneous construction on a contract in writing existing between them and the defendant Luck, and insisted that it included what it does not in fact include, is, in my opinion, no ground for saying that there is no contract. As the motion was refused on that ground, it is our duty to express our opinion upon it, but we do not give a concluded opinion on any other point. All we can say is that there being *prima facie* a contract between the plaintiffs and Luck, what ought to be done is to keep things in *statu quo* till the hearing. [His Lordship then expressed his opinion that there was great doubt whether Captain Turner had any such right of pre-emption as would defeat the plaintiffs' claim, and that as regarded him also matters should be kept in *statu quo* till the hearing.]

Under those circumstances I think that we ought to grant an injunction restraining both the defendants from dealing with the English patent till the hearing or further order. Of course that will be accompanied with an undertaking on the part of the plaintiffs to amend, and the



usual undertaking in damages if at the hearing the court thinks they are in the wrong.

LINDLEY, L.J. The question we have to consider is what is proper to be done between this time and the hearing of the action. We have not now to decide the rights of the parties any further than is necessary for determining that question. In order to determine that question, it is absolutely essential to see whether the plaintiffs have any *locus standi*. They put their case on the agreement, and if there is no agreement they are out of court. In my opinion there is an agreement, for I think that the correspondence running through February and March, and ending with the telegram of the 31st of March, amounts to an agreement to sell the English patent. That gives the plaintiffs a *prima facie* right to have matters kept in *statu quo* to this extent, that their rights under that agreement shall not be defeated before the hearing. Without expressing our opinion as to the rights or claims of Captain Turner, it appears to me that we ought not to allow him and Mr. Luck to deal with this patent, so as to deprive the plaintiffs of such rights as they seek to establish. The plaintiffs must undertake to amend their writ, and they must give the usual undertaking to be answerable in damages, and there will be an injunction restraining Captain Turner and Mr. Luck from assigning or dealing with the patent until the hearing or further order.

As to the costs, we all think that the costs of the parties in the court below ought to be costs in the action, and that the plaintiffs ought to have the costs here.

Solicitors for plaintiffs: *W. W. Wynne & Son.*

Solicitor for Luck: *J. H. Johnson.*

Solicitor for Turner: *E. Kennedy.*

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THOMAS SULLIVAN ET AL. v. ELLA C. JENNINGS ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY, FEBRUARY TERM, 1888.

[*Reported in 44 New Jersey Equity Reports 11.*]

ON order to show cause why a purchaser at a foreclosure sale should not be required to pay the amount of his bid.

*Mr. J. Herbert Potts* for the application.

*Messrs. Riker & Riker, contra.*

THE CHANCELLOR. The defendant, Ella C. Jennings, owned a tract of land in Essex County, which was subject, first, to a mortgage for \$1,800, held by a physician, David C. Smith, and, second, to a mort.

gage for \$2,000, held by the complainants, and then to two judgments for amounts aggregating \$400.

Upon the land there was a green-house, a wind-mill and a water-tank house, upon which the complainants held, and yet hold, a chattel mortgage for \$1,050.

The complainants filed their bill to foreclose their mortgage for \$2,000. They made the holders of the judgments and the owner of the land and her husband parties to the suit. Dr. Smith was not made a party, and no reference was made to the chattel mortgage.

The mortgaged premises were sold in pursuance of the decree in the suit, subject to Dr. Smith's mortgage and to whatever claim the complainants may have under their chattel mortgage.

At the time of the sale, Dr. Smith had but little knowledge of legal matters, and was so self-reliant that he failed to take legal advice, and concluded to bid at the sale for the purpose, as he thought, of protecting his mortgage. As the sale was postponed from time to time, and he could not spare sufficient time to attend upon it, he authorized the under-sheriff, who had the sale in charge, to bid for the property, in his name, an amount not exceeding \$2,500. He had calculated that that sum would pay the expenses of the sale and protect his mortgage. The property was struck down to him for \$2,350.

The sum bid will not quite satisfy the decree of the complainants, and Dr. Smith, if he shall be held to his bid, must pay nearly \$4,500 for land which is proved to be worth about \$1,000 less than that sum, and to take it either without the green-house, wind-mill and water-tank house, which are covered by the chattel mortgage, or contest the lien of that mortgage, or satisfy it.

The complainants seek to take advantage of the mistake that Dr. Smith so carelessly made, and claim that it is a mistake of well-settled law against which this court will not relieve.

I fail to perceive any ground upon which I could relieve Dr. Smith from his bid, if he were the applicant before me. To use the words of the Vice-Chancellor, in *Hayes v. Stiger*,<sup>1</sup> "A purchaser at a judicial sale who voluntarily abstains from all effort to get correct information, and deliberately assumes the hazard of making a purchase ignorantly must, as a general rule, bear the consequences of his negligence." But the complainants are the applicants. They did not make Dr. Smith a party to their foreclosure. They are the holders of the chattel mortgage against which the doctor must contend, and they ask that he may be compelled to pay more for the property than it is worth, not because of any equity in their favor, but because he has placed himself under

<sup>1</sup> 2 Stew. Eq. 196, 198.

legal obligation to pay it, and because the payment will redound to their advantage.

The specific performance of an agreement rests in the sound discretion of the court. It is a matter of favor, not of right. To secure the court's favor the agreement should be just, equal and agreeable to good conscience, and not a catching bargain. The contract here is not such an agreement, it is not conscionable, and should not be enforced in a court of equity.<sup>1</sup>

When Dr. Smith made his bid he did not design to trifle with the court. I am satisfied that he intended in good faith to bid for the protection of his own interests, and that he now withholds the amount of his bid solely to obtain relief, if possible, from the consequences of his error. So far then as the element of contempt, in the doctor's attitude, is concerned, I fail to see that it is deserving of such punishment as the granting of this application will inflict.

The parties should be left to their remedy and defense at law. I am guided to this conclusion by the action of the Vice-Chancellor in *Twining v. Neil*.<sup>2</sup>

The order to show cause will be discharged, and the application denied, but without costs.

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NATHANIEL B. MANSFIELD *v.* GARDINER SHERMAN.

IN THE SUPREME JUDICIAL COURT OF MAINE, MARCH 6, 1889.

[*Reported in 81 Maine Reports 365.*]

ON REPORT. Bill in equity, for specific performance, heard on bill, answer, and proofs.

The facts appear in the opinion.

*Wiswell, King* and *Peters* for plaintiff.

*Deasy* and *Higgins* for defendant.

EMERY, J. This is a bill in equity, in which the court is asked to decree the specific performance of a contract for the conveyance of two lots of land, as marked upon a plan.

Such an application is addressed to the sound discretion of the court. Not every party, who would be entitled as of right to damages for the breach of a contract, is entitled to a decree for its specific performance. Before granting such a decree, the court should be satisfied not only of the existence of a valid contract, free from fraud and enforceable in law,

<sup>1</sup> *Crane v. DeCamp*, 6 C. E. Gr. 414.

<sup>2</sup> 11 *Stew. Eq.* 470.

but also of its fairness and its harmony with equity and good conscience. However strong, clear and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason, cause a result, harsh, inequitable, or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity.<sup>1</sup>

In this case the answer sets up the defense, among others, that the respondent made his offer to sell the land, and named the price under a material mistake, as to the extent and boundaries of one of the lots—that he did not understand that the lots included a certain valuable building site, which he never intended to sell at such a price—that by reason of such mistake he named an inadequate price for the lot, and that for the complainant to seek to compel him to convey at that price is inequitable, and is taking an unfair advantage of his mistake.

The facts material to this issue seem to be these : Mr. Sherman, the respondent, living in New York, owned a tract of land in Bar Harbor, which he had caused to be laid out into avenues and building lots, and a plan to be made by a landscape engineer. There were twelve lots, marked on the plan by numbers.

In March, 1887, Mr. Mansfield, the complainant, saw these lots, and inquired of a firm of real estate brokers at Bar Harbor about lot No. 7, a small lot at the extreme southern end of the tract. The brokers wrote to Mr. Sherman in New York about this inquiry, and suggested that he authorize them to sell the lots. After some correspondence, Mr. Sherman sent from New York the plan, and a list of prices for the lots, and instructions about selling, the conditions, etc. The scale of prices on this list ranged all the way from \$1,500 for lot 7, to \$10,000 for lot 10. The price of lot No. 12 was marked \$2,500, the lowest but two on the list. Lot No. 1 was reserved, and the aggregate price of the eleven lots was \$44,000. Mr. Mansfield, after learning the prices and examining the lots, not only said he would take lot No. 7, but said he would take lot No. 12, nearly at the other extremity of the tract, at the price named. Mr. Sherman, on being written to, sent to the brokers, May 25, an offer to sell both the lots at the price of \$4,000. He subsequently came to Bar Harbor early in June (the 3d or 4th), and went upon the land with the plan, and immediately afterward informed the brokers that he had made a great mistake as to lot No. 12—that he found it contained a valuable building site, which he supposed was not included, and which he had not intended to bargain at such a price—and that therefore he could not convey it.

<sup>1</sup> *Mortlock v. Buller*, 10 Ves. 305 ; *Willard v. Taylor*, 8 Wall. 557 ; *Snell v. Mitchell*, 65 Maine 48.

The testimony of all the witnesses as to the relative value of the lots is to the effect that lot 12 was one of the most valuable lots in the tract; if, indeed, it was not the most valuable. The real estate agents (called by the complainant) so testified, and also that its value was nearly double that of lot No. 11, marked at \$6,000. This evidence was not contradicted, and shows that from some cause Mr. Sherman named a very inadequate price for lot 12 in comparison with the other lots. If this was owing to an error in judgment, or a mistaken opinion about the relative values, perhaps the court should not consider it. Mr. Sherman, however, testifies that it was owing to a mistake in material matters of fact, and not to a mistake in judgment. He says there are two building sites within the territory of what is now lot 12, and that he directed the engineer to make two lots of what was lot 12, so as to include in lot 12, as left, only the more northern and cheaper building site, and exclude the southern and more valuable site; that he supposed that his directions were followed, and that he made the offer to sell lot 12 for \$2,500 under the belief that it did not include the more valuable of the two sites. The engineer corroborates Mr. Sherman. He testifies that he was directed to make such division, but afterward thought it best not to do so, and so put both sites in one lot. It does not appear that Mr. Sherman was ever informed of this departure from his instructions.

It is urged that this story of Mr. Sherman's is not natural, and that he should have seen from the plan itself, when sent him by the engineer, that lot 12 included more than one site, or at least that it had not been divided. Mr. Sherman may have been careless in the matter, and perhaps he should have seen the departure from his instructions, but we can understand how, under the circumstances, he might overlook it and retain the belief that his instructions had been followed. The story explains an evident disparity in price. It is uncontradicted, and it seems to us probable that Mr. Sherman did make the offer under a mistake of fact, as he states.

It should be remembered here that Mr. Mansfield at first only inquired about lot No. 7—the smallest lot, and situated at the extreme southern end of the tract. It was not till after he saw the list of prices that he desired to include in his purchase lot 12, near the extreme northern end of the tract. The two lots are far apart, and have no possible connection with each other. It seems probable that Mr. Mansfield saw the disproportion of price as to lot 12, and for that reason endeavored to secure it.

Would it be equitable, and in accord with good conscience, to compel a conveyance under such circumstances? Do equity and good conscience require that Mr. Mansfield should gain and Mr. Sherman lose by this mistake? The equitable principle involved can perhaps be

more vividly illustrated by stating a case similar in kind, but stronger in degree. Suppose Mr. Sherman had built a costly residence on lot 12, and yet, living in New York, he in some way had the impression that the structures were on lot 11, and that lot 12 was an unimproved lot, and under such actual impression had bargained lot 12 at a correspondingly low price to one who knew that the buildings were on lot 12. Would it be fair or honorable in the vendee, after being apprised of the vendor's mistake, to insist on a conveyance at such an inadequate price? Would not such a vendee justly be thought a hard, rigorous man, and the rule of law that sustained him justly be thought a harsh, inequitable rule?

Mr. Sherman, living at a distance, remembering the particular building site, which he thought so valuable, had somehow acquired the erroneous impression that it was not included in lot No. 12. It was a mistake of fact, and about an important and controlling fact. Mr. Mansfield must have been aware from the evident disparity that there was very likely some mistake about it.

Of course, if there was a valid contract, Mr. Sherman should answer in damages for all the loss his mistake and refusal to convey have occasioned Mr. Mansfield. The court when appealed to in an action at law can only consider whether there was a valid contract and a breach. The mere mistake of one party, however great, will not excuse him from making full compensation. When, however, application is made to the court, not to determine and enforce legal rights, but "to do equity" between the parties, the court will be careful to do only equity, and will not aid one party to take advantage of the mistake of the other party. We think in this case we should decline to decree a specific performance, and should leave the parties to their rights and remedies at law. It does not appear that pecuniary damages for the breach would not fully compensate Mr. Mansfield for all losses he has sustained in the matter.

A few cases will illustrate the principle that a mistake of one party will justify a court of equity in refusing to decree a specific performance against him. In *Leslie v. Thompson*,<sup>1</sup> an estate was put up for sale in several lots. The vendor made a mistake in computing the amount of land in four of the lots. These four lots were sold to one purchaser, and after the sale were found to contain more land than was stated at the sale. It was held that the vendor was entitled to increased compensation, although the mistake was his. In *Alvanley v. Kinnaird*,<sup>2</sup> land was sold under an order of court, with this description: "The manor of Bredbury cum Goite, with the court baron to the same belonging, and all and every the rights, royalties, liberties, privileges and

<sup>1</sup> 9 Hare 268.

<sup>2</sup> 2 Macn. & G. 1.

advantages." The purchaser bought in good faith under this description. The vendors, however, did not intend to include the mines and minerals under any lands within the manor, and it was their mistake that the exception was not expressed in the order of sale. Cottenham, Lord Chancellor, said that in such a case specific performance would not be enforced against the vendors. In *Malins v. Freeman*,<sup>1</sup> the respondent bought at an auction sale "Lot No. 3," under the mistaken impression that it was the "Davies Lot." The mistake was wholly his, as the auctioneer distinctly and correctly described "Lot No. 3." The court declined to decree a specific performance against the purchaser, and left the parties to their remedies at law. In *Webster v. Cecil*,<sup>2</sup> the respondent, owning several parcels of land, had made a memorandum of the price of each, which footed up £2,100. After some negotiations with the complainant about a sale, he wrote to him offering the whole estate for £1,100. The complainant in writing formally accepted the offer. The respondent immediately afterward discovered his error, and at once notified the complainant, who was innocent of any mistake. Sir John Romilly, M.R., said the court would not decree a specific performance, and compel a person to convey his property for much less than its real value, and for £1,000 less than he intended. In *Baxendale v. Seale*,<sup>3</sup> the land bargained was described to be "the manor of Stoke Fleming, . . . embracing nearly the whole parish of Stoke Fleming," with certain immaterial exceptions. The vendor supposed that the manor did not include any lands beyond the parish, but after the sale it was found that the manor did include lands outside the parish. The purchaser, innocent of any mistake, insisted on specific performance, but the Master of the Rolls, Sir John Romilly, refused to decree it. In *Buckhalter v. Jones*,<sup>4</sup> Buckhalter wrote to Jones offering him \$2 000 for a parcel of land. Jones wrote in reply, "we will accept your offer." It appeared that, although the offer was in fact only \$2,000, yet Jones somehow understood it to be \$2,100, and he refused to convey for less. The court declared the contract to be binding at law, but on account of the mistake refused a decree for specific performance, and left the parties to their remedies at law.

In this case, were it clear that there is a contract binding at law, we should think it equitable for the respondent to pay the costs of this proceeding, which would then be defeated by his own mistake; but as there is some doubt about the validity of the alleged contract, we think it more equitable to leave each party to bear his own costs.

Bill dismissed.

PETERS, C.J., WALTON, DANFORTH, VIRGIN, and HASKELL, JJ., concurred.

<sup>1</sup> 2 Keen 25.

<sup>2</sup> 19 Beav. 601.

<sup>3</sup> 30 Beav. 62.

<sup>4</sup> 32 Kansas 5.

## HARRY CALDWELL v. JOHN C. DEPEW.

IN THE SUPREME COURT OF MINNESOTA, MAY 24, 1889.

[*Reported in 40 Minnesota Reports 528.*]

ACTION by purchaser for specific performance, brought in the District Court for Ramsey County, and tried by Simons, J., who ordered judgment for defendant for a concellation of the contract, from which the plaintiff appeals.

*Lawler & Durment* for appellant.

*Hawley & Hall* for respondent.

MITCHELL, J. Action to compel specific performance of a contract of sale of real estate. The terms of the written agreement were that defendant sold and agreed to convey the property "for the sum of seven hundred and fifty dollars, upon the following terms: Purchaser to pay the city assessments for grading Minnehaha Street (\$205), such payment to constitute part of the above sum of \$750, and also to assume the mortgage of \$300 and accrued interest (\$12), now on record against said lot, as part of said \$750; balance of said \$750, after deducting said assessments and said mortgage, to be paid in cash, on delivery of deed." The defendant, in his answer, alleges that the actual agreement was that plaintiff was to pay for the property \$750 in cash, and, in addition thereto, assume payment of the mortgage and assessments referred to; that plaintiff undertook to reduce this agreement to writing, and drew up a contract which he presented to defendant, stating and representing to him that it contained the precise terms of this agreement, and then pretended to read it and did read it to him as though it embodied such agreement; that in ignorance of the truth, and misled by the statements of plaintiff, and supposing that plaintiff had correctly reduced the agreement to writing, he executed the contract without reading it. Then follows a somewhat equivocal allegation to the effect that if plaintiff really believed that defendant intended to sell his property for \$750, the incumbrances to be deducted therefrom, he was acting under a mistake of fact, but, if he correctly understood the terms and conditions of said agreement, as defendant believes he did, then he committed a gross fraud. The relief prayed for is that the contract be cancelled and adjudged void on the ground of such fraud or mistake. A question of pleading is raised whether, under the answer, the defendant would be entitled to relief on the ground of the mistake in case he failed to establish fraud. As we are of opinion that upon the evidence he is not entitled to relief on either ground, it is unnecessary to consider the question further than to say, for the purposes of another trial, although the pleading is obnoxious to criticism, yet we think that, under



it as it stands, the defendant would be entitled to relief on the ground of mistake, if the evidence justified it.

But we are clear that he has made out no case for relief. There is no evidence that plaintiff was guilty of any fraud, concealment, or misrepresentations, or took any unfair advantage of defendant. The defendant is a man of mature years, some business experience, and of at least ordinary intelligence and education. The terms of the writing are explicit, unambiguous, and not subject to any doubtful or double construction. In fact, they are so very clear and explicit that no man with his senses about him could misapprehend them. The defendant was capable of reading the contract, and had ample opportunity of doing so, and of examining it as fully as he desired, before executing it. It is undisputed that he either read it over himself with the plaintiff, or that the plaintiff read it over to him, before he signed it, and, if the latter, there is no evidence that plaintiff did not read it correctly to him. Defendant nowhere testifies that he understood, when he signed it, that it contained any different or other words or language from those that are actually in it. The most that can be claimed for his testimony is that he did not understand the meaning or legal effect of the language as written. No excuse is shown for any such misunderstanding, and the mistake, if any, must have been due solely to defendant's own gross carelessness and inexcusable inattention. There is nothing unconscionable or hard about the contract, unless it be the inadequacy of the price, and this is not so gross as to be evidence of fraud. Upon the trial plaintiff testified positively that the writing correctly embodied the exact terms of the actual agreement of the parties. The only direct evidence opposed to this was the oath of the defendant. We know of no rule of law that will permit a man to be relieved from his contract under such circumstances. If, on such a state of facts, a person can evade performance by merely saying that he did not know what he was doing, or did not understand the language of the instrument which he executed, written contracts would be of little value.

There are many cases where equity will refuse to enforce the specific performance of an agreement against a party who entered into it under a mistake, although the plaintiff was not guilty of any improper conduct, and the mistake was solely that of defendant. When and under what circumstances such mistakes are relivable it would be impracticable, as well as unsafe, to attempt to enumerate. But one principle will, we think, be found to run through all the cases, viz., it must not be a mistake due solely to the negligence and want of reasonable care on the part of him who asks for relief. Where there has been no fraud or misrepresentation, and the terms of the contract were unambiguous, so that there was no reasonable ground or excuse for a mistake, it is not

sufficient, in order to resist specific performance, for a party to say that he did not understand its meaning.<sup>1</sup>

Judgment reversed.

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J. N. CHUTE v. JOSIAH QUINCY AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 2,  
1892.

[*Reported in 156 Massachusetts Reports 189.*]

THE first case was a bill in equity, filed in this court for a specific performance of an agreement to convey land. The second case was a bill, to reform the same agreement, or to have it surrendered and cancelled. Hearing before Lathrop, J., who, at the request of the parties, reported the cases for the consideration of this court. The facts in the two cases, so far as material to the points decided, appear in the opinion.

The cases were argued at the bar in January, 1892, and afterwards were submitted on the briefs to all the judges.

*S. W. Creech, Jr.*, for the petitioners.

*E. M. Parker* for the respondents.

KNOWLTON, J. The plaintiff in the first case entered into a contract in writing for the purchase from the defendants of a lot of land which was one of a large number of lots held by them as trustees. The property was described in the contract as "a certain lot of land, being lot numbered 23 on plan of Charles S. Miller, dated April 10th, 1890, and recorded," etc. This plan showed a great number of building lots, about eight hundred in all, designated by numbers, with the lengths of their boundary lines given and the number of square feet contained in each marked in plain figures. Lot No. 23 contained 9,230 square feet, but by a mistake of the surveyor the figures marked on the plan were 3,230. The defendants' agent in negotiating with the plaintiff agreed to sell the lot for \$430.66, determining the price by computing the value of 3,230 square feet, at 13 $\frac{1}{3}$  cents per foot. It is found as a fact that the defendants made the contract under a mistake as to the contents of the lot, and in the belief that it contained only 3,230 square feet. The defendants' agent did not inform the plaintiff how he fixed the price. The plaintiff "admitted that, when he examined the lot, he had a copy of the above-mentioned plan, and that he noticed at the time

<sup>1</sup> Fry, Spec. Perf. § 733; Waterman, Spec. Perf. § 358; Kerr, Fraud and Mistake, 407, 413.

of his negotiations with the agent that lot 23 was larger than lot 22 or lot 24, the adjoining lots on either side, and that he knew that lot 23 contained more square feet than the plan stated." The dimensions of lots 22 and 24 were plainly marked on the plan, and it is hard to believe that one buying a lot apparently for his own use, to be paid for in small installments, as the contract shows, would not so far investigate the subject, when the boundaries were pointed out to him, and when he had a copy of the plan before him, and "knew that lot 23 contained more square feet than the plan stated," as to find out the nature and extent of the mistake, especially when the shape of the lot and the lengths of its boundary lines, and the size and shapes of other lots in the vicinity, were all correctly given on the plan. It is fair to presume that, before making his purchase, he had some knowledge of the prices at which the defendants were accustomed to sell lands in the vicinity. Whatever his knowledge or ignorance on this subject, he concealed from the defendants' agent his discovery of the mistake in the plan, and took a contract which described the lot merely by a reference to the plan.

It may be that the plaintiff was free from fraud in the transaction—the findings certainly do not go far enough to show that he was guilty of it. The parties were not acting under a mutual mistake, and, in the absence of proof of fraud, or of mistake as to what land was to be conveyed, the cross-bill brought by the defendants in the first case, asking to have the contract reformed or delivered up and cancelled, must be dismissed.

The remaining question is whether the plaintiff should have a decree for specific performance of the contract. If we assume that the contract is good at law, it does not follow that it will be specifically enforced in equity. It is a universally recognized principle, that a court of equity will not decree specific performance of a contract when it would be inequitable so to do. Specific performance may be refused when a contract is hard and unreasonable, so that enforcement of it would be oppressive to the defendant, or where there has been misrepresentation by the plaintiff on a material point, or other unfair conduct, although it may not be sufficient to invalidate the contract, or where the defendant has by mistake, not originating in mere carelessness, entered into a contract different from that intended by him, notwithstanding that there was no unfairness on the plaintiff's part.<sup>1</sup>

Says Chief Justice Shaw, in *Western Railroad v. Babcock*:<sup>2</sup> "A defendant, therefore, may not only show that the agreement is void, by proof of fraud or duress, which would avoid it at law; but he may also

<sup>1</sup> Adams Eq. 83, 85; 2 Story Eq. Jur. § 769.

<sup>2</sup> 6 Met. 346, 352.

show that without any gross laches of his own, he was led into a mistake, by any uncertainty or obscurity in the descriptive part of the agreement, by which he, in fact, mistook one line or one monument for another, though not misled by any representation of the other party, so that the agreement applied to a different subject from that which he understood at the time; or that the bargain was hard, unequal, and oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. In either of these cases, equity will refuse to interfere, and will leave the claimant to his remedy at law." This principle was applied in *Boynton v. Hazelboom*,<sup>1</sup> and the rule prevails generally in the State and Federal courts of the United States, as well as in England.<sup>2</sup>

The recently decided case of *Mansfield v. Sherman*<sup>3</sup> is identical in principle with the one at bar. There the defendant in New York offered for sale, through an agent in Maine, lot No. 12 on a certain plan of lands in Bar Harbor for \$2,500, in ignorance of the fact that the lot, as delineated on the plan, contained a valuable building site which he supposed to be upon another lot, and specific performance of the agreement was denied, though the plaintiff had in no way contributed to the defendant's mistake, and was entirely ignorant of it.

On broad grounds of morality it may be said to be inequitable for a plaintiff to enforce a contract against a defendant, who shows that by mistake and without fault he entered into an agreement very different from that which he thought he was making, and engaged to do something far more onerous than what he supposed he was undertaking. In some English cases that is stated to be the ground on which relief is refused to a plaintiff who innocently entered into a contract which the defendant signed under a mistake. This principle must be adhered to unless specific performance of a contract for a sale of lands is to be decreed as a matter of right wherever a plaintiff shows that he has a contract enforceable at common law. We see no reason for introducing such an innovation in equity practice, or for disregarding the rule that courts of equity will grant relief only when the plaintiff asks for that which in equity and good conscience ought to be granted.

<sup>1</sup> 14 Allen 107.

<sup>2</sup> *Malins v. Freeman*, 2 Keen 25; *Webster v. Cecil*, 30 Beav. 62; *Manser v. Back*, 6 Hare 443; *Leslie v. Thompson*, 9 Hare 268; *Wood v. Scarth*, 2 Kay & Johns. 33; *King v. Hamilton*, 4 Pet. 311, 328; *Willard v. Tayloe*, 8 Wall. 557, 565; *Perkins v. Wright*, 3 Har. & M'H. 324; *Leigh v. Crump*, 1 Ired. Eq. 299; *Cannaday v. Shepard*, 2 Jones Eq. 224; *Eastland v. Vanarsdel*, 3 Bibb 274; *Bowen v. Waters*, 2 Paine C. C. 1; *Veth v. Gierth*, 92 Misso. 97; *Burkhalter v. Jones*, 32 Kans. 5.

<sup>3</sup> 81 Maine 365.

In the present case, it is admitted that, through a mistake, the defendants agreed to sell their land for about one-third of the price which they suppose they were getting for it ; and that, while the plaintiff knew that there was a mistake in the plan which might naturally mislead the defendants in making their bargain, he did not disclose it. Under these circumstances, a majority of the court are of opinion that the plaintiff must be left to his remedy at law upon his contract.

Bill and cross-bill dismissed.

## SECTION IV.—DEFENSES (CONTINUED).

### (f) *Hardship.*

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ADAMS *v.* WEARE.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., MAY 3, 1784.

[*Reported in 1 Brown, Chancery, 567.*]

BILL brought by the vendor against the vendee for a specific performance of an agreement.

The contract was a memorandum, signed only by the defendant, to the following purport: That the vendee agreed to buy of the vendor the premises in question, provided he would convey them to him and make a good title thereto. The vendor took a guinea of the vendee by way of earnest.

The vendee, by his answer, suggested that he had agreed to buy the premises conditionally only, viz., for the purpose of working a mill which he intended to erect upon the lands, provided he could obtain the consent of the corporation of Bristol, and that, in consideration of these circumstances, he agreed to give a very large price, more than sixty years purchase, for the lands; but that, upon application to the corporation, they refused their consent, by which he was prevented from erecting his mill. He therefore refused to perform the contract, insisting that his agreement was conditional in case he could obtain such consent, and, having failed therein, he was not bound to purchase the lands at such advanced price.

There was evidence in the cause of these circumstances, and that the purpose of building the mill, which depended on the consent of the corporation, was in the view of the vendee, but not that it was in the view of the vendor, and so far from having agreed to such condition, the vendor had never mentioned it.

The late MASTER OF THE ROLLS had decreed for the plaintiff.

Upon an appeal:

On the part of the plaintiff it was argued that there was an express

agreement in writing, and as to the hardness of the bargain there was no fraud or surprise. It was a well-considered contract, and however hard the bargain might appear, the party contracting for the purchase did not at the time think so. The court must consider the thing as done ; and supposing the contract to have been executed at the time when the agreement was made the court would not set it aside.<sup>1</sup>

For the defendant it was contended that the bargain, as circumstances had turned out, was hard and unconscionable ; that the proposals and conditions were not adhered to ; and that the court could not carry the agreement into execution ; but if the plaintiff was to have any remedy it was at law upon an action of covenant ; that there are instances where the court, on an agreement executed only on one side, had refused to decree a performance.<sup>2</sup> So in a case where the articles appeared to be unreasonable,<sup>3</sup> so where the lands turn out to be other than the purchaser supposed them to be.<sup>4</sup> Where a bargain is good at the commencement, but turns out a hard one afterwards, the court will not decree a performance.<sup>5</sup> So where a bargain has become oppressive, it is in the discretion of the court to relieve.<sup>6</sup> In this case the purpose has failed, and as the agreement was merely executory, it ought not to be executed.

LORD CHANCELLOR. It is very material, in this case, to attend to facts. I am not very anxious to discuss the point what bargains the court will execute or not ; but when the court has laid it down as an article of the equity, which men shall obtain here and which they cannot obtain at law, that instead of damages they shall have a specific performance, and that every agreement must be performed, unless something at the time of making the bargain or something done since is to amount to a waiver of it at the time of carrying it into execution. If you do not confine yourself within that limit there are no bounds whatsoever ; for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable ; which expressions, unless they are properly applied, mean little or nothing. This bargain, if impeached, must be so at the time of its commencement ; for nothing has happened since to impeach it,

<sup>1</sup> *Mortimer v. Capper*, *ante*, p. 156 ; *Cass v. Ruddle*, 2 Vern. 280, where the premises had been destroyed by an earthquake.

<sup>2</sup> *Bromley v. Jefferies*, 2 Vern. 415.

<sup>3</sup> *Young v. Clerk*, Pre. Ch. 533.

<sup>4</sup> *Hick v. Philipps*, Pre. Ch. 575.

<sup>5</sup> *Stent v. Bailis*, 2 Wms. 220, as in case of a house which is burnt down before the conveyance ; *Pope v. Roots*, 7 Bro. Plt. Ca. 154, and a case mentioned by Sir Joseph Jekyl.

<sup>6</sup> *Chesterfield v. Janssen*, 1 Atk. 301 ; *Barnardiston v. Lingood*, 2 Atk. 135 ; *Buxton v. Cowper*, *ib.* 383.

unless that the party has failed in his speculation in respect to a bargain which he made with his eyes perfectly open. It is perfectly necessary to see what were the real terms of the bargain. On the 11th of March overtures were made concerning the purchase of these lands by Weare. Eight hundred pounds was demanded as the price for the estate, putting that value upon it in contemplation of building the mill and other articles of no moment now, unless the erection of the mill was the real ground upon which the price was carried to the extent it was. It was insisted it cannot be carried into execution because it is proved that the price was more than three-fourths more than the value; but, for what I know to the contrary, it may be the value. After the 11th of March no answer was given to that letter; but Weare, in order to get a further treaty, applied to a Mrs. A. as a relation of the family to go with him and take Adams aside and ask him in privacy the lowest price he would take; which she did, and he made the same demand as before; and some days afterwards Weare went again to Adams with Mrs. A. to treat with him. As to the objection that this is the evidence of relations, I think it is fair and unimpeachable evidence. They went to Adams before dinner, and conversation was had in regard to the improvement by building a mill, which is beyond doubt, and the price was reduced to £740. Mr. Weare agreed to give the price and to build the mill if he could get the consent of the corporation, and the single suggestion mentioned was the consent of the corporation. Mr. Adams said, I will have no if; it shall not be conditional; the business shall be all yours to get that consent. Weare was an alderman of the corporation and he had interest, but Adams had none. The price was settled upon an express acceptance of the estate, and Adams would have nothing to do with any conditional bargain as to obtaining the consent of the corporation. After dinner the agreement was made out, and it is suggested that it was intended as a conditional bargain, though the evidence has proved the contrary, and the agreement is written without expressing anything upon the application. Adams was the person to draw the agreement, and he observed we must be upon honor and no advantage to be taken of the condition. It is impossible, if that conversation had related to such a condition, he should not mention it in the writing. He knew himself to be incapable of executing any such condition, and therefore the conversation related to the mere form of drawing out the writing. Thus the matter rested until the 22d of March, when Weare wrote to Adams to inform him that he had wrote to Mrs. Day (tenant to the corporation), to whom the erection of the mill would have been injurious, and as her consent could not be obtained the bargain was off. It struck me as strange that he should confine himself to Mrs. Day and say nothing of the corporation; but the evidence says that he was in-



formed by him that he had made this bargain, and proposed purchasing lands on the other side of the river, with her consent ; but that was not made one of the terms, because he thought himself sure of her consent. When I consider the evidence, and upon what consideration this consent was to be had, I am sure he made no doubt of obtaining it ; but the surveyor said it would be of prejudice to Mrs. Day, when the consent was denied him. The question is, what he has done to obtain the consent of the corporation ; could he, or could he not, have obtained Mrs. Day's consent if he had offered her a premium for any imaginary damages that would have arisen to her by his building the mill ? The burden lay upon Weare to obtain that consent ; it was his part to have done so ; but there is no evidence of accommodation on his side as to that point, for it only says he applied to Mrs. Day and she refused her consent, but nothing is mentioned as to a premium being offered by him. Suppose he had obtained her consent and the corporation had been mentioned, when it was an express part of the case that the owner should not have been answerable, there appears rather to be fraud on the part of the defendant, for he had no authority to think so. It has been said, stating the answer given to that letter by Adams, that there is something in it, because he does not expressly deny that he could not obtain the consent. In reply, he only insists upon the agreement, but does not charge it in the manner it is done on the other side. It does not appear how this consent may be obtained, for if he can obtain it the agreement may still be executed. It does not appear to me what the value of the premises would be if applied to the purpose of working the mill. What the advantage of it might be is not stated. Therefore I think that, without entering into the particulars of the case, the Master of the Rolls has done right, for no case can be cited where parties have made a bargain with their eyes perfectly open and no surprise whatsoever, as in this case, in which the court has refused to decree a specific performance. Here is no mistake of the object, as in *Hick v. Philipps* ; and as to the greatness of the price, Adams had a right to ask a large sum, and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill ; for he went upon the notion of that, that he was sure of Mrs. Day's consent and, if so, of that of the corporation.

Decree affirmed.

THE DUKE OF BEDFORD v. THE TRUSTEES OF THE  
BRITISH MUSEUM.BEFORE LORD ELDON, C., AND SIR T. PLUMER, M.R., JULY 6,  
1822.*[Reported in 2 Mylne & Keen 552.]*

By a settlement made in the year 1669, on the marriage of the Lady Rachel Vaughan with the Honorable William Russell, afterwards Lord Russell, a messuage called Southampton House, and the appurtenances, together with some fields adjoining, situate at Bloomsbury in the parish of St. Giles, in the county of Middlesex, and then the property of Lady R. Vaughan, were conveyed to trustees, upon such trusts as she alone should, in manner therein mentioned, appoint.

By indenture of feoffment of the 19th of June, 1675, made between the Honorable William Russell and Lady Rachel Vaughan, his wife, of the first part, the trustees of the settlement of the second part, and the Right Honorable Ralph Montagu of the third part, it was witnessed, that in consideration of £2,600 to the said William Russell and his wife paid by the said Ralph Montagu, and of the covenants thereafter mentioned, on his part to be performed, and of 5s. paid to the trustees (which sums were acknowledged to have been received for the absolute purchase of the piece of ground thereafter mentioned), they the said William Russell and his wife, and by their direction and appointment the trustees, granted, bargained, sold, aliened, released, enfeoffed, and confirmed unto the said Ralph Montagu, his heirs and assigns, a piece of land lying in a field called Baber's Field, in St. Giles's, containing seven acres and twenty-five perches, described in a map annexed, and abutting eastward in part upon the messuages lately erected by Mary Hudson, and in other part upon other part of Baber's Field, northwards on Baber's Field aforesaid, westward in part upon the messuage then in the occupation of John Morris, and in other part upon Baber's Field aforesaid, southward upon Great Russell Street in Bloomsbury aforesaid; and also the wall encompassing the said parcel of ground; and also five feet and four inches of ground in breadth, extending the whole front of the said ground abutting upon Great Russell Street, and lying without the south wall, to be palisaded, and as a security for the said wall; and also a way and free passage for foot, horses, coaches, carts, and all manner of carriages in, by, through, and over the grounds of the said William Russell and Lady Rachel Vaughan, then used, or which thereafter should or might be used, in lieu of those that were then used for or as streets in the said parish unto the said piece of ground, or any part thereof, in

case there should be any alteration thereof, and other ways belonging to the said premises, or then used with the same ; and also free liberty and authority to make or open two doors or passages out of and through the wall on the north part of the premises, and to continue the same ; and also full power and free liberty to make all such sewers, water-courses, sinks, gutters, drains, sewers, conveyances for bringing in of water, and other easements as should be fit or necessary for the accommodation of the messuages and outbuildings intended to be built upon the said piece of land, under ground, and southwards unto the said places then used for streets, and unto and into the common sewer belonging to the buildings in Bloomsbury, commonly called Southampton Buildings, and to continue the same, closing up the ground and making up the pavements that should be broken for doing the same ; to hold the same to the use of the said Ralph Montagu, and his heirs and assigns for ever, subject to a rent of £5 per annum to Lady R. Vaughan, her heirs and assigns, which he covenanted to pay, and for the recovery of which a power of distress was given. The deed then contained a covenant to levy a fine and covenants for title.

In consideration of the premises, Ralph Montagu then covenanted with Lady R. Vaughan, her heirs, executors, administrators, and assigns, that in case he, his heirs or assigns, should erect any building upon the said ground, or any part thereof, he or they should erect and new-build upon the said piece of ground one fair and large messuage and dwelling-house, fit for him and his family to inhabit, composed of an uniform building, together with all convenient stables, coach-houses and other out-offices suitable to the said mansion or dwelling-house ; and further should also keep fenced in with a brick wall the residue of the said piece of ground, and should make thereon a convenient court-yard, and on the back part thereof should leave space sufficient for convenient gardens and walks, and should not make any public or other way out of the said piece of ground unto the fields lying northwards of the same, save only two doors out of the said garden to be made for the accommodation of the inhabitants in the said chief mansion-house for walking into and taking the air in the said fields, nor should erect any public brew-house on the said piece of ground, nor make any buildings on the said ground, save only convenient offices for the said chief messuage, and ornaments and conveniences for the said garden, the walls of those to be of brick or stone, and not of timber ; and further should pave, and make, repair and amend the pavement from the outward wall of the said messuage to the middle of the street there, and should fix posts and pales in the street next to the said wall, to range even with the rest of the street ; and should not make any water-course, drain, or sewer out of the said piece of ground backwards northward unto the said field,

nor erect any building on the outermost wall of the said ground next to the said field. He further covenanted with Lady R. Vaughan, her heirs and assigns, that if he, his heirs or assigns, or any of them, should at any time thereafter erect any buildings, of what nature soever, on the north end of the said piece of ground, and which should extend northward beyond the range and building of Southampton House, situate near thereunto, other than one or more summer-house or houses, banqueting-house or houses, for the accommodation of the garden to be made in the said ground, or what should be for the enlargement of the great mansion-house, or should make, or cause or permit to be made, any water-course, drain, or sewer out of the said ground, into the said fields backwards northward, or should build or make any public brew-house upon the said piece of ground, then he, his heirs and assigns, should forfeit and pay to the said Lady R. Vaughan, her heirs and assigns, £3 per day so long as the said building or brew-house, water-course, drain, or sewer should continue, and until the said building or brew-house should be taken down, and such water-course, drain or sewer should be stopped up, and the ground made in the same plight as it was in before the making of such water-course, drain or sewer. The deed then contained a power of distress for recovering this rent, and, lastly, a covenant on the part of William Russell and Lady R. Vaughan that they, or the heirs or assigns of the latter, should not make any drain, water-course, standing ditch or sewer within 500 feet northward of the wall which encompassed the ground thereby granted, which should be any annoyance or be offensive to the said Ralph Montagu, his heirs or assigns, owners of the said ground.

By indentures dated in 1682, new trustees were appointed of the settlement of 1669; and in the year 1685, William Lord Russell being dead, the trustees reconveyed the legal estate to Lady R. Vaughan, then Lady Russell.

In pursuance of the covenants, a mansion-house, with offices, was built by Montagu upon the ground conveyed to him; and that mansion-house having been destroyed by fire, another was subsequently erected on the same site. Soon after the establishment of the British Museum under the authority of an act of Parliament passed in the 26th year of the reign of his Majesty George II., this house and premises, known by the name of Montagu House, were purchased, and were vested in trustees for the purposes of that institution.

The estates of Lady Russell in Bloomsbury had become vested in the plaintiff in fee, subject to leases of some parts of them; and houses had been erected and streets formed on the north, east and west sides, adjacent to the museum, and some of them overlooking the gardens. The yearly rent of £5 was paid to the plaintiff, who claimed under Lady

Russell, not by descent, but as a purchaser. The mansion-house, originally called Southampton House, and afterwards Bedford House, stood formerly on the north side of Bloomsbury Square; it was pulled down in the year 1800, to make way for streets and buildings which were erected on its site.

The bill was filed for the purpose of obtaining an injunction to restrain the defendants, the trustees of the British Museum, from proceeding to raise in the gardens certain additional buildings which they had it then in contemplation to erect. The intended additions were designed for the reception of the statues and other monuments of ancient art brought from Greece by the Earl of Elgin. They were to consist of a wing sixty feet in height, joining the principal building at the eastern extremity, and extending from it into the garden northwards to the distance of two hundred and ninety feet. On the western side a similar wing had been built about the year 1805, extending northwards about one hundred and forty feet; it was designed to lengthen the latter, so as to correspond with that to be built on the east. These wings, if erected, would extend northward considerably beyond what had been the line of the range and building of Southampton House.

A motion was made for an injunction before the Vice-Chancellor, Sir J. Leach, who ordered a case to be stated for the opinion of a court of law upon the question whether the plaintiff could maintain an action of covenant to recover damages in respect of the erection of buildings to the northward of the line of Southampton House; directing that it should be stated in the case that the covenant in the deed of 1675 was made with the trustees, and the rent reserved to them, and not to Lady R. Vaughan.

From this order the plaintiff appealed, and renewed his motion for an injunction; and as the defendants were equally dissatisfied with the Vice-Chancellor's order, and had intended also to appeal, it was arranged between the parties that the question should be considered as if it were before the court upon cross-motions of appeal.

The motion was heard by Lord Chancellor Eldon, assisted by Sir T. Plumer, Master of the Rolls.

*Mr. Shadwell, Mr. Littledale, Mr. Abercromby and Mr. C. S. Cullen* for the plaintiff.

*The Attorney-General (Sir R. Gifford), Mr. Wetherell, Mr. Puller, and Mr. Bligh* for the defendants.

LORD ELDON, C. I think it right for myself to say I have formed no opinion, nor do I mean to pronounce any opinion, whether any action could or could not be maintained by the Duke of Bedford against the trustees of the British Museum if they proceed with the proposed building. That is not the subject of this day's consideration. Neither

am I disposed to meddle with another question, as to which also I disclaim saying one word judicially—whether now or heretofore the trustees of the British Museum, upon anything that appears in this instrument, could have applied to the court to restrain the Bedford family from doing that which they have done. The point to which I have confined my attention, and upon which I am anxious to have the opinion of the Master of the Rolls, is, taking it for granted that an action could be brought by the Duke of Bedford under the deed of 1675, whether, under all the circumstances of this case, his Grace must be content with his legal remedy for the purpose of obtaining compensation for any injury he may have sustained, or whether he has a right to the better mode of relief which a court of equity affords by injunction.

When Bedford Square was built, it is impossible to doubt that the owners of houses on the east side of that square thought that an increased value attached to them, because the residents in those houses would have the Museum on one side and the square on the other. So, with respect to Gower Street, every one remembers that the houses on the east side were always advertised as much more valuable than those on the west; and why? Because from the former there was a prospect of the country, extending to Islington, and because also their inhabitants could have a refreshing walk from their own homes through the fields as far as Queen Square, which was then the northern extremity of that part of the metropolis. It was no doubt imagined that the Duke of Bedford could never be advised to cover this land with buildings, and that all the property between Gower Street and what is called Brunswick Square would remain open as long as the leases of the houses in Gower Street should endure; nor was it to be expected that if the Duke of Bedford had a right to tell the trustees of the British Museum that they should not build further without his consent, the tenants on the east side of Bedford Square might not ask of his Grace to insist upon that right for their sakes.

This subject may be illustrated by what has happened with respect to Gower Street. From time to time buildings were raised by the lessees in that street contrary to the covenants in their leases, but with the consent of the Duke of Bedford, until the covenant against the tenant erecting buildings behind his house became, with reference to the situation of his neighbors, an oppressive though not an unjust restriction. Suppose, for example, there were ninety houses on the east side of Gower Street, and the Duke had allowed the tenants of eighty of them to raise their back buildings to a height extremely inconvenient to the others from whom he withheld that permission, it could not be said that he was acting illegally or improperly in so doing; but it becomes quite a different question, if, under such circumstances, he files a bill to pre-

vent those others from raising their washhouses or outbuildings. If such a bill were filed, it is questionable whether the court would not say it was clear, from all the circumstances, that each of those tenants thought he was entitled to the benefit which his Grace, by declining to enforce the covenant, had allowed to the rest. The question, therefore, is, not whether the party can bring an action, but whether he can come into equity for relief, and thereby render an action for compensation unnecessary—whether, under all the circumstances of the case, the Duke of Bedford can be heard to say, “I can or I cannot maintain an action at law ; but be that as it may, I will not seek relief in that mode, but will come into a court of equity, and insist upon having the extraordinary relief which that court gives beyond what is afforded by courts of law. I will have an injunction, to prevent the necessity of my consulting any law courts whatever as to my relative situation with regard to these trustees.”

Consider how the matter stands upon the deed of 1675. It appears that, from the year 1675 to the year 1800, buildings in the neighborhood of Bedford House have been erected to the eastward ; that there has been a prolongation of streets from Bedford House to the New Road, and that buildings also have been erected on the westward through Bedford Square ; that there were no buildings at all in the space between Brunswick Square and Gower Street, but that the large mansion, to which the terms of this instrument refer, and which now forms the Museum, had stood upon its present site up to the year 1800. The deed is for considerations, partly pecuniary and partly to be found in covenants ; the pecuniary considerations being £2,600 and a rent of £5 a year, and the covenants contained in that instrument being expressly stated to be part of the consideration. A grant is then made, and (what is not immaterial) in the description of the premises it appears that all the time the grant was made there was, at least, one messuage on the east side of Montagu House, one messuage on the west side, but no messuages whatever on the north side. There is, further, the usual covenant to pay the rent, and then follows this covenant : “And in consideration of the premises, the said Ralph Montagu, for himself, his heirs, executors, administrators and assigns, covenants, promises, and grants, to and with the said Lady Rachel Vaughan, her heirs, executors, administrators and assigns, that in case the said Ralph Montagu, his heirs or assigns, shall erect any building upon the said ground and premises, or any part thereof, he, the said Ralph Montagu, his heirs or assigns, shall and will erect and new-build upon the said piece of ground hereby granted, or mentioned to be granted, one fair and large messuage and dwelling-house.” The construction put upon these words is not only a construction to be found in a subsequent part of this instru-

ment, but is the construction which the Duke of Bedford himself gives to it, namely, that the grantee is to build a chief messuage fit for the dwelling-house of a large and noble family, with the necessary conveniences and ornamental appendages. The instrument goes on to covenant, that the house is to be fit for the said Ralph Montagu and his family to inhabit, composed of an uniform building, together with all convenient stables, coach-houses, and other offices suitable to the said mansion or dwelling-house ; and, further, that the said Ralph Montagu, etc., shall keep fenced in with a brick wall the residue of the said piece of ground, and shall make thereout a convenient court-yard, and, on the back part thereof, shall leave space sufficient for convenient gardens and walks, and shall not make any public or other way out of the said piece of ground into the fields lying northwards of the same, save only two doors out of the same garden, to be made for the accommodation of the inhabitants of the said chief mansion-house for walking into and taking the air of the said fields, which fields are before stated to be on the north side of the house. So that the grantee is to have two doors towards the north, which was open ground, but not on the east or the west, nor is he to erect any buildings on the ground save only for convenient offices for the chief messuage, and ornaments and conveniences for the garden, "the walls of those to be of brick or stone and not of timber" ; and, further, it is covenanted, that he and they shall not make any water-course, drain or sewer out of the said piece of ground backwards northward into the said fields, nor erect any buildings on the outermost wall of the said ground next to the said field ; all this again showing care and attention to what was, or what was not, to be done northward, and carrying that care to this extent that the grantee was not to raise any structure upon the wall to the northward of the garden.

Now in determining how a court of equity ought to proceed, it is proper to consider not only what would be done in the actual matter before it, but what the court would do in other cases falling within the same principle. Suppose that after Mr. Montagu had built this house ranging with all the surrounding buildings that belonged to the Duke of Bedford, and ranging with Powis House and other large mansions standing in Great Russell Street ; suppose that after the summer-house and banqueting-house had been erected (which clearly would not have affected the prospect from Bedford House), and after the garden wall (on which the feoffee was not to place three additional bricks) had been built, the Duke of Bedford had said, "there is nothing to restrain me ; I will place a sugar-house on one side and a soap-house or gas-works on the other side" ; or, rather, suppose, which is a handsomer way of putting it, that the Duke had built a row of houses close to the wall, and after-



wards Mr. Montagu had said he did not like to have his gardens overlooked by his neighbors' servants, and he would therefore, notwithstanding the covenant, build this wall twice as high as it was before ; though I admit that the Duke of Bedford might have had a proper ground of action, would this court have granted an injunction ? My answer is, no ; for, upon looking to authority, I find the law to be as Lord Kenyon has laid it down. If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed ; but you cannot under such circumstances come into a court of equity for a remedy which the court never grants except in cases where it would be strictly equitable to grant it. It is impossible to state, as the doctrine of a court of equity, that the court will carry into execution a specific covenant in all cases where the legal intention of the deed is found. A doctrine like that would be widely inconsistent with general practice, and would directly contradict the daily and hourly experience of us all.

The deed proceeds further, and states as a distinct covenant that if the said Ralph Montagu, his heirs or assigns, or any of them, shall at any time thereafter erect any building of what nature soever on the north end of the said piece of ground, and which shall extend northward beyond the range and building of Southampton House, situate near thereunto, other than one or more summer-house or other houses for the accommodation of the garden, he and they shall forfeit and pay, etc. Now what would it have signified as between these parties, in the consideration of such a case as this, whether a house was or was not built in the range of Southampton House, if there were placed between this house and Southampton House three or four streets excluding the smallest possible view from Southampton House of anything north of this mansion, and by the acts of the Bedford family themselves destroying the very purpose for which this covenant was here inserted ?

Suppose again that the moment after Mr. Montagu had in discharge of the original engagement built this great mansion fit for the pleasurable residence of a nobleman or gentleman of fortune, and had also according to the covenants erected suitable offices and the ornamental banqueting-house and summer-house, the Duke of Bedford had then put a public brew-house in the vicinity of the garden, what would the Montagu family have said ? And yet there is nothing here from which it can be pretended that there is an express prohibition of such a proceeding. Neither do I say whether the Bedford family could have built a public brew-house to the north of this mansion ; but suppose such a thing had been done, and the Duke of Montagu had then said, "You have spoilt my banqueting-house and summer-house unless I am to

drink nothing but porter ; I must therefore build a wall which will likewise prevent the smoke of the engines of the brew-house coming from the north." Will it be contended that in such a case the Bedford family could come to a court of equity for protection on the ground that the Duke of Montagu was going to build a wall higher than the covenants permitted, or even, we will suppose, an immense brew house, they having on their part religiously kept their covenant by making two archways through which his Grace might go and take the salubrious air which it was intended he should have ?

If the parties have so dealt with regard to the legal rights, that the object of the one party is defeated, is the other to do what he pleases, while the first is not at liberty to call upon that other to account for doing that which he himself is by the deed prohibited from doing ? I do not think that a court of equity is to act by reciprocity of covenant ; I rather mistake what has been held to be the doctrine of courts of equity during the whole course and practice of my life if this court does not say to parties who are so circumstanced, "Confine yourselves to your legal remedies if you have any, and do not come here in cases of this description to ask of the court to give you more relief than could be obtained in a court of law."

Upon this point I am anxious to have the opinion of the Master of the Rolls, first making most respectfully this single observation, upon a subject which calls for vigilant attention, that if there be a question in a court of equity, the decision of which will render the consideration of it in courts of law unnecessary, it is then the duty of the court of equity first to decide that question. If, for example, it should happen in this case, that after the parties had gone to trial, and the defendant had obtained a verdict at law, this court would nevertheless have given no relief ; then it is for the interest of the suitors that they should be told so in the first instance, and not in the last stage of the proceedings. Why is the court to send them to law, and afterwards to tell them when they come back that nothing can be done for them here ? If that is to be the course, it is better to dismiss them out of court at once and in the first instance, let the result of the application to a court of law be what it may.

I do confess myself unable to say that this is one of the cases in which the court ought to give relief by injunction. The difficulties I have stated are difficulties I am unable to get over, and I state them without prejudice. Having done so, I must request the Master of the Rolls to state what view he has taken of the case.

SIR T. PLUMER, M.R. The single question now before the court is one which respects the exercise of the jurisdiction ; and this court, while it determines that question upon principles peculiar to itself, cau-

tiously abstains from deciding whether either party has a remedy at law against the other, leaving each of them, as, in my opinion, it ought to leave them, to agitate that question in a court of law.

Now, if this were a case in which the plaintiff had not a legal, but had only an equitable remedy, as was attempted to be argued by his counsel, on the assumption that, by reason of certain technical forms, he was debarred from obtaining any redress at law; if the case was reduced to that point, it would become extremely material to consider whether the party had any claim at all to come into a court of equity for its equitable assistance. That, however, is not the present question. On the contrary, those who support the application for the injunction also insist that the Duke of Bedford has a clear legal right; that upon the true construction of the contract, and upon all that has happened between the parties, it is competent to the Duke, as representing the original vendor, to assert his legal right. Undoubtedly it is perfectly open to him to take that course; and nothing which this court shall determine will, in the least, abridge his right.

Again, in considering whether the plaintiff is precluded from having the equitable assistance of this court, it must not be supposed that the slightest imputation is cast upon his conduct. It is not on the ground that the party applying for relief has conducted himself improperly—so contrary to the agreement as to deprive himself of that remedy, that the assistance by injunction may be refused; but the question is, whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state. It was perfectly competent to the plaintiff to make what use he pleased of his contiguous lands; he was not fettered in so doing by any previous obligation to the contrary; and when he took upon himself to act in the manner in which he has acted, and to cover the vacant ground with buildings, the question is, whether, having regard to the mutual dealings between the parties with respect to the property as it stood both originally and afterwards, it is consonant with the principles of equity to interpose at this time of day.

In that point of view, it appears to be a consideration of great importance, more especially with reference to property in the metropolis, how far parties shall now be permitted to go back, and revive all the objections arising out of long antecedent covenants and engagements, and to give them such an application to the buildings of the metropolis in its present rapidly increasing state, that, while one party is left at liberty to obtain the most profitable consideration for his land, every obligation which is in the nature of restriction shall be enforced by that party as against the owner of the adjoining land. The question is not to be de-

terminated on the letter of the contract. By the letter of the contract, the Duke is under no positive engagement to leave the northern boundary open ; but the question is, whether, according to good faith and the true understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its then state. There were, here, two large mansions—one erected, the other to be erected, contiguous to each other—to be enjoyed by two noble families, with their appendages of gardens and offices ; and the question is, whether the obligation did not remain so long as those two mansions remained, the parties mutually contemplating all the enjoyment to be derived from everything which could contribute reciprocally to their beauty, ornament and use.

It is to be recollected that the piece of ground in question was bought for the very purpose ; and it is an obligation cast upon the purchaser, if he builds at all, that he shall erect one mansion only—one large fair mansion, with suitable gardens and offices attached to it—his understanding being that he should have all the advantages which the site then possessed ; unless, indeed, it is to be presumed that he could undertake to erect a mansion in such a situation, and on so magnificent a scale, with all the obligations thrown upon himself, and none on the contrary, expressed or implied, imposed upon the other party who had subjected him to those obligations.

This understanding between the parties results from every part of the agreement. The party whom the Duke represents covenants that M<sup>r</sup>. Montagu shall have the unlimited enjoyment of the property conveyed, with all that belonged to it. It is quite evident, from the expression with respect to the opening into the fields, that it was in the contemplation of the parties that the land to the north should remain fields or open ground ; and in the parts of the deed referring to the streets to the southward and the contiguous buildings to the east and west, there is not a syllable which indicates an intention that the northern boundary was not to remain open. It was that which principally induced M<sup>r</sup>. Montagu to build. If the subject-matter of the contract is changed, if, from the alterations which take place in the lapse of time, both noble families quit their residences, and the mansion which had been built ceases to be a place of residence for a family of this description, and becomes appropriated to other purposes, a new set of interests and rights would be applicable to it in its altered state. Who is it that has created this alteration ? The party who now seeks to enforce the obligation which applied to the property in its former state. It was perfectly competent to the Duke of Bedford to build to the northward all the streets he has built, and to surround and enclose Montagu House with buildings for trade and commerce, or in any way he thought

proper ; but, having so done, can it be said to be equitable or consonant with justice, after having induced a man to build a suitable mansion, after having surrounded him with buildings and blocked up all that tempted him to build, and precluded him from the pleasurable or profitable enjoyment of his mansion, to insist on its remaining in the state in which, by the letter of the deed, the party is bound to preserve it ? At law such conduct may be no defense. Notwithstanding his having altered the state of the property, the Duke may still be entitled to the benefit of the covenant, and if so, let him take his legal remedy ; but the question is, whether a court of equity must not consider how far it is reasonable to permit a party who has so dealt with the property, and so altered its condition, to obtain his remedy by the interposition of this court.

The case made by the bill, therefore, is not that which was contemplated by the deed. The case made by the bill is, that this erection will obstruct the view of the lessees of the new houses which have been built on the adjoining land. Was that the design of the obligation ? The very circumstance of the Bedford family having surrounded Montagu House with streets and buildings, after having become parties to this contract (the intention being, that the two contiguous mansions should be inhabited by noble families), is made the ground on which the equitable relief is sought, because, otherwise, it is said, these lessees will be prevented from enjoying the view into the gardens and grounds of the Museum. Would not that be to apply all the covenants of the deed to a different state of things from that which was the object and design of both parties ?

The question then is, whether a court of equity is bound to assist a party to do that which neither party contemplated, and whether it would not be inequitable, unreasonable, and unjust to enforce the covenant specifically in the existing state of the property ; and considering it in that view, I entertain a strong opinion that this is not a case in which the court ought to interfere.

Upon these grounds, therefore, and without the least imputation upon the Duke or those who advised him, I think he has voluntarily brought the property into a state which makes this part of the agreement no longer applicable, or which at least renders it unreasonable that the covenant should be enforced.

At the close of the judgment, the plaintiff's counsel stated that, as the sole object of the Duke of Bedford, in instituting the suit, was to obtain the opinion of the court upon the question of right, it became unnecessary to prosecute the cause further. An order was accordingly taken, by arrangement between the parties, dismissing the bill.

## HELLING v. LUMLEY.

IN THE COURT OF APPEAL IN CHANCERY, DECEMBER 21, 1858.

*[Reported in 3 De Gex & Jones 493.]*

THESE were two appeals from the decision of Vice-Chancellor Stuart, holding that the plaintiff was entitled to the enjoyment of a box No. 124 at the Opera House, of which the defendant was the lessee.

On the 17th of September, 1816, Edmund Waters became the purchaser of the leases of the Opera House at a sale, under the direction of the court, in a suit of *Waters v. Taylor*. One of the leases contained a proviso, that with the exception of forty-one specified boxes (not including No. 124) no box should be let for a greater term than that of the season, or from year to year. There was also a covenant for renewal.

By articles of agreement, dated the 25th of August, 1821, and made between John Mills for and on behalf of Edmund Waters, of the one part, and Abraham Henry Chambers, of the other part, Edmund Waters agreed to sell and Abraham Henry Chambers to purchase, for £80,000, the Opera House, for the residue of the terms granted by the leases, subject to the rents, covenants and agreements therein reserved and contained, and also subject to the right and interest of the several lessees or proprietors of the several boxes in the said Opera House, and lettered as therein mentioned, and also subject as follows; that is to say, "subject to the right of possession of the said Edmund Waters, his executors, administrators, or assigns, to the box numbered 124, hitherto usually occupied by him the said Edmund Waters, on the east side of the theatre, or his or their nominees, not exceeding in number six persons nightly, during the remainder of the said several terms granted by the hereinbefore-mentioned indentures of lease, and of the terms covenanted by the said indentures of lease to be granted, and which, with the box No. 125, reserved for the use of the said Thomas Holloway, adjoin the gallery of the said theatre."

By two indentures, both dated the 15th of March, 1823, and made between Edmund Waters, of the one part, and Alderman Winchester, of the other part, Edmund Waters assigned his property in trust for such of his creditors as had executed or should execute the latter of the two indentures, or to their respective executors, administrators, or assigns, ratably and in proportion to the amount of the debts owing to them respectively.

In 1845 Chambers completed a sale of the Opera House to the defendant Benjamin Lumley, who, when he entered into a treaty for his

purchase, had full notice of the contract of the 25th of August, 1821, which constituted the only title of the assignees and of the reservation of the box No. 124 by such contract, and of the fact that the representatives of the trustee of Waters' assignment were in the receipt of the rents and profits of the box.

The defendant Lumley, by virtue of his contract for the purchase of the Opera House from the assignees of Chambers, and by their direction and by virtue of the covenants for renewal contained in the expired leases of the Opera House, obtained a new lease of the premises to be granted to him by an indenture of the 10th of July, 1845, whereby he was restrained from disposing of boxes for more than one year, except forty-one boxes to be selected by him within five years, which he was to be at liberty to dispose of at pleasure ; but, after the five years, provision was thereby made for his acquiring, with the assent of the lessors, and by exchange or otherwise, the right of disposing of any other boxes.

By an indenture dated the 5th of May, 1856, the defendant Lumley, for the considerations therein mentioned, assigned the lease to the defendant Lord Ward for the residue of his term therein, but he still retained some interest in the premises.

The bill stated an allegation on the part of the defendants, that the defendant Lumley selected, within the five years mentioned in the renewed lease, forty-one boxes to dispose of, not including box No. 124, and that they could not now let the plaintiff have that box without forfeiting the renewed lease ; but the plaintiff, by his bill, charged that they could, by purchase or exchange, obtain liberty to give up the box to the plaintiff, or, at all events, ought to compensate the plaintiff for the same.

The prayer was, that it might be declared that the plaintiff, as the trustee of the indentures of the 15th of March, 1823, was entitled to the box No. 124 in the Opera House, or, at all events, to an equivalent in money or otherwise for the same for the residue of the renewed term of years granted by the indenture of the 10th of July, 1845, pursuant to the covenant or covenants for renewal mentioned or referred to in the contract of the 25th of August, 1821, and to sell or let the box, or an equivalent for the same, accordingly ; and it sought an account and an injunction against letting or selling or otherwise disposing of or dealing with the box, and from assigning or underletting or otherwise dealing with the Opera House, except subject to the plaintiff's aforesaid right to the said box.

The Vice-Chancellor made a decree, declaring the plaintiff entitled to the enjoyment, and granted an injunction, and from this decree each of the defendants appealed.

*Mr. Bacon* and *Mr. H. R. Bagshawe* for the plaintiff.

*Mr. Malins* and *Mr. C. M. Roupell* for the appellant Lumley.

*Mr. Craig* and *Mr. Renshaw* for Lord Ward.

Mr. Bacon was not called upon to reply.

The LORD JUSTICE TURNER. This is a bill filed by the trustee of a deed of the 15th of March, 1823, claiming either the possession or occupation of box No. 124 at the Opera House, or an equivalent in money. [His Lordship read the prayer of the bill.]

The case arises thus: In the year 1792 a lease of the Opera House was granted to William Taylor, through whom Edmund Waters claimed title. By this lease it was provided that with the exception of certain specified boxes, not including No. 124, no box should be let for a greater term than that of the season, or from year to year. But the forty-one specified boxes might be let without any such restriction. The lease contained a covenant for renewal. The term having become vested in Waters, he, on the 25th August, 1821, contracted to sell his interest in the lease, and in any renewed terms, to Chambers. That contract contained a reservation in these terms: [His Lordship read it] so that Waters reserved the right of possession of box No. 124 for himself and his nominees during the term and any renewed term. Having this reserved right, Waters settled it by the assignment of March, 1823, upon trusts for the benefit of his creditors, and the plaintiff is the present trustee of that deed. The Vice-Chancellor was of opinion that the court ought to declare the plaintiff entitled, as against the defendants Lumley and Lord Ward, to the benefit of the reservation of the box, and that the defendants, and all claiming under them, are bound to give the occupation of the box according to the terms of the reservation, and His Honor granted an injunction and directed accounts as sought by the bill. From that decision two appeals have been brought, one by each defendant.

In the first place, it is said that if the court enforces specific performance of the agreement constituted by the reservation, the consequence will be a forfeiture of the lease, under which the landlord may re-enter. And it is said that courts of equity do not decree a specific performance of an agreement of which the consequence would be a forfeiture. But when a defendant sets up the consequence of forfeiture as a defense to a bill for specific performance, the court must be well satisfied before it admits the validity of such a defense, that forfeiture will follow from the specific performance of the agreement, and it must also look at the fact by whose acts and conduct the forfeiture would be occasioned. The court will not permit a defendant to put himself in such a position as that his performance of his agreement shall create a forfeiture, and then to turn round and say that the plaintiff shall not have a specific performance of the agreement, because the defendant has by his own act enabled the



landlord to enter, upon the agreement being performed. How does the present case stand in that point of view? The original lease contained a contract that no box, except forty-one which were specified, should be leased except for the season, or from year to year. This lease has, however, expired, and therefore there could not possibly now be any breach of the contract contained in it. A new lease was granted in 1845, and it appears that although forty-one boxes were also excepted in the new lease they were not specified, so that the defendant Lumley had a right to deal as he pleased with any forty-one boxes which he thought fit, he having a power of selection for that purpose. In the year 1845, therefore, Mr. Lumley was in this position. He had power to select the box No. 124. as one which he might be at liberty to lease otherwise than for the season, or from year to year. By so making his selection he would have the power to perform specifically the contract constituted by the reservation. He thought proper to select forty-one other boxes, and having so selected he then says he cannot grant a lease or carry out the reservation in the deed of 1821, because, having already made his selection of forty-one boxes, not including No. 124, he would by selecting that box have selected forty-two instead of forty-one boxes. If, therefore, there was any danger of a forfeiture being incurred under the covenant contained in the lease, it would be occasioned by the act of Mr. Lumley, and not by the act of the plaintiff. Now, Mr. Lumley took, as is admitted, with notice of the reservation, and must be bound by it. If, then, he has put it out of his power to perform the agreement constituted by the reservation, the consequences must fall upon him and not on the plaintiff. I am not, however, satisfied that the performance of the agreement contained in the reservation would create a forfeiture, for the contract may admit of this interpretation—that the lessee might let any one occupy the box No. 124 from night to night during several successive seasons, and I do not see anything to prevent his doing so. But if there were it would arise from the act of Lumley and not from the contract. The first ground, therefore, cannot be maintained.

But then it is said that in truth there was no such right in existence in Waters at the time of the agreement, and that the true construction of the reservation is to confine it to such right (if any) as Waters had, and that if he had none the reservation was inoperative. I think that this argument scarcely requires an answer to be given to it. For the right which is referred to in the reservation is a right of occupation for six persons, not only during the whole of the original but during any renewed term. It is further argued that this was a mere personal right, and that the intention of the parties simply was that Waters should personally enjoy the occupation of the box. The terms of the agreement

do not, in my opinion, admit of that construction. This appears to me to be clear from the use of the word "noninees," showing that Waters might grant to any one the right of occupying the box. There appears to me nothing which prevented Waters from selling that right. Some argument has also been grounded on the delay which has taken place in enforcing the agreement. But I think that there has been no such delay as to displace the right.

It should, I think, be noticed in the decree that the defendants decline to make the compensation which is prayed by the bill. I think the decree right, with that exception, and that the appellants should pay the costs.

THE LORD JUSTICE KNIGHT BRUCE. We have thought it as well to make a slight alteration in the language of the decree, but it will create no substantial difference. A single appeal would have been frivolous and vexatious ; the two appeals are doubly so.

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WILLARD v. TAYLOE.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER  
TERM, 1869.

[*Reported in 8 Wallace 557.*]

APPEAL from the Supreme Court of the District of Columbia.

This was a suit in equity for the specific performance of a contract for the sale of certain real property situated in the city of Washington, in the District of Columbia, and adjoining the hotel owned by the complainant Willard, and known as Willard's Hotel.

The facts out of which the case arose were as follows :

In April, 1854, the defendant leased to the complainant the property in question, which was generally known in Washington as "The Mansion House," for the period of ten years from the 1st of May following, at the yearly rent of twelve hundred dollars. The lease contained a covenant that the lessee should have the right or option of purchasing the premises, with the buildings and improvements thereon, at any time before the expiration of the lease, for the sum of twenty-two thousand and five hundred dollars, payable as follows : Two thousand dollars in cash, and two thousand dollars, together with the interest on all the deferred installments, each year thereafter until the whole was paid ; the deferred payments to be secured by a deed of trust on the property, and the vendor to execute to the purchaser a warranty deed of the premises, subject to a yearly ground rent of three hundred and ninety dollars.

At the time of this lease gold and silver, or bank bills convertible on demand into it, were the ordinary money of the country and the standard of values. In 1861 the rebellion broke out, lasting till 1865. In the interval, owing to the influx of people, property in the metropolis used for hotels greatly increased in value, and as was alleged by Tayloe, who produced what he deemed a record to show the fact, the complainant Willard assigned an undivided half of the property which had been leased to him as above-mentioned to a brother of his. In December, 1861, the banks throughout the country suspended payments in specie, and in 1862 and 1863 the Federal Government issued some hundred millions of notes to be used as money, and which Congress declared should be a tender in the payment of debts. Coin soon ceased to circulate generally, and people used, in a great degree, the notes of the government to pay what they owed.

On the 15th of April, 1864, two weeks before the expiration of the period allowed the complainant for his election to purchase—the property having greatly increased in value since 1854, the year in which the lease was made—the complainant addressed a letter to the defendant, enclosing a check, payable to his order, on the Bank of America, in New York, for two thousand dollars, as the amount due on the 1st of May following on the purchase of the property, with a blank receipt for the money, and requesting the defendant to sign and return the receipt, and stating that if it were agreeable to the defendant he would have the deed of the property, and the trust deed to be executed by himself, prepared between that date and the 1st of May. To this letter the defendant, on the same day, replied that he had no time then to look into the business, and returned the check, expressing a wish to see the complainant for explanations before closing the matter.

On the following morning the complainant called on the defendant and informed him that he had two thousand dollars to make the first payment for the property, and offered the money to him. The money thus offered consisted of notes of the United States, made by act of Congress a legal tender for debts. These the defendant refused to accept, stating that he understood the purchase-money was to be paid in gold, and that gold he would accept, but not the notes, and give the receipt desired. It was admitted that these notes were at the time greatly depreciated in the market below their nominal value.<sup>1</sup> On repeated occasions subsequently the complainant sent the same amount—two thousand dollars—in these United States notes to the

<sup>1</sup> Between the 15th of April and May 1, 1864, one dollar in gold was worth from one dollar and seventy-three cents to one dollar and eighty cents in United States notes.

defendant in payment of the cash installment on the purchase, and as often were they refused by him. On one of these occasions a draft of the deed of conveyance to be executed by the defendant, and a draft of the trust deed to be executed by the complainant, were sent for examination, with the money. This last was prepared for execution by the complainant alone, and contained a provision that he might, if he should elect to do so, pay off the deferred payments at earlier dates than those mentioned in the lease. These deeds were returned by the defendant, accompanied with a letter expressing dissatisfaction at the manner in which he was induced to sign the lease with the clause for the sale of the premises, but stating that as he had signed it he "should have carried the matter out" if the complainant had proffered the amount which he knew he had offered for the property, meaning by this statement, as the court understood it, if he had proffered the amount stipulated in gold. No objection was made to the form of either of the deeds.

Soon afterwards the defendant left the city of Washington, with the intention of being absent until after the 1st of May.

On the 29th of April the complainant, finding that the defendant had left the city, and perceiving that the purchase was not about to be completed within the period prescribed by the covenant in the lease, and apprehensive that unless legal proceedings were taken by him to enforce its execution his rights thereunder might be lost, instituted the present suit.

In the bill he set forth the covenant giving him the right or option to purchase the premises; his election to purchase; the notice to the defendant; the repeated efforts made by him to obtain a deed of the property; his offer to pay the amount required as the first installment of the purchase-money in United States notes, and to execute the trust deed stipulated to secure the deferred payments, and the refusal of the defendant to receive the United States notes and to execute to him a deed of the premises. It also set forth the departure of the defendant from the city of Washington, and his intended absence beyond the 1st of May following, and alleged that the appeal was made to the equitable interposition of the court, lest on the return of the defendant he might refuse to allow the complainant to complete the purchase, and urge as a reason that the time within which it was to be made had passed. The bill concluded with a prayer that the court decree a specific performance of the agreement by the defendant, and the execution of a deed of the premises to the complainant; the latter offering to perform the agreement on his part according to its true intent and meaning.

The bill also stated some facts, which it is unnecessary to detail,

tending to show that the acquisition of the property in question was of especial importance to the complainant.

The answer set up that the complainant, even on his own showing, had no case ; that there was no proper tender ; that even if the complainant once had a right to file a bill in his sole right—the way in which the present bill was filed—he had lost this right by the transfer of the half to his brother ; that the complainant had not demanded an execution even of the contract which he himself set forth, but by the drafts of the trust deed sent to Tayloe, and which was the trust deed of which he contemplated the execution, he proposed to pay, at his own option, the whole purchase-money before the expiration of the ten years, and thus would interfere with the duration of that security and investment in the identical property leased, which had been originally contemplated and provided for ; thus subjecting the defendant to risk and expense in making a new investment. The answer concluded with an allegation, that “by the great national acts and events which had occurred when the complainant filed his bill, and which were still influencing all values and interests in the country such a state of things had arisen and now existed, as according to equity and good conscience ought to prevent a decree for specific performance in this case, upon a demand made on the last day of a term of ten years, even if in strict law (which was denied) the complainant was entitled to make such demand.”

Both Tayloe and Willard were examined as witnesses. The former testified, that when the lease was executed he objected to a stipulation for a sale of the premises, and that Willard said it should go for nothing. Willard swore that he had said no such thing.

The court below dismissed the bill, and Willard took the present appeal.

*Messrs. Curtis, Poland and Howe* for the appellant.

*Messrs. Cox and McPherson, contra.*

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows :

The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant a contract of sale between the parties was completed.<sup>1</sup> This

<sup>1</sup> *Boston and Maine Railroad Company v. Bartlett*, 3 Cushing 224 ; *Welchman v. Spinks*, 5 Law Times, N. S. 385 ; *Warner v. Willington*, 3 Drewry 523 *Old Colony Railroad v. Evans*, 6 Gray 25.

contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under fifteen thousand dollars, and a greater increase than one-half in value during the period of ten years could not then have been reasonably anticipated.

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine,<sup>1</sup> "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under [the] circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it."

And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In *Joynes v. Statham*,<sup>2</sup> Lord Hardwicke said: "The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law." And in *Underwood v. Hitchcox*<sup>3</sup> the same great judge said, in refusing to enforce a contract: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances."

Later jurists, both in England and in the United States, have reiterated the same doctrine. Chancellor Kent, in *Seymour v. Delancy*,<sup>4</sup> upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and Chancellor Bates, of Delaware, in *Godwin v. Collins*, recently decided, upon a very full consideration of the adjudged cases, says that a patient examination of the whole course of decisions on this subject has left with him "no doubt that, as a matter of judicial history, such

<sup>1</sup> 12 Vesey, Jr., 332.

<sup>2</sup> 3 Atkyns 388.

<sup>3</sup> 1 Vesey, Sen., 279.

<sup>4</sup> 6 Johnson's Chancery 222.

a discretion has always been exercised in administering this branch of equity jurisprudence."

It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties.

In the case of the *City of London v. Nash*,<sup>1</sup> the defendant, a lessee, had covenanted to rebuild some houses, but instead of doing this he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance Lord Hardwicke held that the covenant was one which the court could specifically enforce; but said, "the most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them." In *Faine v. Brown*,<sup>2</sup> similar hardship, flowing from the specific execution of a contract, was made the ground for refusing the decree prayed. In that case the defendant was the owner of a small estate, devised to him on condition that if he sold it within twenty-five years one-half of the purchase-money should go to his brother. Having contracted to sell the property, and refusing to carry out the contract under the pretence that he was intoxicated at the time, a bill was filed to enforce its specific execution, but Lord Hardwicke is reported to have said that, without regard to the other circumstance, the hardship alone of losing half the purchase-money, if the contract was carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave the parties to the law.

The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hard-

<sup>1</sup> 1 Vesey, Sen., 12.

<sup>2</sup> Cited in *Ramsden v. Hylton*, 2 Vesey, Sen., 306.

ship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in *Davis v. Hone*,<sup>1</sup> that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.

In the present case objection is taken to the action of the complainant in offering, in payment of the first installment stipulated, notes of the United States. It was insisted by the defendant at the time, and it is contended by his counsel now, that the covenant in the lease required payment for the property to be made in gold. The covenant does not in terms specify gold as the currency in which payment is to be made; but gold, it is said, must have been in the contemplation of the parties, as no other currency, except for small amounts, which could be discharged in silver, was at the time recognized by law as a legal tender for private debts.

Although the contract in this case was not completed until the proposition of the defendant was accepted in April, 1864, after the passage of the act of Congress making notes of the United States a legal tender for private debts, yet as the proposition containing the terms of the contract was previously made, the contract itself must be construed as if it had been then concluded to take effect subsequently.

It is not our intention to express any opinion upon the constitutionality of the provision of the act of Congress, which makes the notes of the United States a legal tender for private debts, nor whether, if constitutional, the provision is to be limited in its application to contracts made subsequent to the passage of the act.<sup>2</sup> These questions are the subject of special consideration in other cases, and their solution is not required for the determination of the case before

<sup>1</sup> 2 Schoales & Lefroy 348.

<sup>2</sup> See *infra*, *Hepburn v. Griswold*, p. 603.



us. In the view we take of the case, it is immaterial whether the constitutionality of the provision be affirmed or denied. The relief which the complainant seeks rests, as already stated, in the sound discretion of the court; and, if granted, it may be accompanied with such conditions as will prevent hardship and insure justice to the defendant. The suit itself is an appeal to the equitable jurisdiction of the court, and, in asking what is equitable to himself, the complainant necessarily submits himself to the judgment of the court, to do what it shall adjudge to be equitable to the defendant.

The kind of currency which the complainant offered is only important in considering the good faith of his conduct. A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required. The condition of the currency at the time repels any imputation of bad faith in the action of the complainant. The act of Congress had declared the notes of the United States to be a legal tender for all debts, without, in terms, making any distinction between debts contracted before and those contracted after its passage. Gold had almost entirely disappeared from circulation. The community at large used the notes of the United States in the discharge of all debts. They constituted, in fact, almost the entire currency of the country in 1864. They were received and paid out by the government; and the validity of the act declaring them a legal tender had been sustained by nearly every State court before which the question had been raised. The defendant, it is true, insisted upon his right to payment in gold, but before the expiration of the period prescribed for the completion of the purchase he left the city of Washington, and thus cut off the possibility of any other tender than the one made within that period. In the presence of this difficulty, respecting the mode of payment, which could not be obviated by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he ought in equity and conscience to do in the execution of the contract.

Nothing further could have been reasonably required of him under the circumstances, even if we should assume that the act of Congress

making the notes of the United States a legal tender does not apply to debts created before its passage, or, if applicable to such debts, is, to that extent, unconstitutional and void.

In the case of *Chesterman v. Mann*,<sup>1</sup> it was held by the Court of Chancery of England that where an underlessee had a covenant for the renewal of his lease, upon paying to his lessor a fair proportion of the fines and expenses to which the lessor might be subjected in obtaining a renewal of his own term from the superior landlord, and of any increased rent upon such renewal, and there was a difference between the parties as to the amount to be paid by the underlessee, he might apply for a specific performance of the covenant, and submit to the court the amount to be paid. So here in this case the complainant applies for a specific performance, and submits the amount to be paid by him to the judgment of the court.

We proceed to consider whether any other circumstances have arisen since the covenant in the lease was made which renders the enforcement of the contract of sale, subsequently completed between the parties, inequitable. Such circumstances are asserted to have arisen in two particulars—first, in the greatly increased value of the property; and, second, in the transfer of a moiety of the complainant's original interest to his brother.

It is true, the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts, in case of the lessee's election to purchase, the payment of one-half more than its then estimated value. If the actual increase has exceeded the estimate then made, that circumstance furnishes no ground for interference with the arrangement of the parties. The question in such cases always is, was the contract at the time it was made a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement.<sup>2</sup> Here the contract, as already stated, was when made a fair one, and in all its attendant circumstances free from objection. The rent reserved largely exceeded the rent then paid, and the sum stipulated for the property largely exceeded its then market value.

The transfer, by the complainant to his brother, of one-half interest in the lease, assuming now, for the purpose of the argument, that there is in the record evidence, which we can notice, of such transfer,

<sup>1</sup> 9 Hare 212.

<sup>2</sup> *Wells v. The Direct London & Portsmouth Railway Company*, 9 Hare 129; *Low v. Treadwell*, 3 Fairfield 441; *Fry on Specific Performance of Contracts*, §§ 235 and 252.

in no respect affects the obligation of the defendant, or impairs the right of the complainant to the enforcement of the contract. The brother is no party to the contract, and any partial interest he may have acquired therein the defendant was not bound to notice. The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern.

If the entire contract had been assigned to the brother, so that he had become substituted in the place of the complainant, the case would have been different. In that event the brother might have filed the bill, and insisted upon being treated as representing the vendee. The general rule is, that the parties to the contract are the only proper parties to the suit for its performance, and, except in the case of an assignment of the entire contract, there must be some special circumstances to authorize a departure from the rule.

The court, says Chancellor Cottenham in *Tasher v. Small*,<sup>1</sup> "assumes jurisdiction in cases of specific performance of contracts, because a court of law, giving damages only for the non-performance of the contract, in many cases, does not afford an adequate remedy. But in equity, as well as at law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining, as nearly as possible, in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the rights nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

When the complainant has received his deed from the defendant, the brother may claim from him a conveyance of an interest in the premises, if he have a valid contract for such interest, and enforce such conveyance by suit; but that is a matter with which the defendant has no concern.

It seems that the draft of the trust deed, to secure the deferred payments, sent to the defendant for examination, was prepared for execution by the complainant alone, and contained a stipulation that he might, if he should so elect, pay off the deferred payments at earlier dates than those mentioned in the covenant in the lease; and it is objected to the complainant's right to a specific performance, that the trust deed was not drawn to be executed jointly by him and

<sup>1</sup> 3 Mylne & Craig 69.

his brother, and that it contained this stipulation. A short answer to this objection is found in the fact, that the parties had disagreed in relation to the payment to be made, and until the disagreement ceased no deeds were required. It is admitted that the form of the trust deed was not such a one as the defendant was bound to receive, but as it was sent to him for examination, good faith and fair dealing required him to indicate in what particulars it was defective, or with which clauses he was dissatisfied. Whether it was the duty of the complainant or defendant to prepare the trust deed, according to the usage prevailing in Washington, is not entirely clear from the evidence. There is testimony both ways. The true rule, independent of any usage on the subject, would seem to be that the party who is to execute and deliver a deed should prepare it. It is, however, immaterial for this case what rule obtains in Washington. Until the purchase-money was accepted, there was no occasion to prepare any instrument for execution. So long as that was refused the preparation of a trust deed was a work of supererogation. Besides, the execution of the trust deed by the complainant was to be simultaneous with the execution of a conveyance by the defendant. The two were to be concurrent acts; and if the complainant was to prepare one of them, the defendant was to prepare the other, and it is not pretended that the defendant acted in the matter at all.

The objection to the trust deed, founded upon the omission of the name of the complainant's brother as a co-grantor, does not merit consideration. All that the defendant had to do was to see that he got a trust deed, as security for the deferred payments, from the party to whom he transferred the title.

The defendant states in his testimony that when the lease was executed he objected to the stipulation for a sale of the premises, and that the defendant told him that it should go for nothing. And it has been argued by counsel that this evidence should control the terms of the covenant. The answer to the position taken is brief and decisive. First, nothing of the kind is averred in the answer; second, the testimony of the defendant in this particular is distinctly contradicted by that of the complainant, and is inconsistent with the attendant circumstances; and, third, the evidence is inadmissible. When parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law.

Upon a full consideration of the positions of the defendant we perceive none which should preclude the complainant from claiming a specific performance of the contract.

The only question remaining is, upon what terms shall the decree be made? and upon this we have no doubt.

The parties, at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable to compel a transfer of the property for notes worth, when tendered in the market, only a little more than one-half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity.

The decree of the court below will, therefore, be reversed, and the cause remanded with directions to enter a decree for the execution, by the defendant to the complainant, of a conveyance of the premises with warranty, subject to the yearly ground-rent specified in the covenant in the lease, upon the payment by the latter of the installments past due, with legal interest thereon, in gold and silver coin of the United States, and upon the execution of a trust deed of the premises to the defendant as security for the payment of the remaining installments as they respectively become due, with legal interest thereon, in like coin; the amounts to be paid and secured to be stated, and the form of the deeds to be settled by a Master; the costs to be paid by the complainant.

The CHIEF JUSTICE with NELSON, J., concurred in the conclusion as above announced—that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin—but expressed their inability to yield their assent to the argument by which, in this case, it was supported.

THE TRUSTEES OF COLUMBIA COLLEGE, IN THE CITY OF  
NEW YORK, RESPONDENT, v. THOMAS THACHER,  
IMPLEADED, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 17, 1882.

[*Reported in 87 New York Reports 311.*]

APPEAL from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made June, 1880, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The action was brought to enforce the observance of certain covenants in an agreement made on the 25th of July, 1859, between the plaintiffs and Joseph D. Beers, who then owned adjacent portions of the block of land between Fifth and Sixth Avenues and Fiftieth and Fifty-first Streets, New York, in respect to the mode of improvement and the future occupation of their respective portions.

The case upon a former appeal is reported in 70 N. Y. 440. Beers owned the portion of the block on the westerly or Sixth Avenue side, and the plaintiffs the land adjoining on the east. The property was then vacant. The general object of the agreement as stated therein was "to provide for the better improvement of the said lands, and to secure their permanent value," which was to be accomplished by the erection, by both parties, of dwelling-houses of a superior class, which were to be set back eight feet, and to be used exclusively as dwelling-houses, the covenant of Beers for himself, his heirs and assigns being not to erect, establish or carry on "in any manner, on any part of the said lands, any stable, school-house, engine-house, tenement or community-house, or any kind of manufactory, trade or business whatsoever, or erect or build, or commence to erect or build, any building or edifice with intent to use the same, or any part thereof, for any of the purposes aforesaid." The covenant of the plaintiffs was, that they would insert similar restrictions in all leases executed by them. The defendant Lynch acquired title to the lot on the corner of Fiftieth Street and Sixth Avenue by sundry *mesne* conveyances from Beers, each of which expressed that it was made subject to this agreement. She erected a four-story brown-stone front dwelling-house upon the premises, of the full width thereof, fronting on and entered by a high stoop from Fiftieth Street; having, in the basement story in front, by the side of the stoop, and on the side opening on Sixth Avenue, French windows, two of which, on Sixth Avenue, and one on Fiftieth Street, were used as entrance doors to the basement and offices hereinafter mentioned. At the time of the commencement of this action, defendant Yates occupied a portion of the

basement as a dwelling for himself and family, having in one room thereof a real estate office, and using it for that business, with a business sign; and the defendant Blaisdell occupied a room in said office for receiving orders for painting, having also a business sign. During the pendency of this action the defendant Thacher became the owner of the said premises, having purchased the same with notice of said agreement and of this action, and he was made a defendant herein by an order of the court, upon his own application. The court found that said "Thacher permits certain parts of the house upon said premises to be occupied by his tenants for the purpose of trade and business; that is to say, apartments in the first story of said house for the business of a tailor and for that of a milliner, and apartments in the basement of the said house for the business of an insurance agent, of a newspaper dealer, of two express carriers, and of a tobacconist, which trades or businesses were carried on in the said house at the time of the trial. That the several trades or businesses carried on as aforesaid by the defendants Yates and Blaisdell, at the time of the commencement of the action, and by the tenants of the defendant Thacher at the time of the trial, were violations of the agreement above set forth, and of the spirit as well as the letter thereof. That since the action was begun an elevated railway has been built in the Sixth Avenue, running by the said premises, and a station thereof established at the intersection of Fiftieth Street and the Sixth Avenue, in front of said premises, and that the said railway and station affect the said premises injuriously, and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation. The said railway and station, however, do not injuriously affect all the property fronting on Fiftieth Street and included in the said covenant, but only a comparatively small part thereof."

Further facts appear in the opinion.

*A. J. Dittenhoefer* for appellant.

*S. P. Nash* for respondents.

DANFORTH, J. The validity and binding obligation of the covenant cannot be questioned by the defendant Thacher.<sup>1</sup> Moreover it appears that he bought with notice, not only of the agreement, but of this action. He, therefore, could not take the property without performing the obligation attached to it, and must be deemed to have taken it at his own peril, to the extent of such judgment as might be rendered in the action. It is claimed in his behalf that the business charged in the complaint to have been carried on does not come within the prohibition of the covenant. This question was not raised upon the former trial, and of course

<sup>1</sup> Trustees of Columbia College *v.* Lynch, 70 New York 440.

there is nothing in our decision <sup>1</sup> to prevent its litigation upon the trial then ordered, and now under review. The words are very plain; they include "any kind of manufactory, trade or business whatsoever," upon the premises. The complaint shows their occupation in part by "a real estate and insurance broker or agent," and in part by "sign and fresco painters," while the finding of the trial judge—and this is somewhat more important—shows that "the business of a tailor and milliner, of a newspaper agent, express carriers, a tobacconist, as well as that of an insurance agent," were carried on by permission of the defendant at the time of the trial. It would be a useless waste of time to argue that these vocations—for employment or profit, whether described in the complaint, or found by the court—have no relation to the exclusive use to which the premises were set apart. In such a suit as this, the relief which the court can give must depend upon the condition of things at the time of the trial. We have no doubt that the conclusion of the trial judge was right upon the point presented, and agree with him, that these several trades or occupations were violations, not only of the spirit, but also of the letter of the covenant.

Now, having before us a covenant binding the defendant, and his breach of it, if there is nothing more, the usual result must follow, viz.: an injunction to keep within the terms of the agreement; for the case would come under the rule laid down in *Tipping v. Eckersley*,<sup>2</sup> thus: "If the construction of the instrument be clear, and the breach clear, then it is not a question of damage, but the mere circumstance of a breach of covenant affords sufficient ground for the court to interfere by injunction." Indeed, this has in substance been recognized in the decision before made by us.<sup>3</sup> It was then, however, suggested, that another trial might disclose objections not before us, and it is now claimed by the appellant, that there has been such an entire change in the character of the neighborhood of the premises, as to defeat the object and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privilege of conforming his property to that character, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. The agreement before us recites, that the object which the parties to the covenant had in view was "to provide for the better improvement of the lands, and to secure their permanent value." It certainly is not the doctrine of courts of equity, to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief

<sup>1</sup> 70 N. Y., *supra*.<sup>2</sup> 2 K. & J. 264, 270.<sup>3</sup> 70 N. Y., *supra*.



he seeks would be inequitable.<sup>1</sup> If for any reason, therefore, not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere, or if in fact the condition of the property by which the premises are surrounded has been so altered "that the terms and restrictions" of the covenant are no longer applicable to the existing state of things.<sup>2</sup> And so though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff.<sup>3</sup>

There is, no doubt, difficulty in embodying these principles in any general rule applicable alike to all cases, but in any given instance a court can more easily determine whether it should interfere, or leave the plaintiff to his remedy at law. In *Clarke v. The Rochester, Lockport and Niagara Falls Railroad Company* (*supra*), there was a duty imposed by statute upon the defendant to construct a farm crossing, and the plaintiff sued in equity for its performance. He succeeded at special Term, but the General Term dismissed his complaint so far as it demanded equitable relief, yet allowed it to stand for the assessment of damages. This result was reached, because the expense to the defendant in constructing the crossing "would much exceed the value of it to the plaintiff," and so in the opinion of the court there was not only an absence of proof that the enforcement of the performance of the duty would be equitable, but it was affirmatively proved that it would be inequitable. There, the plaintiff's case was within the statute<sup>4</sup> requiring railroad corporations to erect farm crossings for the use of the proprietors of land adjoining such railroad—and so the court held—but also that a refusal to perform did not, as of course, entitle the plaintiff to the interposition of a court of equity. In *Willard v. Tayloe* (*supra*), the court refers to cases where a claim had, in the discretion of the court, been denied, because of some irregularity or unfairness in the terms of the contract, by reason of which injustice would have followed a specific performance, and to others which show that the same discretion is exercised where the

<sup>1</sup> *Peters v. Delaplaine*, 49 N. Y. 362; *Margraf v. Muir*, 57 id. 155; *Mathews v. Terwilliger*, 3 Barb. 51; *Radcliffe v. Warrington*, 12 Vesey 331.

<sup>2</sup> 1 Story's Eq. Jur. (10th ed.), § 750.

<sup>3</sup> *Willard v. Tayloe*, 8 Wall. 557; *Thomson v. Harcourt*, case 66, p. 415, vol. 2, Brown's Parliamentary Reports; *Davis v. Hone*, 2 Sch. & Lef. 340; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Clarke v. Rochester, Lockport and Niagara Falls Railroad Company*, 18 Barb. 350.

<sup>4</sup> Laws of 1850, chap. 140, §§ 50, 49, 44.

contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work the same result, or even hardship, to either of the parties. In that case, although relief was granted, it was upon reasons which do not concern the one in hand, and it was also said that it was "not sufficient to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect," but "it must also appear that the specific performance will work no hardship or injustice." In *Thomson v. Harcourt* (*supra*), the irregularity of the bargain related exclusively to the time when performance was demanded. In *Baily v. De Crespigny* (*supra*), we find a case whose facts come near to those before us. The action was at law for damages for breach of an agreement that neither the defendant nor his assigns would permit any building to be placed upon a certain "paddock" fronting the demised premises. The plea alleged the purchase and a compulsory taking of it by a railroad company for the purposes of their incorporation, and the erection upon it, by them, of the structure complained of as a breach of covenant. Upon demurrer judgment was given for the defendant, upon the ground that the transfer to the company was not by voluntary act of the prior owner, but by compulsion of law, and the court was of opinion that he was discharged from his covenant, on the principle expressed in the maxim, "*lex non cogit ad impossibilia*."

In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complainant and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled. The general current of business affairs has reached and covered the entire premises fronting on Sixth Avenue, both above and below the lot in question. If this was all, however, the plaintiffs would be justified in their claim, for it is apparent from the agreement that such encroachment was anticipated, and that the parties to it intended to secure the property in question from the disturbance which business would necessarily produce. But the trial court has found that since the action was begun an elevated railway has been built in the Sixth Avenue. It runs past the premises, and a station has been established in front of them, at the intersection of Fiftieth Street. He finds that "the railway and station

affect the premises injuriously and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation." The evidence sustains the finding. The premises may still be used for dwellings, but the occupants are not likely to be those whose convenience and wishes were to be promoted by the covenant, persons of less pecuniary ability, and willing to sacrifice some degree of comfort for economy, transient tenants of still another class, whose presence would be more offensive to quiet and orderly people who might reside in the neighborhood. Not only large depreciation in rents when occupied, but also frequent vacancies have followed the construction of the road. Its trains, propelled by steam, run at intervals of a few minutes, until midnight. The station covers from fifteen to twenty feet of the street opposite the defendant's premises. Half the width of the sidewalk is occupied by its elevated platform. From it persons waiting for the trains, or there for other purposes, can look directly into the windows. Noise from its trains can be heard from one avenue to the other.

It is obvious, without further detail, that the construction of this road and its management have rendered privacy and quiet in the adjacent buildings impossible, and so affected the premises of the defendant, and all those originally owned by him, who, with the plaintiff, entered into the covenant, that neither their better improvement nor permanent value can be promoted by enforcing its observance. Nor are the causes of this depreciation transient. The platform of the railroad station, which renders inspection of the interior of the house easy to all observers; the stairs, which render the road accessible, must remain so long as the road is operated; and the noise and smoke are now, at least, an apparent necessity, consequent upon its operation. It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the Legislature, and, by reason of it, there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood, and property values. It has made the defendant's property unsuitable for the use to which, by the covenant of his grantor, it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity. The land in question furnishes an ill seat for dwelling-houses, and it cannot be supposed that the parties to the

covenant would now select it for a residence, or expect others to prefer it for that purpose. And although the land has not itself been taken, as in *Baily v. De Crespigny* (*supra*), for actual occupation by the railroad, the railroad has encumbered the walks and streets about it, and taken away those advantages of situation which induced its owners to dedicate it to dwellings instead of stores, and to retirement rather than to the bustle of business. Submission to this is necessary, because it is authorized by the Legislature, and so the defendant is made incapable of carrying out, if he should desire it, the wishes of those by whose agreement he would otherwise be bound.

There is, I think, no merit in the respondent's suggestion that the change in the character of the neighborhood is insufficient so long as it does not extend to all the property affected by the agreement. If this assumption is well founded—if the influence of the road is felt only by the portion of land owned by the defendant, it is still apparent that the original design of the parties has been broken up by acts for which neither the defendant nor his grantors are responsible, that the object of the covenant has been, so far as the defendant is concerned, defeated, and that to enforce it would work oppression, and not equity.

To avoid this result the judgment appealed from should be reversed, and the complaint dismissed, but as this result is made necessary by reason of events occurring since the commencement of the action, it should be without costs.

All concur.

Judgment reversed, and complaint dismissed.

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J. R. THOMPSON v. H. T. WINTER.

IN THE SUPREME COURT OF MINNESOTA, NOVEMBER 30, 1889.

[*Reported in 42 Minnesota Reports 121.*]

APPEAL by plaintiff from an order of the district court for Redwood County, refusing a new trial after a trial by Webber, J., who ordered a dismissal without prejudice to plaintiff's right to bring an action for damages.

*John H. Bowers* for appellant.

*J. M. Thompson* for respondent.

GILFILLAN, C.J. This is an action to compel specific performance of a contract in the nature of one to convey real estate. The defendant had purchased the land from the State, paying 15 per cent. of the purchase price, and receiving certificates of purchase. February 1,

1886, these parties entered into a contract in writing, whereby defendant agreed that, upon full performance on the part of the plaintiff, he would transfer by deed of assignment the said land certificates. Plaintiff was to pay therefor \$590, according to two promissory notes—one for \$190, due October 1, 1886, with interest at 10 per cent., and one for \$400, due two years from February 1, 1886, with interest at 8 per cent.—and pay all taxes and assessments, and the unpaid purchase-money to the State. The plaintiff fully performed this contract on his part. In March, 1886, the parties made an oral agreement, by which defendant agreed to make certain improvements for the plaintiff on the land, by breaking, erecting buildings, and digging a well, for which plaintiff agreed to pay him the cost thereof, with interest; such payment not to be made before the expiration of five years from the time of making the improvements. Afterwards, pursuant to such agreement, defendant made such improvements to the amount of \$500, no part of which has been paid. The plaintiff was insolvent. On these facts the court below denied specific performance.

From the memorandum filed by the court below it appears that the specific performance was refused, in the exercise of what the court deemed its discretionary power, the reason for so exercising that power being stated that plaintiff has become insolvent; that the value of the improvements is equal to the purchase price; and that plaintiff can be compensated in damages. The mere fact that a person has a contract for the conveyance to him of real estate does not entitle him, as of right, to the interposition of a court of equity to enforce it. The matter of compelling specific performance is one of sound and reasonable discretion—of judicial, not arbitrary and capricious, discretion. There must be some reason, founded in equity and good conscience, for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud or unconscionableness in the contract, or in some laches on the part of the plaintiff changing the circumstances so as to make it inequitable to compel a conveyance, or where the claim is stale, or there is reason to believe it was abandoned. But, whatever the reason may be, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff, nor because the defendant had some independent claim which he might not be able to enforce against the plaintiff. If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all unclosed transactions between the parties, whether relating to the contract or subject-matter of the action, or entirely distinct from it. In this case there is

no reason to suppose the contract other than a fair one. The plaintiff has been prompt in performing on his part, and in seeking his remedy. The defendant has a claim against plaintiff, entirely independent of the contract to convey, which claim, by the terms of the agreement under which it arose, was not to become due for more than three years after the time when he was to convey. The possibility that when it becomes due he may not be able to enforce it, by reason that plaintiff's insolvency may continue, does not make it inequitable to enforce this contract already matured. That a purchaser may have an adequate remedy by action for damages, although a reason for not holding what he has done to be part-performance to take the case out of the operation of the Statute of Frauds is of itself no reason for withholding the proper remedy, where the contract is valid under the statute. The order is reversed, and the court below will enter judgment on the findings of fact in favor of plaintiff for the relief demanded in the complaint.

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CLARENCE R. CONGER, INDIVIDUALLY AND AS TRUSTEE, ETC.,  
ET AL., APPELLANTS, *v.* THE NEW YORK, WEST SHORE  
AND BUFFALO RAILROAD COMPANY, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 18, 1890.

[*Reported in 120 New York Reports 29.*]

APPEAL from a judgment of the General Term of the Supreme Court of the Second Judicial Department, entered upon an order made July 2, 1887, which affirmed a judgment in favor of defendant entered upon the decision of the court on trial at Special Term.

The nature of the action and the facts are sufficiently stated in the opinion.

*Clarence R. Conger* for appellants.

*Calvin Frost* for respondent.

HAIGHT, J. This action was brought to compel a specific performance of a contract. The Jersey City and Albany Railway Company was incorporated for the purpose of constructing and operating a railroad from Fort Montgomery, in the county of Orange, to a point on the Hudson River opposite to the city of New York. As such incorporation it entered into a written agreement with one Catherine A. Hedges, the plaintiff's grantor, in and by the terms of which she gave to the company a right of way across her premises in Rockland County upon certain conditions, one of which was that the company should locate a station in the gorge commonly known as the Long Clove, and stop thereat five express trains each way daily. Subsequently the Jersey

City and Albany Railway Company was consolidated with the North River Railway Company, under the name of the North River Railroad Company, and that company was consolidated with the defendant, which was incorporated for the purpose of constructing and operating a railroad from the New Jersey State line through the State of New York to the city of Buffalo.

The defendant has entered upon the lands of the said Catherine A. Hedges and constructed its roadbed across the same, but it has not constructed any station thereon in the Long Clove gorge or stopped any of its express trains thereat.

The trial court has found as facts that a suitable station for the accommodation of passengers and the receipt and delivery of freight at the Long Clove gorge could be built by the defendant only at a considerable expense, because of the nature of the ground at that point; that the place where the plaintiffs demand that the station be located is near the mouth of a long tunnel and at a sharp curve in the defendant's railroad, upon the side of a steep mountain approached by steep grades in both directions; that it is sparsely settled, and if a station were established there it would be of no use to the public; that very little, if any, benefit would result to the plaintiffs by the erection of a station or the stoppage of the trains thereat; that the public convenience would not be promoted, but the public travel would be delayed; and, as a conclusion of law, that a specific enforcement of the agreement would work hardship and injustice to the defendant, and such enforcement would not subserve the ends of justice; that specific performance should be denied and the plaintiffs left to their action for damages for a breach of the contract. The evidence sustains the findings of the trial court which have been affirmed by the General Term.

The questions for our consideration are, therefore, narrowed to a determination as to whether the conclusions of law reached are justified under the findings of fact.

It has become the well-settled doctrine of this court that the specific performance of a contract is discretionary with the court, and that performance will not be decreed where it will result in great hardship and injustice to one party, without any considerable gain or utility to the other, or in cases where the public interest would be prejudiced thereby.<sup>1</sup>

As we have seen, the Long Clove gorge is located upon the side of a steep mountain, in a sparsely-settled district, and is approached by a steep grade, and that a passenger station with an approach thereat could

<sup>1</sup> *Clarke v. R. L. & N. F. R.R. Co.*, 18 Barb. 350; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311-317; *Murdfeldt v. N. Y., W. S. & B. R.R. Co.*, 102 *id.* 703; *Day v. Hunt*, 112 *id.* 191-195.

be constructed only at a considerable expense. These are reasons worthy of consideration, but if there were no others the trial court might not have deemed them sufficient to refuse specific performance. But they are followed by another, which gives additional force and weight, and that is that public travel will be delayed by the stoppage of the trains and that the public convenience will not be promoted.

The defendant is a corporation organized under the laws of the State, and is a common carrier of passengers and freight ; its duties are largely of a public nature, and it is bound to so run its trains and operate its road as to promote the public interest and convenience ; and in view of the fact that but little, if any, benefit would result to the plaintiffs by the erection of a station and the stoppage of trains thereat, as found by the trial court, it appears to us that that court properly refused to decree specific performance and remanded the plaintiffs to their action for damages.

The judgment should be affirmed, with costs.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

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FREDERICK MILES, APPELLANT, v. THE DOVER FURNACE  
IRON COMPANY ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 13, 1891.

[*Reported in 125 New York Reports 294.*]

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made June 27, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to recover of defendant, the Dover Furnace Iron Company, damages sustained by plaintiff by reason of the failure to deliver certain iron-ore in accordance with the terms of a contract between it and plaintiff, and also to compel said company to execute a lease to plaintiff as provided for by said contract.

The contract recited that said company had conveyed to plaintiff certain described premises, upon which was an iron-mine then being worked by it, which conveyance was to secure a loan, and plaintiff agreed, upon repayment of the loan, to reconvey the premises to the company. The company was to retain the possession and use of the premises, with the right to work the mine and sell the ore ; it agreed to deliver to plaintiff a certain quantity of the ore at prices specified.

The contract then contained this clause :

"And it is further agreed that in consideration of the premises and



one dollar to it in hand paid by said Frederick Miles, of said Salisbury, the said Dover Furnace Iron Company agrees that, in case they shall be able to and do repay said moneys as provided herein, that, at the expiration of said two years, said company will make, execute, and deliver to said Miles a good and sufficient lease for the space of twelve years, giving and granting the right and privilege to mine and take from the ore-bed of said company, on said described premises, ore below twenty-five feet from the present level, or lowest point where said company are now working, with a privilege of washing ore on said premises and of taking ore on track to the Harlem track, jointly with said company, for a royalty to be paid by said Miles to said Dover Furnace Iron Company of twenty-five cents per ton."

The further facts, so far as material, are stated in the opinion.

*Homer A. Nelson* for plaintiff.

*H. D. Hufcut* for defendants.

FINCH, J. These are cross-appeals, the defendant questioning the judgment for damages awarded against him and the plaintiff complaining that a specific performance of the contract for a twelve-years' lease of the iron-mine was refused and small damages given him as the value of the lease.

But the principal discussion has grown out of the plaintiff's appeal.<sup>1</sup> By the terms of the contract he was entitled to a twelve-year's lease of the right to take out iron-ore from the mine at a level twenty-five feet below the working of the defendant, paying therefor a royalty of twenty-five cents a ton. Proof was given tending to show that the mine could not be profitably worked in that manner; that the upper drifts or areas could not be adequately supported from below at any cost leaving room for profit; that the earth and ore would be likely to fall in; and that difficulties and disagreements would prove inevitable. Upon the proofs the court found as facts that the plaintiff could not work and take out ore below the existing level without interfering with the owner of the mines in working the upper part, and that the mine would probably be very much injured in value should the lease be made—injured beyond the lease itself—and if worked by both interests would probably result in litigation and trouble. The court thereupon awarded damages in lieu of a specific performance, which was refused, and that refusal, it is claimed, was erroneous and should be reversed.

The right to a specific performance by the decree of a court of equity rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of sound discretion.<sup>2</sup> Enough appeared in the evidence to justify a conclusion that

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

<sup>2</sup> *Seymour v. Delancey*, 6 J. Ch. 222; *Margraf v. Muir*, 57 N. Y. 155.

the lease would be of little benefit to the plaintiff and yet work almost a destruction of the mine, and so a specific performance would simply injure both parties and benefit neither. Under such circumstances the court had a right to substitute damages for the breach in the room of specific performance.

It is now objected that such defense should have been pleaded, and that the question was raised in time. I do not think the facts were new matter constituting a defense. Indeed, they were not a defense at all. They left the defendant guilty of a breach of its contract and liable for its default, and so respected merely the form of the remedy which the court should administer. The plaintiff in his complaint asked, as he had a right to, both damages for a breach of the entire contract and a specific performance of a single branch of it, and himself raised the question which relief should be granted, and made admissible all the facts of the situation bearing upon the alternative and the exercise of the discretion invoked. It was his duty to show that the specific performance he sought would be, under the circumstances, an equitable and just remedy, and what he was required to establish the defendant might disprove so long as he confined himself to the character and consequences and effect of the very contract in issue.

The judgment should be affirmed, without costs to either party against the other.

All concur.

Judgment affirmed.

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MARY V. AMERMAN, APPELLANT, *v.* BERTHA A. DEANE,  
RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 19, 1892.

[*Reported in 132 New York Reports 355.*]

APPEAL from order of the General Term of the Superior Court of the city of New York, made August 27, 1889, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*W. J. Townsend* for appellant.

*Cephas Brainerd* for respondent.

HAIGHT, J. This action was brought for a permanent injunction, and for damages.

Clarence S. Brown was the former owner of a block of land in the

city of New York, bounded on the north by Sixty-fourth Street, on the east by Ninth Avenue, on the south by Sixty-third Street, and on the west by Tenth Avenue. He made conveyances of separate parts of such block to different parties, all of which conveyances were made subject to certain restrictions and covenants, among which was that the grantee, his heirs and assigns, would not, at any time thereafter, erect, suffer or permit upon the premises thereby conveyed, or any part thereof, any tenement-house; and it was agreed between the parties to such conveyance that such covenants should run with the land.

The defendant, through various mesne conveyances from Brown, under deeds containing the restriction and covenant above mentioned, has become the owner of a lot on the southeast corner of Tenth Avenue and Sixty-fourth Street; the plaintiff, in like manner, has become the owner of a private residence on the south side of Sixty-fourth Street, distant forty-two feet and nine inches easterly from the rear of defendant's lot. Since the purchase by the plaintiff of her residence, the defendant has erected upon her lot a tenement-house in violation of the restriction and covenant alluded to. The building contains a frontage of seventy-five feet on Tenth Avenue, and ninety-five feet on Sixty-fourth Street. It is arranged for three stores fronting upon the avenue, and three stores fronting upon Sixty-fourth Street, with four stories above the first floor, each arranged for the accommodation of four families.

Flat or tenement houses of the ordinary description have been erected for a considerable distance below Sixty-third Street, on both sides of Tenth Avenue; also on the opposite side of Tenth Avenue, between Sixty-third and Sixty-fourth Streets; also upon the entire block fronting on the easterly side of Tenth Avenue from Sixty-fourth Street to Sixty-fifth Street; also in the middle of the block, between Ninth and Tenth Avenues on the northerly side of Sixty-third Street; ordinary tenement-houses have been built on the southerly side of Sixty-third street from Ninth Avenue westwardly, covering more than half of the block; flat or tenement houses have been built opposite the premises of the plaintiff, on the northerly side of Sixty-fourth Street, and like houses have been built for a considerable distance northward on both sides of Tenth Avenue. On the northwesterly corner of Tenth Avenue and Sixty-fifth Street is an establishment for the manufacture of illuminating gas, and on the block below, on the westerly side of Tenth Avenue, are carpenter-shops, liquor and beer saloons, blacksmith-shops, and one tenement or flat house.

The trial court refused a permanent injunction, but awarded damages to the plaintiff in the sum of fifteen hundred dollars, and an injunction restraining the defendant from renting the building upon her lot to any

tenant until such damages, together with the costs of the action, shall be paid.

The facts to which we have alluded were found by the trial court, and are such as to entitle the plaintiff to an injunction were it not for the fact that the surrounding neighborhood has been chiefly built up and occupied with flat or tenement houses. The defendant's building is a large one, constructed at considerable expense, and is in a neighborhood devoted chiefly to the residence of people for which the defendant's building was designed; if enjoined from using the same for that purpose, the defendant must necessarily suffer damages greatly in excess of any which is likely or possible to be sustained by the plaintiff.

In the case of *Trustees of Columbia College v. Thacher*,<sup>1</sup> it was held, that whilst a court of equity has jurisdiction to enforce the observance of covenants made by an owner of lands in a city, with an adjoining owner, in consideration of similar reciprocal covenants on the part of the latter, restricting the use of the lands to the purposes of private residences, the exercise of this authority is within its discretion; and where there has been such a change in the character of the neighborhood as to defeat the object and purposes of the agreement, and to render it inequitable to deprive such owner of the privilege of conforming his property to that character, such relief will not be granted.

In *High on Injunctions* (§ 22), it is said, if it is apparent upon an application for an injunction that the relief sought is disproportioned to the nature and extent of the injury sustained, or likely to be sustained, the court will decline to interfere. And again at section 1158, where the character and condition of the adjoining lands, with reference to that conveyed, have so changed as to render the restriction in the conveyance inapplicable, according to its true intent and spirit, a court of equity will not interfere by injunction to prevent a breach of the covenant, but will leave the party aggrieved to his remedy at law.<sup>2</sup>

Under the rule to which we have called attention, and the facts disclosed, the trial court properly withheld a permanent injunction, and confined the relief of the plaintiff to damages.

As we have seen, the trial court awarded fifteen hundred dollars as damages. This was found to be the difference in value of the plaintiff's premises, with and without the defendant's tenement building. The award is for the permanent injury sustained. The defendant's building was in process of construction when this action was brought. At the time of the trial, it had been completed, but was only partially occupied. The plaintiff's damages depended not upon the construction of the

<sup>1</sup> 87 N. Y. 311.

<sup>2</sup> *Conger v. N. Y., West Shore & Buffalo Railroad Company*, 120 N. Y. 29; *Margraf v. Muir*, 57 id. 155; *Peters v. Delaplaine*, 49 id. 362.

building, but the use made of it. If it should never be used for a tenement building, no damages would result, and if, as is claimed, damages only could be awarded to the time the action was commenced, none could be allowed for the reason that at that time none had been sustained. It appears to have been upon this theory that the General Term ordered the reversal of the judgment, following the cases of *Pond v. Metropolitan El. Railway Co.*,<sup>1</sup> *Uline v. N. Y. C. & H. R. R.R. Co.*,<sup>2</sup> and other kindred cases; but those cases were actions for damages, and were disposed of upon the theory that as to the plaintiff there was an unlawful structure upon his easement, amounting to a nuisance. That being a nuisance, the defendant was under a legal obligation to remove it, and the law would not presume that he would not do so. For that reason damages could only be recovered up to the time of the commencement of the action.

We do not regard these cases as having any application to the question under consideration. The defendant's building does not encumber or interfere with any easement of the plaintiff; it is not unlawful or a nuisance. There is consequently no presumption that it will be abated or discontinued. The devoting of it to the use for which it was constructed operates as a breach of the covenant embraced in the deeds to which we have alluded, and because of such breach, the plaintiff is entitled to damages. The building is a permanent structure, specially arranged for continued use as a tenement or flat house. This action is in equity, and one of the objects sought is to avoid a multiplicity of actions which might be brought in case only past damages could be recovered.

We see no reason why permanent damages may not be awarded. This right is recognized by the recent cases.

In *Pappenheim v. Met. El. Railway Company*,<sup>3</sup> Peckham, J., in delivering the opinion of the court, says: "In an action at law, the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can only recover the damages which he has sustained up to the commencement of the action. . . . But the owner can resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damages which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey the right to the defendant."<sup>4</sup>

<sup>1</sup> 112 N. Y. 186.

<sup>2</sup> 101 id. 98.

128 N. Y. 436.

<sup>4</sup> *Thompson v. Manhattan Railway Company*, 41 N. Y. S. Rep. 697; *Henderson v. N. Y. C. R.R. Co.*, 78 N. Y., 423-434.

We discover no exceptions in the case that call for a reversal of the judgment. Evidence was received in reference to there being windows on the east end of the building, but it was received only for the purpose of showing the kind of house that was erected, and no claim for damages was made by reason of such windows. To the question as to what the effect would have been upon the plaintiff's property, if instead of the house erected by Mr. Dean there had been placed houses corresponding in quality and character to those which front on Tenth Avenue above Sixty-fourth Street, the answer of the witness is, that he did not know the character of those houses. He does not pretend to speak as to the effect, and consequently the exception taken is not available. His answer to the next question is in favor of the defendant, and consequently did her no harm.

The damages awarded by the trial court was for the permanent injury sustained by the plaintiff by reason of the breach of the covenant alluded to. Under the practice adopted in kindred cases, the trial court might properly have required the plaintiff, upon the receipt of the damages awarded, to have duly executed, acknowledged and delivered to the defendant a release from the covenant, so far as it restricts the use of the premises for the purpose of a tenement-house. Whilst this requirement may not be necessary to bar a further action for damages, it seems but just, under the circumstances and in view of the liberal award made, that the release should be given.

The order of the General Term will, therefore, be affirmed, and judgment absolute ordered against the appellant upon her stipulation, with costs, unless within thirty days she stipulates that the judgment of the trial court be modified, by adding thereto a provision that upon the payment to her of the damages and costs awarded by the trial court she execute, acknowledge and deliver to the defendant a release from the covenant embraced in the deed, so far as it restricts the use of the premises for the purpose of a tenement-house. If such stipulation is given, the order of the General Term is reversed, and the judgment of the trial court, as so modified, is affirmed, without costs.

All concur.

Ordered accordingly.

## FRANKLIN TELEGRAPH COMPANY v. HARRISON.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 16, 1892.

[*Reported in 145 United States Reports 459.*]

THE CASE is stated in the opinion.

*Mr. John F. Dillon* and *Mr. Rush Taggart* for appellants.

*Mr. R. C. McMurtrie* and *Mr. S. S. Hollingsworth* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought to obtain a decree restraining the appellants, the defendants below, from terminating or in anywise interfering with the use by the appellees, the plaintiffs below, of a telegraph wire upon the poles of the defendants between Philadelphia and New York, and requiring the defendants to maintain such wire in good working order for the use of plaintiffs and their licensees.

The plaintiffs base their claim to this relief upon a written contract made in 1867 with the Franklin Telegraph Company, a Massachusetts corporation, acting for itself and other companies. As the case depends upon the construction of that contract, it is given in full, as follows :

“Memorandum of agreement made this 21st day of May, 1867, by the Franklin Telegraph Company for their own account and on behalf of the Insulated Lines Telegraph Company, of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co., manufacturing chemists of Philadelphia, of the other part :

“Witnesseth, That the party of the first part, for and in consideration of the relinquishment by the parties of the second part to the party of the first part of a valuable contract made by the party of the second part with the Insulated Lines Telegraph Company, hereby grants to the party of the second part the right to put up, maintain and use a telegraphic wire between the cities of New York and Philadelphia, upon the poles of the Franklin Telegraph Company, or of the Insulated Lines Telegraph Company, or of those persons or corporations whose property has lately been purchased by or consolidated into the stock of the party of the first part. And the party of the second part are privileged at their option to allow four other parties to use the same with them, they and the licensees aforesaid to have priority in the use of the said wire, for transmission of messages free of all expense. The party of the first part to have the use of the same when not so employed. And in consideration of allowing the use of said wire to the party of the first part when they, the said parties of the second part and

the licensees aforesaid, are not using the same, the party of the first part agrees, said wire having first been put up to the acceptance of J. G. Smithe, the superintendent of said Franklin Telegraph Company, and accepted by him, to keep and maintain at their own expense the said wire in good working order to and between the offices of the parties of the first part in New York and Philadelphia, and between said offices and the places of business of the parties of the second part and such four other persons or firms in the said cities of New York and Philadelphia, all expenses of batteries, etc., connected with the working of said wire to be paid by the parties of the first part. At the expiration of ten years the party of the second part agree that their private wire shall belong to the parties of the first part ; after which time the parties of the first part agree to lease the same to the party of the second part, for the use of themselves and such other four persons or firms as the party of the second part shall suffer and permit or license to use the same, for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part.

“The party of the second part, however, agree that no assignment by them of their right under this contract shall give their assignees the right to demand a lease of the said wire after the expiration of the ten years, which right is to be a personal privilege of the party of the second part or of that firm for the time being.

“It is further agreed that the right of giving the use of the wire to four other parties shall be exercised by the party of the second part or their assignees only by giving the same to any person or firm not being a telegraph company, a banker, or stock or exchange broker or railroad company.

“And in case the party of the second part shall procure a charter to carry on the business they are now engaged [in], or a similar business, the privileges and rights of the party of the second part shall enure to said corporation in like manner as if such corporation had been named as the party of the second part herein.

“In case of any disagreement on that or any other point embraced in this contract, the decision of the same shall be left to two disinterested persons mutually chosen by the parties hereto, with a right to call in a third as umpire, whose decision shall be final.

“In case those objections are held valid by the arbitrators and not acquiesced in by the parties of the second part, the party of the first part reserves the right to purchase the said wire at a fair valuation, to be determined by referees in the same manner as any other matter in this agreement ; with the above exception, the party of the second part has the right of transfer.



"No change in the firm or firm name of the party of the second part or those interested through them by death or retirement or by addition of members to said firm or from other cause shall vitiate the right or title of the party of the second part under this contract or destroy its continuance in full force to such new firm and the members thereof as if they were named herein.

"The parties of the second part and those interested through them are not to do other than their own legitimate mercantile and personal business. Should they be willing to transmit any other messages they are to charge the company's regular tolls and hand the same over weekly to the proper officers of said companies without discount or diminution.

"In case of a violation of this contract in this respect by the party of the second part or their licensees, they shall respectively pay the parties of the first part four times the current rates of similar messages and the expenses of recovering the same as liquidated damages, and if this should continue and be found by arbitration to have been intentionally persisted in, it shall terminate this contract against the offending party, whether Harrison Bros. & Co., or either of their licensees.

"It is agreed by the Franklin and Insulated Lines Telegraph Companies that no debts at present made or hereafter contracted shall in any way affect or injure the rights of the parties of the second part under this agreement, or impair their title to the wire put up by them on the poles of said companies.

"In case the said wire shall at any time be out of order or incapable from any cause of being used, the parties of the first part will transmit the messages of the party of the second part and their licensees from any of their offices to and from New York and Philadelphia in regular turn, with all other messages received for transmission, free of all charge and expense."

The plaintiffs are the successors in business of Harrison Brothers & Co., parties to the above contract, and entitled to all the rights conferred, and subject to all the liabilities imposed, by its provisions.

The Franklin Telegraph Company, June 14, 1876, leased all its property and franchises to the Atlantic and Pacific Telegraph Company, a corporation of New York, for the term of ninety-nine years from May 1, 1876; and on the 19th day of January, 1881, the latter corporation sold and transferred all its property and franchises (except the franchise to continue its corporate existence) to the Western Union Telegraph Company.

The plaintiffs, at their own expense, put up the required wire on the poles of the Franklin Telegraph Company between New York and Philadelphia. After May 21, 1877—ten years from the date of the

above contract having expired—they enjoyed its use, and paid to the Atlantic and Pacific Telegraph Company the stipulated sum of \$600 per annum.

On the 20th of August, 1880, the plaintiffs received from the Atlantic and Pacific Telegraph Company a communication, in which it was said :

“In the contract entered into between your house and the Franklin Telegraph Company in May, 1867, it was contemplated that the telegraph company should have the use of the wire leased during a considerable portion of the time, in consideration of which the telegraph company were to maintain the line in working order and furnish battery power therefor. Your own business and that of your licensees has deprived us more and more of the use of this wire, until we find ourselves furnishing the exclusive use of a wire, between New York and Philadelphia, maintaining and supplying battery for it, for the sum of \$600 per annum. As this cannot be afforded and was not contemplated by the contract, and as the contract fixes no limit of continuance, we respectfully give notice that we shall consider it terminated from and after 21st of November next, being the end of the next quarter. Should you desire to continue the connection we shall be glad to accommodate you upon as favorable terms as can be afforded, and would like to have your decision at an early day, that we may make suitable provision for you, if desired, upon our new and substantial line now in process of construction.”

To this the plaintiffs replied : “We are sorry that you still insist on your view of our rights under the contract. We had hoped that the views that we lately presented to you would, when you came to think the matter over, convince you. We see no way, however, of settling the case except by having the meaning of the contract decided. We suggest, therefore, that an amicable suit be instituted for this purpose, and that your notice be extended so as to cover the time necessary to make a decision. If, in the meanwhile, you have any substitute to propose for the existing arrangement, we shall be glad to consider it. We desire that the pleasant relations that have existed between us may not be disturbed, and think that our suggestion will meet with your approval.”

Nothing further was done to interfere with the rights claimed by the plaintiffs until May 20, 1882, when they received the following notice : “You will please take notice that the Franklin Telegraph Company desires to terminate the agreement heretofore, and on the twenty-first day of May, 1867, executed between themselves and you, and that the same will be so terminated on the twenty-first day of November, 1882.”

In anticipation of this threatened termination of the contract, and to

prevent the consequences that would result from such action, the present suit was brought by the plaintiffs.

The defendants, in their answer, allege that the telegraphic wire, erected under the said agreement, consisted of the wire, the insulation thereof, and a cable under the North River, in order to complete the line of communication into the city of New York; that such cable became worn by long use and was no longer serviceable, so that the defendants were compelled to abandon its use, and it has since been taken up and removed; that the insulation of the wire, erected by the plaintiffs, also became, by long use, unserviceable, and a new one was substituted by the defendants; that, finally, the wire itself, by long use, became imperfect, unreliable, unfit for use, and was taken down; and that, before the commencement of this suit, every part of the telegraphic line erected by the plaintiffs under the above agreement had been taken down and removed for the reasons just stated, and no part of it was now in use.

It was also alleged in the answer that the cost to the plaintiffs of erecting said wire could not properly have exceeded \$3,000, that the expense to defendants of keeping and maintaining the same in good working order, and the expenses of batteries, etc., connected with the working of the wire, which defendants paid, amounted to \$600 per annum between May 21, 1867, and May 21, 1877; and that the telegraphic facilities furnished to the plaintiffs and their licensees during the same period were of the value to the plaintiffs of \$600 per annum.

By the final decree of the Circuit Court, held by Mr. Justice Bradley and Judge Butler, it was ordered, adjudged and decreed that "under and by virtue of the contract or agreement made and bearing date the 21st day of May, 1867, by and between the Franklin Telegraph Company, for their own account and on behalf of the Insulated Lines Telegraph Company, of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Company, manufacturing chemists of Philadelphia, of the other part, the complainants in this suit, as successors of said Harrison Brothers & Company, are entitled, so long as the defendants, The Franklin Telegraph Company, their successors or assigns, shall keep up and maintain the line of telegraph between the cities of New York and Philadelphia mentioned in the said agreement or any telegraph line between the said cities, to an irrevocable license, subject to the payment of six hundred dollars per annum, payable quarterly; to have the use of one wire in and upon said line in the manner provided for in said agreement, for the benefit and use of the said firm of Harrison Brothers & Company, so long as the complainants or either of them shall continue to be members or a member

of said firm and the said firm shall continue to carry on the business they were engaged in at the time of said agreement or a similar business, by whatever name the said firm may be called, or whether acting as a firm of individuals or under a charter of incorporation. The court, therefore, doth order, adjudge and decree that the defendants, the said Franklin Telegraph Company, their successors and assigns, so long as they shall continue to maintain said line of telegraph or any telegraph line between the cities of New York and Philadelphia, do maintain in good working order a telegraph wire thereon, for the use of the said firm or corporation, so long as the complainants or either of them shall be members or a member thereof, according to the terms of said contract, and that they be enjoined from interfering with the use of said wire by the said firm or corporation in manner aforesaid."

The principal question is as to the nature of the interest the appellees had under the agreement of May 21, 1867, after the expiration of ten years from its date, when the ownership of the wire passed from Harrison Bros. & Co. to the telegraph company. It was stipulated that the company after the wire became its property should "lease the same" to Harrison Bros. & Co. "for the use of themselves and such other four persons or firms" as that firm "shall suffer and permit or license to use the same, for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to" the telegraph company. The appellants insist that the agreement was only for a lease of the wire, to begin when it became the property of the telegraph company and to continue for one year; that as the appellees occupied it for that year and the next year, they became tenants from year to year; that it was in the power of the appellants to determine such tenancy at the end of any year upon notice; and that, having given proper notice, the interest of the appellees ceased.

It appears from the uncontradicted averments of the bill, as well as from the evidence, that the Franklin Telegraph Company originally owned two wires from Philadelphia to New York, and was doing a paying business; and that the Insulated Lines Telegraph Company owned four wires from Boston to New York, and four wires running south from New York to Washington through Philadelphia, but had a large bonded and floating debt, and was losing money. The latter company made overtures to the former for a consideration, pending which inquiries were set on foot in respect to the nature of the contract between Harrison Bros. & Co. and the Insulated Lines Telegraph Company. The Franklin Telegraph Company was unwilling to enter into the proposed consolidation, so long as that contract existed. Thereupon negotiations were commenced with Harrison Bros. & Co., which resulted in the agreement

of May 21, 1867. The bill avers, and the answer admits, that said agreement "was made by said Franklin Telegraph Company with said Harrison Bros. & Co. for the purpose of having rescinded the said contract between the said Insulated Lines Telegraph Company and said Harrison Bros. & Co., and in order to secure the erection of a wire upon the poles of said company between New York and Philadelphia by and at the expense of said last-mentioned firm." What was the intrinsic value to that firm of the contract thus relinquished, or how necessary it was, at that time, to the interests of the Franklin Telegraph Company and of the proposed consolidated company that that contract should be surrendered and cancelled, the record does not disclose. But the agreement recites, and, therefore, the parties agree, that the contract so relinquished by Harrison Bros. & Co. was a "valuable" one. And the evidence shows that it was delivered up to the Insulated Lines Telegraph Company. At the examination of a witness, who had been the general agent of the Franklin Telegraph Company, and was directly connected with the negotiations leading up to that agreement, the plaintiffs called for the production of the contract which Harrison Bros. & Co. had relinquished. The attorney for the telegraph companies answered that he had not received previous notice to produce it, and could not do so then because it was not in his possession. This notice may have been insufficient under the strict rules of evidence, but it was within the power of defendants to have produced the contract at some subsequent date, so as to enable the court and the jury, if it was necessary to do so, to ascertain, with reasonable certainty, the real value of the privileges surrendered by Harrison Bros. & Co. in consideration of the rights given them by the contract of 1867. The contract would, perhaps, have thrown light upon the meaning of the clause by which that firm acquired the right to "lease" the wire put up by them after it became the property of the telegraph company. With that contract before us we could, perhaps, better understand the suggestion, made in different forms, that Harrison Bros. & Co. got by the decree below privileges far greater in value than any relinquished by them, and that the contract of 1867, as interpreted by them, is a hard, unreasonable one that ought not to be enforced by a court of equity.

Looking at the written contract—which the bill alleges, and defendants insist, was made to carry out the previous agreement and understanding of the parties—it is quite clear that, although the word "lease" is used, the parties did not intend that the plaintiffs should be subjected, after the expiration of ten years, to the strict conditions applicable to a technical lease of real estate. The contract limits the period during which appellees should be the owners of the wire, but does not limit the time during which they could, of right, use it in their

business. If it was intended that Harrison Bros. & Co.—having relinquished their valuable contract with the Insulated Lines Telegraph Company, and put up the wire at their own expense—should become, after ten years, only tenants from year to year of the telegraph company, that intention, it seems to the court, would have been distinctly avowed.

The agreement is clear and specific as to the consideration which passed from the respective parties. In consideration of the relinquishment by Harrison Bros. & Co. of their contract with the Insulated Lines Telegraph Company, that firm was given the privilege of putting up, at its own expense, a wire on the poles of the telegraph company, between Philadelphia and New York, to be used as well by them in their legitimate mercantile and personal business, as by their licensees, not exceeding four in number—such licensees not being telegraph or railroad companies, bankers, or stock or exchange brokers. And in consideration of the company being allowed to use the wire, when not in use by Harrison Bros. & Co. or their licensees, the company agreed to keep and maintain it in good working order at its expense. The contract next provided that, upon the expiration of ten years, the wire should become the property of the telegraph company. Then follows the agreement of the telegraph company to lease it for \$600 per annum, payable quarterly, to be used by Harrison Bros. & Co. and their licensees, “upon the same terms in all other respects as if the wire had not been given up” to the telegraph company. Now, this means that, whereas, before the expiration of ten years, the wire should belong to Harrison Bros. & Co. and be used by them and their licensees, free of charge or expense for legitimate messages, it should, after ten years, belong to the telegraph company, but subject to be used in the same way as before by paying \$600 annually; the right, however, remaining with the telegraph company to use it when not in use by Harrison Bros. & Co. and their licensees. The requirement that its use by Harrison Bros. & Co. after ten years should be “upon the same terms in all other respects as if the wire had not been given up,” can only be met by according to appellees and their licensees the same absolute right of use they enjoyed before the wire was given up to the company, subject to the condition that, instead of having their messages transmitted without charge, they must pay \$600 per annum. This, we think, is the reasonable interpretation of the contract. And that view is supported to some extent by the fact that the parties deemed it necessary to provide that no assignment by Harrison Bros. & Co. of their right under the contract should give their assignees the right to demand a lease of the wire after the expiration of the ten years. That clause was wholly unnecessary if it was intended to give Harrison Bros. &

Co. merely the rights of a tenant from year to year ; for, if only that relation was established by the contract, the telegraph company could have determined it at any time, upon due notice. After the expiration of ten years, Harrison Bros. & Co. had only a priority in the use of the wire in consideration of a fixed annual sum to be paid quarterly. They retained neither control nor possession nor interest in the property. They simply purchased the use, without limitation as to time, after the ten years, for themselves and licensees, of a wire erected on the poles of the telegraph company, between Philadelphia and New York. We do not find in all this the essential characteristics of a lease.

Why shall not the telegraph company perform the terms of its contract ? Its original execution was unattended by fraud, surprise, misrepresentation, imposition, concealment of material facts, or mistake. The parties thoroughly understood the situation and knew what they were doing. The possibility that, by reason of an increase in the population and business of New York and Philadelphia, the use of a telegraphic wire between those cities could, in time, be sold for more than \$600 per annum was, of course, present to the minds of those who were interested in the telegraph company, and to whom were entrusted the negotiations for the relinquishment of the contract Harrison Bros. & Co. had with the Insulated Lines Telegraph Company. Nevertheless, the telegraph company deliberately chose to risk that possibility in order to get the Harrison contract out of its way. That contract having been relinquished, and a large sum, exceeding \$10,000, having been advanced by Harrison Bros. & Co. to erect the wire, the telegraph company ought not to be heard to urge, as a ground for not performing its agreement, that the annual license fee stipulated to be paid by appellees is much less than could be now obtained from others. If competing telegraph lines had been established between New York and Philadelphia, and by reason thereof such use as appellees and their licensees make of the wire in question could now be had for much less than \$600 per annum, that circumstance could hardly constitute sufficient ground for them to refuse payment of the full amount stipulated to be paid for its use annually. A different rule should not be applied where the price has increased, because of the absence of competition among telegraph companies, or from other causes not attributable to the plaintiffs.

It is said that the contract turns out to be a hard one for the telegraph company, and that a court of equity should not aid in its enforcement. It is true that in many adjudged cases, and by numerous text-writers, the general rule is laid down that equity in the exercise of a sound judicial discretion will refuse a decree for specific performance where it would be a great hardship upon one of the parties to grant relief of that character. But this general rule is subject, in its ap-

plication, to some limitations that arise out of the facts of particular cases.

In *Cathcart v. Robinson* <sup>1</sup>—which was a suit to enforce the specific performance of a contract for the sale and purchase of land, in which one of the defenses was the excessive price for which the land was sold—Chief Justice Marshall, while conceding that excess of price was an ingredient which, associated with others, will contribute to prevent the interference of a court of equity, said: “The value of real property had fallen. Its future fluctuation was matter of speculation. At any rate, this excess of price over value, if the contract be free from imposition, is not in itself sufficient to prevent a decree for specific performance.”

In *Marble Company v. Ripley*,<sup>2</sup> where the decree required the specific performance of a contract to quarry marble, and was objected to upon the ground that, though supposed to be fair and equal when made, the contract became, by lapse of time and the operation of unforeseen causes, and changed circumstances, unfair, unreasonable and unconscionable, the court, speaking by Mr. Justice Strong, said: “It may be doubted, however, whether the hardship of the contract is any greater than must have been contemplated when it was made. It is not unconscionable because Ripley obtains a larger profit from it than was at first expected, or because the other party obtains less. Those were contingencies, the possibility of which might have been foreseen. It could not have escaped the thought of the contracting parties that the expense of quarrying might possibly increase, and that the expense of sawing and preparing for market might either increase or diminish in the progress of time. Of that they took their chances. Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events.” These principles, the court said, must be applicable to contracts “that do not look to complete performance within a defined or reasonable time, but contemplate a continuous performance, extending through an indefinite number of years, or perpetually.”<sup>3</sup>

In *Sugden on Vendors* it is said that “a court of equity does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it cannot listen to one party saying that another man would give him more money or better terms than he agreed to take. It may be an improvident contract; but improvidence or inadequacy do not determine a court of equity

<sup>1</sup> 5 Pet. 264, 271.

<sup>2</sup> 10 Wall. 339, 356.

<sup>3</sup> Fry on Specific Performance, 116, and c. 6.



against decreeing specific performance.”<sup>1</sup> So, in *Lee v. Kirby*:<sup>2</sup> “The question of the want of equality and fairness, and of the hardship of the contract, should, as a general rule, be judged of in relation to the time of the contract, and not by subsequent events. We do not intend to say that the court will never pay any attention to hardships produced by a change of circumstances; but certainly the general rule is, that a mere decline in value since the date of the contract is not to be regarded by the court in cases of this nature.”<sup>3</sup>

In view of these principles, which we think are founded in wisdom, we are of opinion that the fact that the appellants could, at the commencement of this suit, or since, sell at an increased price the privilege for which the appellees paid by relinquishing a valuable contract and advancing a large sum of money, and which privilege they now enjoy for the stipulated price of \$600 per annum, is not sufficient to justify the court in withholding the relief asked.

It was said in argument, as a reason why the relief sought should not be granted, that the appellees and their licensees had now the exclusive use of the wire in question; whereas, the expectation of the parties, at the time of the contract, was that the telegraph company would have the use of it during, at least, a part of the time. It is sufficient to say that this fact is not established by the evidence. It is true that an officer of the Atlantic and Pacific Telegraph Company, in a letter addressed to Harrison Bros. & Co., stated that his company was furnishing to that firm “the exclusive use of a wire between New York and Philadelphia, maintaining and supplying battery for it for the sum of \$600 per annum.” But no such fact was stated by any witness in the cause. It is still more significant that the answer contains no such defense. What would be the rights of the parties if the appellees so used the wire in question as to deprive the telegraph company of all opportunity to use it for its general business, or whether, in such a case, the court would or would not refuse specific performance, except upon the condition that the telegraph companies shared in the use of the wire for a reasonable portion of the time,<sup>4</sup> we need not inquire. No such case is presented for our consideration.

In respect to the question discussed at the bar relating to the remedy, but little need be said. It is clear that the appellees had no adequate remedy at law for the protection of their rights. Suits at law, from time to time, to recover damages for the refusal of the telegraph

<sup>1</sup> c. 5, § 3, par. 25; *Sullivan v. Jacob*, 1 Molloy 472, 478.

<sup>2</sup> 104 Mass. 420, 428.

<sup>3</sup> *Revell v. Hussey*, 2 Ball & Beatty 280, 287; *Paine v. Mellor*, 6 Ves. 349, 352; *Mortimer v. Capper*, 1 Bro. Ch. 156.

<sup>4</sup> *Willard v. Tayloe*, 8 Wall 557.

company to transmit the messages of appellees over this wire, would not have given the relief necessary to secure their rights under the contract. Such a remedy would not be complete, nor an adequate substitute for an injunction that would secure the appellees against perpetually recurring denials of their rights.<sup>1</sup> If appellees are entitled, for the sum of \$600 per year, payable quarterly, to have the messages of themselves and their licensees transmitted over the appellants' wire between New York and Philadelphia, so long as the latter maintain a telegraph line between those cities—as we think they are—the only effective relief is a decree such as that rendered below.

Decree affirmed.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE BREWER, dissenting.

I cannot assent to the conclusion reached by the court. In my judgment, the interest of appellees under the contract, after the expiration of ten years from its date, was in the nature of a lease, the word "lease" being advisedly used in the agreement. And as while the length of time was not expressed, it was provided that the wire should be leased "for the sum of six hundred dollars per annum, payable quarterly," the implication is that it was a right to use it from year to year.

The accepted rules of construction forbid the view that the contract was of indefinite duration; and if such had been the intention, it should have been expressed.

Moreover, this is not a case for specific performance. The construction contended for by appellees is at the best doubtful, and as the record sufficiently discloses that the contract thus construed has a harsh and unconscionable operation, not reasonably within the contemplation of the parties when they entered into it, the court was not bound, by way of grace and not of right, to compel its execution.

My brother BREWER concurs with me in this dissent.

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FRIEND, APPELLANT, v. LAMB.

IN THE SUPREME COURT OF PENNSYLVANIA, JANUARY TERM, 1893.

[*Reported in 152 Pennsylvania Reports 529.*]

BILL in equity for specific performance.

The bill averred that plaintiff was owner of a certain piece of land in Braddock Township, Allegheny County, Pa., containing seventy acres, subject to two leases, expiring April 1, 1891, to James Hamilton, a

<sup>1</sup> *Joy v. St. Louis*, 138 U. S. 1, 46; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 567.

stone lease at fifteen cents a perch on all stone taken out; and to Samuel McKelvey, a farm lease at a rental of \$250 per year. That by an article of agreement dated Sept. 15, 1890, plaintiff agreed to sell this property, subject to the two leases, for the price of \$50,000, payable as follows: One thousand dollars on signing agreement, \$4,000 on Nov. 1, 1890, \$45,000, the balance, to be secured by bond and mortgage, payable \$5,000 Nov. 1, 1891; \$7,000 Nov. 1, 1892; \$7,000 Nov. 1, 1893; \$7,000 Nov. 1, 1894; \$7,000 Nov. 1, 1895; \$7,000 Nov. 1, 1896; \$5,000 Nov. 1, 1897, interest payable semi-annually. The first two payments of \$5,000 and \$7,000 were to be secured by a collateral mortgage on other property of Martha E. Lamb. That on Nov. 1, 1890, plaintiff, being the owner of said property by a good and marketable title, made a tender of a deed of conveyance in fee simple, duly signed by himself and wife, to Martha E. Lamb, and offered the bonds and mortgages to Martha E. Lamb and Benj. F. Lamb to be executed by them. That they refused the tender and refused to pay the purchase-money and execute the bonds and mortgages. The bill prayed that the defendants be ordered to carry out the agreement, and general relief.

The answer of Martha E. Lamb alleged that it was verbally understood and agreed, at the time of signing the agreement, that the said land was not to be taken subject to the leases referred to in the bill. It also averred that, at the time of making the agreement, plaintiff and his agents represented that the tract was underlaid with coal, and defendant relying on this representation made the agreement; that this representation was false, as the coal had been almost entirely removed; that the defendant had refused to accept the deed because of these facts.

The facts appear by the opinion of the Supreme Court.

The case was referred to J. M. Shields, Esq., as Master, who recommended a decree in accordance with the prayers of the bill. Exceptions to the Master's report were sustained by the court, and a decree entered dismissing the bill, in an opinion by Stowe, P.J.

Error assigned, *inter alia*, was decree, not quoting it.

*Edwin W. Smith, Knox & Reed* with him, for appellant.

*James S. Young, S. U. Trent* with him, for appellee.

MR. JUSTICE GREEN, January 3, 1893. We are of opinion that the learned court below, rather than the Master, adjudged correctly the facts and law of the present contention. It is not a case of mere legal right and is not dependent solely upon principles which control the determination of causes of that character. The proceeding is by bill in equity, and the relief sought is the specific performance of a contract for the sale of a tract of land for the price of fifty thousand dollars.

The defendant against whom the contract is proposed to be enforced is a married woman, and as only five thousand dollars of the purchase-money were to be paid in cash, the sale is to be regarded as one made almost entirely upon credit, and the credit is to be secured by a mortgage for the sum of forty-five thousand dollars in annual payments of five and seven thousand dollars respectively, with interest on all, and reaching over a period of seven years. For a man to encumber himself with such a contract, would be, in all ordinary circumstances, a rash, improvident and extremely hazardous undertaking. Nothing but a rare combination of fortunate events to occur in the very near future, capable of being foreseen by an extremely sagacious and experienced operator in speculative transactions, would justify such a contract in the ordinary judgment of men. But with a woman, especially a married woman, unless possessed of ample cash capital to meet her maturing payments, and a special skill and experience in conducting such affairs, an engagement of this character would seem to be almost entirely destructive of the least prospect of success, and improvident and oppressive to the last degree. There is no evidence in this case that Mrs. Lamb possessed any of the essential qualifications either in capital or experience to conduct such an enterprise to a successful conclusion. Where the money was to come from to meet the annual payments does not appear, and the consequences of "the usual *sci. fa.* clause" are well enough known to indicate what would become of the property if the payments were not promptly met. We deem the contract in this case as highly improvident and rash, and most likely to result in great disaster even before the maturity of the payments and therefore oppressive in its character. In its merely legal aspects these considerations could not be regarded and they would not constitute a defense to an action to recover damages for its breach. But in equity the rule is very different where the application is for a specific performance of the contract. It was thus expressed by this court in *Freetly v. Barnhart*,<sup>1</sup> where we said that "there is nothing better settled than that a decree for specific performance is not a matter of course, but rests in the sound discretion of a Chancellor. It may be refused, therefore, notwithstanding a contract obligation, if there be circumstances rendering it inequitable, and then the party seeking it is left to his action for damages. I know of no case in which specific performance is ever decreed unless it appears to accord with good conscience that it should be so decreed, be the contract ever so specific in its terms."

To the same effect are *Weise's Ap.*, 72 Pa. 351; *Elbert v. O'Neil*,<sup>2</sup> and *Rennyson v. Rozell*.<sup>3</sup> In the last of these cases our late Brother

<sup>1</sup> 51 Pa. 279.

<sup>2</sup> 102 Pa. 302.

<sup>3</sup> 106 Pa. 407.

Clark said: "It is not sufficient to call forth equitable interposition of the court that the legal obligation under the contract may be perfect; if injustice would result from a decree for specific relief the parties must be remitted to their remedies at law. Even when the agreement is perfectly good, the price adequate and no blame attaches to the purchase, if the transaction be inequitable and unjust in itself, or rendered so by matters subsequently occurring, specific performance may be denied and the parties turned over to their remedy in damages."<sup>1</sup>

An unconscionable price, a clouded title, any circumstances of overreaching, misrepresentation, suppression of the truth, suggestion of the false, fraud of any kind, breach of confidential relation and many other similar causes will induce the courts to refuse specific performance. The cases and illustrations in the books are very numerous and of great variety.

In the present case, besides the improvident and oppressive character of the contract and the coverture of the purchase, it was alleged as a defense that it was represented to Mrs. Lamb, before the contract was made by the plaintiff or his agent, that the property was underlaid with coal. The defendant, Mrs. Lamb, testified that Mr. Miller, who conducted the negotiation for the plaintiff, said "that there was also brick shale and clay suitable for making brick, and that it was underlaid with coal. I asked the question when he spoke about the brick shale and clay, where could I get the coal? and he said, Why there is plenty of it all underneath this property." And again: "He said the property, the whole property, was underlaid with coal—I do not know whether he stated the thickness of the vein or not. Q. What did Mr. Miller say of the coal as to its value, prior to signing the agreement? A. Mr. Miller said the land was underlaid with coal; he said it would be more valuable on that account." On cross-examination she said she saw a coal pit on the farm, noticed the old slack piles, did not go into the coal pit. "When I saw the coal pit I presumed that some coal had been taken out at some time before. I did not at any time make any inquiry as to the quantity of coal taken out. Nothing else was said to me about this coal but what Mr. Miller told me at the first meeting in the office."

Harry Collins, a witness for the defendant, testified that he was present at an interview between Miller and Mrs. Lamb at Somer's office in which "Miller told Mrs. Lamb that the property was underlaid with coal. He also said that the coal that was underneath the property, together with the stone, would make that as valuable property as there was anywhere in the State."

<sup>1</sup> Henderson v. Hays, 2 Watts 148; Remington v. Irwin, 14 Pa. 143; Freely v. Barnhart, 51 Pa. 279.

It was proved by McKelvey, a witness for the plaintiff, that the coal had been taken out years before by tenants of a former owner and that there was no coal on the premises left, but about five or six acres which were not included in the lease to the lessees of the coal.

The Master in his treatment of this testimony laid stress upon the fact that Miller, the plaintiff's agent, denied that he had ever represented that there was coal on the property, and held that if the representations were made, Mrs. Lamb did not rely on them, but made an examination for herself, and he expresses some doubt as to the truth of the testimony of the defendant and her witness. We do not perceive any sufficient reason for discrediting the positive testimony of Mrs. Lamb and Collins on this subject, and as the actual presence of coal underlying all, or any considerable part of the land, would naturally be a fact of the gravest importance in considering the value of the property, we feel constrained to say that even a condition of doubt upon this most serious subject would impel a Chancellor to refuse specific performance. This was the conviction of the learned court below, and it is also ours. We cannot think it would be equitable to force upon any purchaser a title to seventy acres of land, at a price of fifty thousand dollars, when the supposed presence of a large body of coal which had been in fact removed may have been the chief inducing cause of the contract. Certainly the evidence should be most convincing that the purchaser knew that the coal had been removed, and made the contract without regard to its presence or absence. Instead of testimony to that effect we have only denials of the fact that the representations were made, and these denials are a practical concession of their importance, if made. The fact that they were made is attested by two witnesses and denied by one. In such a state of the testimony it may well be doubted that even a jury in an action at law for damages for breach of the contract would award a verdict in favor of the seller, but, assuredly, a Chancellor would decline to enforce such a contract, in such a condition of the testimony, upon an unwilling purchaser. In *Holmes's Ap.*<sup>1</sup> we said: "Even if there had been no misrepresentations on Holme's part it would be doubtful whether a Chancellor would compel specific performance against one who is ignorant of the fact." There was no testimony to the effect that Mrs. Lamb was informed that the coal had been removed, and the testimony of herself and Collins was, that she was assured by the agent of her vendor that it was actually there and in large quantity.

There was also a controverted question of fact as to the time when Mrs. Lamb was to have possession of the premises, she and her witness Collins testifying that Miller agreed that she should have it immediately,

<sup>1</sup> 77 Pa. 50.

and Miller denying such agreement. Mrs. Lamb testified that she declined to sign the contract with the provision in it regarding the leases, and that thereupon Miller promised that she should have immediate possession, and upon the faith of that promise she signed the paper. The preponderance of the testimony on this subject is with the defendant and, as an unsuccessful attempt to get possession was made, another element of doubt is introduced into the case, causing additional hesitation as to the specific performance of the contract.

One of the elements of the contract was that Mrs. Lamb was to give a mortgage on other property owned by her for twelve thousand dollars to secure the first two payments. The circumstance that such a security was required is additional proof that even the plaintiff did not regard the land itself as of sufficient value to assure the payment of the purchase-money, and is another reason why a Chancellor would regard the contract as oppressive and burdensome.

Treating the whole case as one between parties *sui juris*, we do not regard it as one in which a Chancellor should decree specific performance. We do not discuss or decide the question whether the contract was within the legal competency of Mrs. Lamb, because it is not necessary, but we do think it proper to give some consideration to her state and condition as being a married woman, in determining whether or not a decree for specific performance should be made against her. The very recent emancipation of married women from the disabilities formerly incident to their relation does not remove them from consideration by the courts, when questions of improvidence, hardship and oppression, in contracts made by them, require judicial attention. In so far as these circumstances are recognized as occasions for intervention, they will be availed of, in favor of married women as well as of all other persons, with the added consideration of their less protected and, comparatively speaking, more helpless condition. We are of the opinion that the case was correctly decided by the learned court below.

Decree affirmed and bill dismissed at the cost of the plaintiff.

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EDWARD E. RICE v. CAMILLE D'ARVILLE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 2,  
1895.

[*Reported in 162 Massachusetts Reports 559.*]

LATHROP, J. This is a bill in equity, filed on September 18, 1894, to restrain the defendant from performing or singing at any theatre or place of amusement in the United States or Canada except under the

management of the plaintiff. On November 27, 1893, the plaintiff and the defendant entered into a contract by the terms of which the plaintiff engaged the defendant as prima-donna of his company, to render services at such theatres, opera-houses, and halls as required, beginning on or about September 17, 1894, and to continue for a season of thirty-five weeks, or more, at the option of the plaintiff. For this he agreed to pay her \$450 a week when in New York or Boston and \$500 a week elsewhere. The plaintiff was also to pay railroad and steamboat transportation, but not carriage hire. The contract also contained these clauses: "And said Camille D'Arville hereby agrees to render said services to the best of her ability at any theatre desired by said Rice in a correct and painstaking manner. . . . Said Camille D'Arville hereby agrees that she will not render services at any other place of amusement in the United States or Canada, from the date of the commencement of this contract to its close, except those under the management of" the plaintiff.

The contract also contained an agreement as to the years 1895 and 1896.

The single justice of this court who heard the case has found that, when this contract was made, the defendant was performing for the plaintiff under an earlier and similar contract; that although at the time the contract of November, 1893, was signed nothing was due the defendant, the plaintiff soon after began to run behind with her salary, and now owes her some thousands of dollars, which he is unable to pay, and which he told the defendant he was unable to pay before she refused to go on under the present contract; and that the defendant's chance of getting her pay, so far as the plaintiff is concerned, would depend upon the success of the season, and perhaps on other elements.

At the hearing a bond to the satisfaction of the court for the performance of the plaintiff's undertaking in this contract was offered by him.

Before the filing of the bill the defendant repudiated the contract and entered into an engagement with another manager.

The defendant is found to be a singer of established reputation in comic opera, and of such excellence that in a commercial sense her loss to the plaintiff would be irreparable, though there is at least one comic opera singer in this country who has as high or a higher rank.

It is conceded that the court has no power to enforce the affirmative covenant in the agreement; but the plaintiff contends that the negative covenant should be enforced. The effect of this would be to compel the defendant either to perform for the plaintiff or to remain idle. The principal authority in favor of the plaintiff's contention is the case of *Lumley v. Wagner*,<sup>1</sup> which has lately been followed to some extent in

<sup>1</sup> 1 De G., M. & G. 604.



this country, contrary to earlier cases, and has been much criticised in England.<sup>1</sup>

We have no occasion, however, at present to determine whether we should in any case enforce a negative covenant in a contract of hiring, when we had no power to enforce a positive covenant, as we are of opinion that in the case at bar this power should not be exercised.

We are not disposed to enforce a negative covenant where, if the court had the power, it would not enforce an affirmative covenant. Suppose the owner of a parcel of land should covenant to sell it for a certain price, and should also covenant not to sell it to any one else, and when the time came for performance the covenantee was unable to pay for it. Here the court would certainly dismiss a bill for specific performance, whether it sought to enforce the affirmative or the negative covenant.

Taking this to be the rule, it seems to us plain that, in the case at bar, the court would not, if it had the power, enforce the affirmative covenant. Without regard to the failure of the plaintiff to perform his previous contract with the defendant, the only inference which can be drawn from the findings of the justice who heard the case is that the plaintiff is unable to perform his part of the contract, and will be unable to perform it unless the season proves successful. The defendant ought not to be subjected to this contingency. Nor ought the court, by enforcing the negative covenant, to compel her to be so subjected, or to remain out of employment.

Inability on the part of the plaintiff to perform his part of an agreement is a good ground for refusing to enforce the agreement against the defendant in a bill in equity for specific performance.<sup>2</sup>

The fact that the plaintiff at the hearing offered a bond for the performance of his contract makes no difference. This was offered after the defendant, for good cause, had refused to continue with the plaintiff and had entered into other engagements. Besides, a bond is not an assurance that the money will be paid when due according to the terms of the contract, but an agreement which usually has to be enforced by a lawsuit.

Bill dismissed.

*J. H. Blanchard* for the plaintiff.

*A. H. Hummel* (of New York) & *R. T. Babson* for the defendant.

<sup>1</sup> See Beach, Eq. §§ 604, 605; Fry, Spec. Perf. (3d ed.) §§ 860-862; Davis v. Foreman [1894], 3 Ch. 654.

<sup>2</sup> Carter v. Phillips, 144 Mass. 100, 102; Willingham v. Joyce, 3 Ves. 168; Franklin v. Brownlow, 14 Ves. 550; Price v. Assheton, 1 Y. & C. Ex. 441; McNally v. Gradwell, 16 Ir. Ch. 512, 519.

## SECTION IV.—DEFENSES (CONTINUED).

### (g) *Plaintiff in Default.*

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#### BENEDICT *v.* LYNCH.

IN THE COURT OF CHANCERY OF NEW YORK, APRIL 1, 1815.

[*Reported in 1 Johnson, Chancery, 370.*]

THIS was a bill for the specific performance of an agreement for the sale of the land. The plaintiff stated that, on the 28th of March, 1810, he contracted with the defendant for the purchase of land, described in the agreement signed by the defendant, which was as follows: "That it was thereby agreed between the parties that the defendant sell to the plaintiff a piece of ground (described therein), containing 39 acres, at \$14.50 per acre, and upon the following conditions being performed, to wit: That the plaintiff pay to the defendant \$250 in one year (March, 1811); one-third of the remainder in one year thereafter (1812); one-third in the next year (1813); and the balance in the year following (1814), with interest, annually, on all the sums; and upon his complying with the payments the defendant agreed to give a deed. If the plaintiff failed in the payments, or any of them, the agreement to be void." That the plaintiff made and delivered to the defendant a counterpart of the agreement.

That the plaintiff took immediate possession of the land, cleared eight acres, and built a house thereon; but, in consequence of unforeseen disappointments, failed to make his payments. That in order to induce the defendant not to sue him for the purchase-money the plaintiff, subsequently to the above contract, agreed with the defendant to clear five acres in one year, and, in consideration thereof, the defendant promised not to prosecute the plaintiff during that year.

That he had since procured and tendered (in January, 1814) all the purchase-money, to the amount of \$720, though the whole of it was not due; but the defendant refused to accept the money, alleging that the contract was void, and had brought an action of ejectment against the plaintiff.

The plaintiff prayed for an injunction, which was granted March 12, 1814, on the plaintiff's depositing the \$720 with the register.

The answer of the defendant admitted the agreement of the 28th of March, 1810, and that it was without any other consideration than what was therein stated; but denied the delivery by the plaintiff of any counterpart of the agreement. The defendant admitted the entry of the plaintiff on the land and the erections and improvements made by him, which he had enjoyed and used down to the time of the answer without offering any compensation to the defendant; that he refused to accept the money tendered to him by the plaintiff in February or March, 1814, and to execute any conveyance.

The defendant also stated that, in 1811 or 1812, the plaintiff often declared his inability to pay, and disclaimed all right to the premises, and relied wholly on the liberality of the defendant to permit him to occupy the premises until the defendant could sell them. That, in the spring of 1812, the defendant required the plaintiff to quit the premises, and the plaintiff then agreed that, if he might be allowed to occupy the premises for one year, he would clear and fence five acres of the land, to which the defendant assented. But the defendant denied that it entered into the consideration of this agreement that the defendant should not sue for the purchase-money; that the defendant had brought an action of ejectment for the premises and had recovered judgment; that the defendant had since frequently referred purchasers to the plaintiff to show them the premises, and he had done so. That on the 1st of October, 1813, Samuel Hills offered to purchase the premises, and the plaintiff acquiesced in the sale, and declared that he should abandon the premises whether Hills purchased or not. That on the 2d of October, 1813, the defendant contracted with Hills for the sale of the premises for \$700, and he paid above \$500 of the purchase-money.

The facts alleged in the answer were proved by the defendant's witnesses.

The plaintiff proved that the farm was worth more than \$20 per acre, and that the improvements on it were worth about \$300, the annual value of which was about \$40.

*Gold* for the plaintiff.

*J. Lynch* for the defendant.

The points and authorities are so fully discussed in the judgment delivered by the court that it is unnecessary to state the arguments of the counsel.

The CHANCELLOR.<sup>1</sup> I have considered this case with great attention, and I cannot discover any just principle arising out of the facts that will warrant a decree for a specific performance.

<sup>1</sup> James Kent.—ED.

The bill is founded on an agreement of the 28th of March, 1810, signed by the defendant only, and by which he agreed to sell to the plaintiff the land in question "upon the following conditions being performed at the times stipulated, to wit : That the plaintiff should pay the defendant \$250 within one year; one-third of the remainder within one year thereafter; one-third in the next year; and the balance in the year following, with interest, annually, upon all sums unpaid from the date; and upon his complying with the above payments, with the interest, at the respective times for that purpose above mentioned, the defendant agreed to give a deed; but if he should fail in them, or either of them, the agreement to be void." Under this agreement the plaintiff entered into possession, and made improvements, but he made no payments; and in October, 1813 (and which was above two years and a half after the first default), the defendant, considering the agreement as void or abandoned, sold the land to another person, and in February, 1814, the plaintiff filed his bill for a specific performance.<sup>1</sup>

There was an express stipulation in this contract that if the plaintiff failed in either of his payments the agreement was to be void. The first question that naturally presents itself is, whether the time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment, in 1811. Lord Thurlow is said to have intimated, in *Gregson v. Riddle*<sup>2</sup> that time could not be made of the essence of the contract even by a positive stipulation of the parties, but there was no decision on that point; and in other and later cases<sup>3</sup> it has been admitted that the parties may make the time of the essence of the agreement, so that, if there be a default at the day without any just excuse, and without any waiver afterwards, the court will not interfere to help the party in default. The case is not analagous to that of a mortgage, where the only object of the security is the payment of the money, and not the transfer of the estate; and it seems to be conducive to the preservation of good faith and the rights of parties that if a contract of sale is expressly declared to be vacated on non-performance by a given day that the courts should not interfere, as of course, to annul such a provision. The opinion of Lord Loughborough in *Lloyd v. Collett* contains a strong and decisive argument upon this point. "There is nothing," he observes, "of more importance than that the ordinary contracts between man and man,

<sup>1</sup> The Chancellor's observations on the doctrine of mutuality have been omitted.—ED.

<sup>2</sup> 7 Ves. 268.

<sup>3</sup> *Lloyd v. Collett*, 4 Bro. 469; 4 Ves. 689 *n.*; *Seton v. Slade*, 7 Ves. 265.

which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say the time is so essential that, in no case in which the day has by any means been suffered to elapse, the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, they shall be at liberty to rescind it. In most of the cases there have been steps taken." "I want a case," he says, "to prove that where nothing has been done by the parties this court will hold, in a contract of buying and selling, a rule that the time is not an essential part of the contract. Here no step had been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity." It would be impossible for me to add to the perspicuity and energy of this reasoning; and the Lord Chancellor, in that case, held that as the vendor had omitted to complete a purchase for six months, being all that time in default, he was considered as having abandoned the contract; and he said there was no case where no step had been taken by the one party, and the other had immediately, when the time had elapsed, refused to perform the agreement, that a performance had been decreed.

It may, then, be laid down as an acknowledged rule in courts of equity (and so the rule is considered in the elementary treatises on this subject),<sup>1</sup> that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. This rule appears to me to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail (and of which the facts in the present case furnish an example), that a party may be utterly regardless of his stipulated payments, and that a Court of Chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of

<sup>1</sup> Newland on Contracts, 242 Sug. L. of Vend. (3d Lond. edit.) 268.

obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity to help those who show no equitable title to relief.

It may be useful, however, before we come to apply the rules of the court to the facts in this case, to look more particularly into the cases on the subject of relieving parties from delays in the performance of contracts for the sale of land.

It was formerly supposed that the time fixed on for the completion of the contract was quite immaterial, and there are some cases which have given countenance to this idea. The case of *Vernon v. Stephens*<sup>1</sup> was a bill brought by a vendee for a specific performance after repeated defaults; but in that case different payments had been made and accepted, and further time had been given after each default, by agreement in writing; and the final default, after the last agreement, arose from the death of the original vendor and a neglect for some time to take out letters of administration, so that the last default was reasonably accounted for; and the case, therefore, proves nothing in favor of a party in default, without excuse and without a waiver from the opposite party. The case of *Gibson v. Patterson*,<sup>2</sup> in which Lord Hardwicke was supposed to have held that non-performance at the time was very immaterial, is proved to be most inaccurately reported, and that Lord Hardwicke made no such decision in that case, and the facts admitted of no such deduction.<sup>3</sup> And, indeed, in another case,<sup>4</sup> Lord Hardwicke lays down the true rule on this subject when he says that it is the business of this court to relieve against lapse of time in the performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance. So it was also held, in the case of *Hayes v. Caryll*, as early as 1702,<sup>5</sup> that where one person has trifled or shown a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favor, especially if circumstances are altered.

I do not perceive, therefore, that in the more ancient cases there is real ground for the opinion that the time stipulated for the performance of a contract is of no moment in this court, and I am at a loss to conceive how such an extravagant proposition should ever have gained currency. It is certainly, and very justly, exploded in the modern decisions.

In *Pincke v. Curteis*,<sup>6</sup> the suit was by the vendor for a specific performance, and the plaintiff had failed, for near a month after the

<sup>1</sup> 2 P. Wms. 66.

<sup>3</sup> 4 Ves. 689, 690 *n.*; 4 Bro. 497; 13 Ves. 228, 9.

<sup>5</sup> 5 Viner 538, pl. 18.

<sup>2</sup> 1 Atk 12.

<sup>4</sup> 1 Ves. 450.

<sup>6</sup> 4 Bro. 329.

specified day, to complete his title; but it appeared that the delay arose because the title depended upon the event of a chancery suit, and the vendee was apprised of this cause of the delay, and acquiesced in it, and was willing to go on with the purchase, and a performance was consequently decreed. The case is not well reported (see the note to Sugden's Law of Vendors, p. 278); but these were the true grounds of the decree, and the Chancellor said that if the vendee had called for the deposit at the end of the time limited for completing the purchase, and had insisted not to go on with the purchase, the court would not have compelled him. The case of *Fordyce v. Ford*<sup>1</sup> is to the same effect. There was a delay short of two months beyond the stipulated time; but when the abstract of the title was delivered to the vendee he made no objection, but acquiesced; and if he had not, said Lord Alvanley, I should not have decreed a performance; and the rule now is that if either party has been guilty of gross negligence the court will not lend its aid to complete the contract; and he hoped, he said, that it would not be understood from that decision that a man is to enter into a contract and then to think that he has his own time to perform it.

These were cases of delay on the part of the vendor, but the rule applies equally to both parties, and the purchaser who neglects his part of the engagement will be left to his remedy at law, if he has any, though he may have paid part of the purchase-money. He cannot be suffered to lie by and speculate on the rise of the estate. The cases of *Spurrier v. Hancock* and of *Harrington v. Wheeler*<sup>2</sup> were on bills filed by the purchaser for a specific performance, and, in the latter case, he had paid part of the purchase-money; but the bill, in each case, was dismissed on account of his laches and trifling and unreasonable delay.

The observation of the Master of the Rolls in *Milward v. Thanet*<sup>3</sup> is very emphatical on the subject before us. He observed that Lord Kenyon was the first who set himself against the idea that had prevailed that when an agreement was entered into either party might come at any time, and that it was then perfectly known that a party cannot call upon a court of equity for a specific performance unless he had shown himself ready, desirous, prompt, and eager. *Guest v. Hornfray*<sup>4</sup> is another strong case on the point. Specific performance was there refused on account of the laches of the plaintiff, who was the vendor. Here the purchaser had been put into possession when the contract was made, but the question was, as the court said, whether the plaintiff had done enough to show he took all the pains

<sup>1</sup> 4 Bro. 494.

<sup>2</sup> 5 Ves. 720, *n.*

<sup>3</sup> 4 Ves. 667, 686.

<sup>4</sup> 5 Ves. 818.

he could be ready to carry the agreement into effect; and as it did not appear that he had done all he ought to have done, and though the delay was but three months, and the plaintiff had met with an unwilling purchaser, who meant to get rid of the contract if he could, the bill was dismissed. If, on the other hand, the circumstances of the case and the conduct of the opposite party will afford ground for a just inference that he has acquiesced in the delay and waived the default, the non-performance at the stipulated time will be overlooked and will be deemed to have been waived by the other party. The cases of *Seton v. Slade*,<sup>1</sup> of *Smith v. Burnam*,<sup>2</sup> and of *Paine v. Meller*,<sup>3</sup> as well as many others which might be cited, turn upon this distinction. From the review which I have taken of the cases, the general principle appears to be perfectly established that time is a circumstance of decisive importance in these contracts, but it may be waived by the conduct of the party; that it is incumbent on the plaintiff calling for a specific performance to show that he has used due diligence, or, if not, that his negligence arose from some just cause, or has been acquiesced in; that it is not necessary for the party resisting the performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the plaintiff, but considered it as releasing him.

These principles appear to me to be founded in natural justice, and to be equally conducive to public convenience and to the maintenance of public morals.

I shall cite only one more case, that of *Alley v. Deschamps*,<sup>4</sup> which was a late decision by Lord Erskine, and which, in all the circumstances of the case, is very analogous to the one now before me. It was a bill in behalf of a purchaser for a specific performance; he was to pay by installments, and was put into possession upon the execution of the agreement. He afterwards became embarrassed and unable to comply with the terms, though he had paid £100 in part satisfaction of the contract. The bill was filed before the last installment was due. The defendant, in his answer, said that the contract was considered by him as relinquished, and that the plaintiff was suffered to continue in possession as tenant. The Lord Chancellor said he should take it that the agreement was not abandoned, and that the plaintiff did not, by his own act, consent to rescind it; but he said that under the circumstances of the case there was not a color for decreeing a specific performance, and that his judgment proceeded upon a plain principle, that a bill for specific performance would not be endured under such circumstances; that it would be dangerous to permit parties to

<sup>1</sup> 7 Ves. 265.<sup>2</sup> 2 Anst. 527.<sup>3</sup> 6 Ves. 349.<sup>4</sup> 13 Ves. 224.



lie by, with a view to see whether the contract would prove a gaining or losing bargain, and, according to the event, either to abandon it or, considering the lapse of time as nothing, to claim a specific performance; that here nothing had been done except the one small payment towards performance when the purchaser became bankrupt, nor afterwards until the premises, by a subsequent event, proved to be much more valuable than they were at the time the contract took place. The bill was dismissed, with costs.

It is impossible not to be struck with the close analogy between that and the case now under consideration. Here the purchaser has paid nothing, but suffered defaults to accumulate, year after year, as if he had forgotten that he was under any obligation to pay; and if the land had not risen in value within the last two or three years, so as to render the purchases an object of speculation, there is no reason to believe that the plaintiff would ever have attempted to raise the money out of the benevolence of his friends. I think that, within the reason and spirit of all the cases, here was a gross negligence on the part of the plaintiff that takes away his claim to assistance.

The circumstances attending the new agreement between the parties of the 14th of March, 1812, prove conclusively that the original contract was expressly abandoned. This agreement, by which the plaintiff contracted with the defendant to clear off and fence five acres within one year, does not, of itself, import that the original agreement was, or was not, abandoned; and parol evidence is admissible to explain that fact, which is collateral to the operation of the instrument. Such evidence would not vary or qualify the effect of it; it would only go to repel any presumption, or rebut any equity, which might be attempted to be deduced from the instrument itself. But there is another ground on which the parol evidence to which I allude is competent. This agreement is stated to have been given in consideration of one dollar, and for various other considerations; and it was admitted by Lord Hardwicke in the case of *Peacock v. Monk*<sup>1</sup> that if a deed, after mentioning any particular consideration, adds, "and for other considerations," you may enter into proof of these other considerations; and the same doctrine was alluded to in the case of *Maigley v. Hauer*.<sup>2</sup> There is no repugnancy, in such a case, between the proof and the deed. It is then proved, in this case, by two witnesses (James Lynch and Mansel Falcot) that when the agreement was made the defendant, by his agent, stated to the plaintiff that, as he had failed in his contract, the plaintiff must sell the land to some other person; that the plaintiff admitted he could not

<sup>1</sup> 1 Ves. 127.

<sup>2</sup> 7 Johns. Rep 341.

pay for the land, and that, if the defendant would permit him to remain on the land for one year, he would then abandon the same and give up the possession; and, as a consideration for continuing on the land for a year, he would clear and fence five acres; and that the writing was given for that purpose. In addition to this testimony, we have that of Josiah Hills, who states that in September, 1813, he went with Samuel Hills to the plaintiff, and the plaintiff then told him that he could not pay for the land nor complete his purchase, and that he expected to leave the land in the course of the then next winter, and that he was willing to give up the possession, and even offered to sell his claim under the contract for \$10, though without warranting a deed. This was the person who, a few days after, purchased the land of the defendant and paid most of the consideration money. No doubt this purchase was greatly induced by that conversation, and the plaintiff, after such continued and gross neglect in not complying with his original contract, and after such express abandonment of the purchase, and after such admissions to a subsequent purchaser, comes into this court, without any color of equity, to ask for a specific performance. I shall, accordingly, dissolve the injunction and dismiss the bill, with costs.

Decree accordingly.

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WELLS v. SMITH.

IN THE COURT OF CHANCERY OF NEW YORK, AUGUST 28, 1837.

[*Reported in 7 Paige 22.*]

THIS was an appeal from the decree of the Vice-Chancellor of the first circuit dismissing the complainant's bill. The facts of the case and the Vice-Chancellor's opinion are contained in the report of the case before him.<sup>1</sup>

*S. P. Staples* for the appellant.

*R. Bogardus* for the respondent.

The CHANCELLOR.<sup>2</sup> This bill is filed to compel a specific performance of a contract for the sale of a lot of land in New York, the complainant having failed to perform the contract on his part within the time stipulated. And the only questions are, whether upon an executory contract of sale parties may make time an essential part of the contract, so that this court will not relieve against a non-compliance at the day; and whether it was the intention of the parties in this case to

<sup>1</sup> See 2 Edw. Ch. Rep. 78.

<sup>2</sup> Reuben H. Walworth.—ED.

make the payment of the money on or before the time stipulated an essential part of the agreement.

There cannot be a doubt that it was the intention of the parties in this case to make the time specified an essential part of the contract. It is hardly possible to make language more explicit. The contract was, that if the complainant failed or neglected to perform all or any one of the covenants therein contained on his part, at the time or times therein before limited, then and in such case all the covenants and agreements on the part of the defendant should cease and be absolutely void ; and all the complainant's right or interest in the premises either in law or equity should cease, etc. And one of the covenants on the part of the complainant was, to build and enclose a house upon the front of the lot on or before the first day of August, or in lieu thereof, that he should on that day pay to the defendant one thousand dollars as the first payment towards the purchase-money. The complainant had his election to do one or the other, as was most convenient for him ; but if he did neither, it was unquestionably the intention of both parties that the defendant should be no longer bound by the contract. And although Mrs. Smith afterwards consented to modify the contract, so far as to permit him to pay the whole instead of a part only of the purchase-money on the day—he not having attempted to build the house—she gave him fair notice that if he suffered the day to pass without paying the amount stipulated in the contract, she should avail herself of the condition expressed in the agreement and refuse him the deed.

The Vice-Chancellor is right in supposing that the defendant was not bound to prepare and tender the deed until the complainant paid or offered to pay the money. If she wished to compel a performance of the agreement and recover the money, in a suit at law upon the covenants, it might be necessary perhaps that she should have made a tender of the deed, and offered to deliver the same upon the payment of the \$1,000 and the delivery of a bond and mortgage for the residue of the purchase-money. On the other hand, if the purchaser wished to comply with the contract so as to have the benefit thereof, he should have tendered the money at the day ; or have offered to pay the same, and to execute the bond and mortgage for the residue, upon the delivery to him of a deed of the premises. And if he wished time to examine as to the validity of the vendor's title, he should have called for the abstract of title in season to enable his counsel to examine the title before the day upon which the money was to be paid and the conveyances executed. But he had no right to call upon the defendant to make out the deed itself, or to furnish him with a draft thereof, previous to the time when the deed was by the terms of the agreement to be delivered.

As to the power of the vendor, or of the purchaser to make the performance of a condition precedent essential to the vesting of a legal or equitable right in the adverse party to a specific performance, I have no doubt; though this court may perhaps relieve against a forfeiture where it would be unconscientious to insist upon a strict and literal compliance. Thus if a vendor, after he had received the greater portion of the purchase-money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received and the premises also if the last payment was not made at the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment and convey the premises, or to restore the purchase-money already paid, after deducting a reasonable allowance for the use of the premises in the meantime.

In this case, however, the interest of the money till the first of August, and the shop which the complainant agreed to leave on the premises if he did not perform his part of the contract at the day, are not probably more than the value of the use of the premises in the meantime and of the chance of gain to the purchaser by the probable increase in the value of the property. They may, therefore, very properly considered as reasonable stipulated damages for the non-performance of the contract by the vendee at the time fixed upon by the parties, and are not properly a forfeiture. Although in theory the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact the person to whom it is due frequently sustains great losses in consequence of the disappointment, which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title and the delivery of the possession of the premises at the time contemplated by the purchaser is of essential benefit to him, which cannot be compensated by damages which are ascertainable by the ordinary rules of computing damages. It would therefore not only be unreasonable, but entirely unjust, for any court to hold that parties, in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law, where, as in this case, the other party was fully apprised of the intention to insist upon a strict performance at the day.

Here there was no such impossibility as might not have been foreseen and provided against by proper care and vigilance. Under such circumstances, if the property had very much increased in value after the making of the original contract, the defendant is fairly entitled to the benefit thereof under the agreement by which the complainant contracted to relinquish all claims upon the property, either at law or in

equity, if he did not comply with the terms of the agreement at the day. And as there is nothing inequitable or unconscientious in her insisting upon this part of the contract, I think the Vice-Chancellor was right in not making a new contract for her, contrary to the understanding of both parties when they entered into this agreement.

The decree appealed from is therefore affirmed, with costs.

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MACBRYDE *v.* WEEKES.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JULY 19, 20, 21,  
1856.

[*Reported in 22 Beavan 533.*]

THIS was a suit for the specific performance of an agreement of a lease of a certain mining property. It was resisted, first, on the ground of misrepresentation; and secondly, that the defendant, after due notice, had rescinded the contract. The agreement between the plaintiff and defendant, dated the 4th of October, 1855, provided as follows:

"1st. Mr. Macbryde agrees to grant a lease of his present freehold of about five and a half acres of mineral land, situate," etc., "for twenty-one years, to Mr. Weekes, renewable at the end of that time, if desired by Mr. Weekes.

"2d. Mr. Macbryde also agrees to purchase the adjoining field of about four acres, now belonging to Mr. Strongitharm, and to grant a similar lease of it to Mr. Weekes.

"3d. Mr. Macbryde further agrees to procure the assignment of the lease of about twelve acres of mineral land, now held by his brother James Macbryde, from Mr. Neville to Mr. Weekes.

"4th. Mr. Macbryde also agrees to sell to Mr. Weekes the whole of the plant, engines, shafts, tools, brick-kilns, offices, weighing machines, etc., on the joint estates.

"5th. Mr. Macbryde will exercise all his influence to procure an extension of Mr. Neville's lease to twenty-one years, and to obtain a modification of the final levelling clause in that lease.

"Next, Mr. Weekes agrees to pay £1,500 for the lease of the twelve acres from Mr. Neville, the lease of the nine and a half acres from Mr. Macbryde, the engines, plant, brick-kilns, buildings, etc., etc., in the following manner." It then provided for the payment by installments, the first to be paid "on being put in possession legally."

The agreement then went on to specify the royalties in minerals, and surface rent, which was to be paid by Mr. Weekes.

The plaintiff proceeded to purchase the field mentioned in the second clause, and on the 5th of November, 1855, Mr. Strongitharm (the owner of the field) agreed to sell it to the plaintiff for £560. On the 12th of that month, a meeting took place between the plaintiff and Mr. Neville, in the presence of the defendant, when Mr. Neville, in consideration of £200, gave his consent in writing to the assignment to the plaintiff of the lease mentioned in the third clause, or to the defendant as his nominee. Such lease contained a restriction against any assignment thereof by the lessee, without the written consent of the lessor. The plaintiff thereupon gave Mr. Neville two promissory notes of £100 each in payment of the £200. Mr. Neville, however, refused to extend the term granted by the lease, or to allow any modification of the clause referred to as "the levelling clause," and which required the lessee to level the land demised at the expiration of the term.

The plaintiff alleged that he was at the date of the agreement, seised in fee simple in possession of the land mentioned in the first clause, subject to a mortgage; and it was thought desirable that a transfer of this mortgage should be effected previously to the completion of the agreement; that he proceeded to endeavor to effect such transfer, and that he was, in other respects, occupied in placing himself in a position to carry the said agreement into effect, when, on the 10th of December, 1855, he received the following notice from the defendant:

"I hereby require you to perform and complete, within one calendar month from the day of the date hereof, your part of the agreement in writing entered into by you with me, bearing date the 4th of October last, and signed by you; and I hereby offer to perform my part of the said agreement within the time aforesaid, on your performing your part thereof. And I hereby give you notice, that, in default of your performing your part of the said agreement within the period aforesaid, I shall consider the said agreement at an end."

On the receipt of this notice, the plaintiff's solicitors, by his direction, applied to Mr. Strongitharm for the abstract of his title to the field which the plaintiff had agreed to purchase. Although two applications were made to him on the subject, such abstract was not forwarded by him till the 2d of January, 1856, whereupon it was immediately examined, and the plaintiff's solicitors, finding the title satisfactory, prepared the draft of a conveyance of this field, and on the 7th they forwarded the draft to the solicitor of Mr. Strongitharm for his perusal. The plaintiff's solicitors also prepared the draft of an assignment to the defendant of the lease granted by Mr. Neville, and also the draft of a lease to the defendant of all the land to which the

agreement related, including the field purchased by the plaintiff of Mr. Strongitharm. On the 9th of January, 1856, they forwarded the last-mentioned drafts to the defendant's solicitors.

The defendant's solicitors retained these drafts, but on the 12th of January sent the following letter to the plaintiff's solicitors:

"DEAR SIR: Mr. Macbryde not having performed his part of the agreement between himself and Mr. Weekes of the 4th of October last, within the time specified by the notice, served by the latter on the former on the 10th of December last, on behalf of our client, we rescind the contract, and beg to return draft lease and assignment."

On the 14th of January the plaintiff's solicitors wrote to the defendant's solicitors denying their right to rescind the contract.

*Mr. R. Palmer* and *Mr. Karlake* for the plaintiff.

*Mr. Follett* and *Mr. Southgate* for the defendant.

THE MASTER OF THE ROLLS. This is a suit for specific performance.

The defense is two-fold. First, it is said that the plaintiff made inaccurate representations as to the value of the mine, and on the faith of which the defendant entered into the contract; and, secondly, the defendant says that he has determined the contract by a notice given on the 10th of December, 1855, stating that unless the plaintiff performed his part of the contract within a month from that period, it was to be put an end to, and which he asserts was done.

On the first part of this case, I expressed my opinion at the hearing, that it failed, for, assuming the misrepresentations to have been made, as the defendant alleges, still after he had full information respecting that representation and the value, he gave the notice in question, in which he had undertaken to perform his part of the contract, in case the plaintiff performed his part within a month after notice. This, in my opinion, is conclusive evidence that he did not, at that time, consider the misrepresentation to be material, and that, notwithstanding it, he was willing to perform his part of the contract. After this, it appears to me to be impossible for the defendant to say that the misrepresentations which he was then aware of were so serious that it would be inequitable to compel him to perform his part of the contract. His notice pronounces judgment on his own objection, and in fact declares it to be untenable.

The other objection on which I reserved my judgment depends upon the question of time—whether, in the circumstances of this case, the notice of the 10th of December, 1855, was a reasonable one for the defendant to give, and if so, whether it has been complied with by the plaintiff or has been subsequently waived by the defendant. The contract was dated the 4th of October, 1855. [The Master

of the Rolls here read it.] It is in favor of the plaintiff, that no time is mentioned for the completion of the contract; and also, that it imposes upon him several matters to be accomplished, which, in the ordinary affairs of mankind, take time, and the completion of which did not depend upon himself alone. It must be assumed that it was contemplated between the parties, that the plaintiff was to have a reasonable time to enable him to accomplish these objects. On the other hand, on the side of the defendant, it is to be observed, that the subject-matter of the contract was a lease for working mines, and, above all, that more than half the land intended to be worked was held under a lease for less than twenty-one years, which was to be assigned, and which was rapidly running out. The absence from the contract of any specific mention of time within which it was to be completed, which would probably be conclusive against the defendant at law, I consider unimportant in equity. This, in my opinion, is one of those cases, in which time was, from the nature of the property, necessarily of the essence of the contract, in this sense and to this extent, that it was incumbent on the owner to use his utmost diligence to complete his part of the contract, and that if he failed in so exerting himself, the defendant might decline having anything further to do with the matter. The subject of the contract was in part a lease for working a mine; which is a trade of a fluctuating character, and obviously coming within the principles laid down in the cases cited of *Parker v. Frith*,<sup>1</sup> *Wright v. Howard*,<sup>2</sup> *Coslake v. Till*,<sup>3</sup> and *Walker v. Jeffreys*,<sup>4</sup> and several other cases. The rest of the property contracted for was not merely for the same purpose, but was a leasehold having a short period to run, and therefore, from day to day, rapidly decreasing in value. In such a case, it is incumbent upon the vendor to use his utmost diligence to complete his part of the contract, although no time is specified in the contract; and in equity, the purchaser is at liberty to fix a time for the completion of the contract, by giving reasonable notice for that purpose. No doubt this would have no operation at law; the difference being very marked between law and equity, so far as regards this question; law only considering time as of the essence of the contract, when it is expressly specified, whatever may be the condition of the parties and the property, but equity considering time essential in those cases only, in which injury would be inflicted upon one party by disregarding it.

With respect to that part of the contract which contemplates the plaintiff purchasing the adjoining field, and obtaining the consent of

<sup>1</sup> 1 Sim. & S. 199, *n*.

<sup>3</sup> 1 Russ. 376.

<sup>2</sup> 1 Sim. & S. 190.

<sup>4</sup> 1 Hare 341.



Mr. Neville to the assignment of the twelve acres, it is true, as I have observed, that a reasonable time is to be allowed to the plaintiff to effect these objects; but the time that is to be allowed for this purpose is to be taken with this qualification: that the plaintiff, by entering into the contract, not only positively affirms that he can accomplish these objects, but he impliedly affirms that he will be able to accomplish them speedily; and he cannot, in my opinion, afterwards be allowed to urge, as a sufficient excuse for a considerable delay, the fact that it was two or three months before he could induce the owner to sell the field in question, or that the purchase and the investigation of the vendor's title occupied several months. For the same reason, he cannot, in my opinion, urge as an excuse, that a considerable time elapsed before he could induce Mr. Neville to agree to the terms upon which the lease should be assigned. Although he might, in this case, be permitted to show, that unexpected obstacles occurred, and that he had used the utmost diligence to surmount them; many cases, of which *Gee v. Pearse*<sup>1</sup> is an instance, affirm this principle: that the vendor must be taken to have the means of completing his part of the contract when he entered into it; in my opinion, the present contract is no exception to that rule, although it is a very peculiar one, and one of which, from its nature, it would have been almost impossible for the defendant to have enforced the specific performance against the plaintiff.

This then was the state of the parties when the contract was entered into: the subject-matter of it was such, that it was of the greatest importance that it should be completed forthwith, and that the defendant should be put into possession of the subject of it without any delay; the plaintiff was under the obligation to use every species of exertion to accomplish this end, and if he could not do so within reasonable time, on being apprised of that fact, the defendant might abandon the contract.

In this state of things, I have looked at the evidence to see what has been done by the plaintiff, having regard to that, which, as I have already stated, he was bound to do. The contract was on the 4th of October, 1855. On the 5th of November the plaintiff entered into an agreement with the owner of the adjoining field to purchase it for £560. No explanation is given why this contract was not sooner made, and a month had then already elapsed. Up to the time when the notice was given by the defendant, I do not find that any further steps had been taken by the plaintiff relative to this property. It would appear, that no time for the completion of the contract was

<sup>1</sup> 2 De G. & Sm. 325.

fixed ; that the abstract was not delivered, and was not even applied for until the notice of the 10th of December. No communication whatever appears to have been made to the defendant or his solicitors, on the subject of the lease of the piece of land of which the plaintiff was the owner under the contract.

With respect to the assignment of the lease from Mr. Neville, the delay, up to this time, appears to have been much the same as in the case of the purchase from Mr. Strongitharm. It does not appear when Mr. Neville was first applied to for his consent to the assignment of the lease ; at all events, his consent was not obtained until the 12th of November, 1855, on which occasion the defendant was present. Nothing further was done on the subject, and the correspondence shows, that the defendant, if he did not strongly press, at least suggested to the plaintiff, the necessity of speedily settling the matter, and urged that, at all events, the lease from Mr. Neville might be assigned, if the rest of the matter stood over.

In this state of things, more than nine weeks having elapsed since the contract, and no communication having been made to the defendant, to show when it was likely that it would be completed, he gave the notice on the 10th of December, in which he says, if not completed within a month, "he should consider the agreement at an end."

What constitutes a reasonable notice, and a reasonable time to be fixed in it, must depend upon the contract and the circumstances of each case. I think in those of the present case, having regard to the subject-matter of the contract, to the fact that more than two months had already elapsed, and that nothing appears to have been completed, so far as the defendant was concerned, no abstract of title delivered, no communication made or information given which looked like advancement (except that he was present on the 12th of November, and knew that Mr. Neville had consented to the assignment of the lease), I think, under all these circumstances, that the defendant was justified in giving the notice in question, and that a month was not an unreasonable time to be fixed for this purpose.

*Parker v. Frith*<sup>1</sup> was, in my opinion, a very different case. There, there was nothing in the subject-matter of the contract which required dispatch. The time originally limited in the contract had been mutually abandoned ; the vendor had shown no want of diligence in making out his title, and in doing so he met with an unexpected obstacle in the withholding of a deed, which he used his best exertions to obtain as speedily as possible. In that case also, on receiving the notice, the vendor disputed the right of the purchaser to give it, and insisted throughout on the contract. Here, on the con-

<sup>1</sup> 1 Sim. & Stu. 199, note.

trary, when the notice was received, no objection seems to have been taken, either to the right of the defendant to give it or to the time specified. This, it is true, does not vary the rights of the parties, but as far as it goes, it shows that the plaintiff took the same view of the construction of the contract he had entered into, which I have expressed. What I have already stated of this case shows also how marked the difference is between it and *Parker v. Frith*<sup>1</sup> in other respects. That case was never meant to decide, that the parties to a contract are not bound to use due diligence for its completion, but it merely decides that the fact, that a time was specified in the contract within which it was to be completed, does not necessarily, in equity, as it does at law, make time of the essence of the contract. Upon the facts in evidence of that case, the want of due diligence could not, in my opinion, be imputed to the vendor; the facts in evidence in this case lead me to a contrary conclusion as regards the plaintiff.<sup>2</sup>

The conclusion, therefore, to which I have come, upon the whole case, is, that the nature of the subject-matter of the contract, and the circumstances which affected the case prior to the 10th of December, 1855, justified the defendant in giving the notice on that day that the plaintiff having, at the expiration of that notice, failed in showing that he had complied with his part of the contract, or that he was in a situation to complete it, and the defendant never having waived the notice, the plaintiff is not entitled to the assistance of this court for the specific performance of the contract, and, consequently, the bill must be dismissed, and with costs.

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TILLEY v. THOMAS.

IN THE COURT OF APPEAL IN CHANCERY, NOVEMBER 4, 5, 11, 1867.

[*Reported in Law Reports, 3 Chancery Appeals 61.*]

THIS was an appeal from a decision of Vice-Chancellor Stuart.

The plaintiff, James John Tilley, was the owner of a leasehold dwelling-house and premises at Fulham, held under a lease for a term of forty-nine years, from Michaelmas, 1834.

On the 14th of December, 1864, the plaintiff agreed to sell the premises to the defendant, Charles Thomas, for £700. The agreement was in the following terms :

“LONDON, 14th December, 1864.

“I hereby agree to purchase the lease of Cambridge Lodge, North

<sup>1</sup> 1 Sim. & Stu. 199, *note*.

<sup>2</sup> A portion of the opinion has been omitted.—ED.

End, Fulham, for the sum of £700, to include house, fixtures and fittings of outbuildings adjoining thereto, and garden stock in ground. Possession to be given on the 14th January next."

At the same time the defendant paid the auctioneers, Messrs. Kingston & Elstob, a deposit of £70, and received a receipt in the following form :

"Received of C. Thomas, Esq., the sum of £70, by check, being the deposit on the sum of £700 agreed to be paid for him for the lease of Cambridge Lodge, North End, Fulham, to be returned in the event of the sale not being completed through the vendor's fault."

On the 23d of December the plaintiff delivered an abstract of his title, but difficulties arose in the production of the lessor's title, which were not cleared up before the 14th of January, 1865. On that day the plaintiff offered to deliver up possession of the house and premises to the defendant, but he refused to accept possession on the ground that the plaintiff had not shown a complete title. On the 5th of June, 1865, the plaintiff filed his bill for specific performance of the contract, alleging that he had, since the 14th of January, deduced a good title to the premises.

The defendant, in his answer, stated that his object in agreeing to purchase the house was to occupy it as a residence, and that he wanted immediate possession in order to prepare it for that purpose, and he insisted that he was entitled to possession under a good title, and not to actual possession only, on the 14th of January. The third paragraph of the answer was as follows :

"At the time when I entered into the said agreement I had recently concluded an arrangement with the Clergy Club and Hotel Company, Limited, for the sale to them of my lease of Thomas's Hotel, in which I was then residing. Extensive repairs and alterations were required to make the hotel suitable for a club, and I was compelled to find another residence within a very short period. I was principally induced to enter into the said agreement for the purchase of Cambridge Lodge by the statements of the plaintiff, and the said J. A. Elstob, that the purchase should be completed, and that I should be let into possession, within a month, so that I might make any alterations which I thought desirable in the grounds and gardens, and might furnish the house throughout before quitting the hotel. I distinctly informed the plaintiff and the said J. A. Elstob that it was my intention to make such alterations, and to furnish the house as aforesaid, and I understood from them that the meaning and effect of the agreement which I had signed, and the receipt which had been given to me (such agreement and receipt being both in the handwriting of the said J. A. Elstob, and written at the same time, and as part of the same transaction), was that possession

of Cambridge Lodge was to be given to me, and the sale completed, on the 14th of January, 1865, and that if through the vendor's fault the sale was not completed and possession given to me on that day, the deposit was to be returned."

In reply to this the plaintiff and J. A. Elstob, in the joint affidavit filed by them, said: "We have read the third paragraph of the answer of the above-named defendant, Charles Thomas, filed in this cause, and we admit it to be true, as therein stated, that the said defendant informed us that he wished to have possession given to him of the house and grounds of Cambridge Lodge by the 14th day of January, 1865, in order that he might make any alterations which he might think desirable in the grounds and gardens, and that he might furnish the house, but we positively deny that any mention whatever was made, either by the said defendant, or by us, or by either of us, either before or after the signing of the said agreement therein mentioned, that the purchase should be completed on the said 14th day of January, 1865, or at any other time, nor was any allusion whatever made by the said defendant, or either of us, as to the completion of the purchase at the time stated in the said paragraph, nor at any other time, nor was anything said by either of us, or the said defendant, which could possibly induce or lead the said defendant to suppose that by naming the 14th day of January, 1865, as the day upon which possession of the said premises should be given up to him, it was also intended that on or before that date the purchase should be completed as stated in the said paragraph of the said defendant's answer; nor did we then suppose, nor believe, that the said defendant then supposed or understood that the sale was to be completed on the said 14th day of January, 1865, as well as possession of the premises given to him on that day, but, on the contrary, that the said 14th day of January, 1865, was specially fixed as the day upon which possession only of the said premises should be given to the said defendant."

On the 24th of December the plaintiff's solicitor, Mr. Overbury, delivered an abstract of the title to Mr. Cameron, the defendant's solicitor, and an appointment was made for the 27th to examine the deeds. Cameron and his clerk attended accordingly, and saw a clerk of Overbury, who stated that the deeds were not in the possession of Overbury, and that he had gone to the plaintiff's house for them; and it was arranged that Overbury should write and make an appointment for their examination.

On the 3d of January, 1865, Cameron wrote to Overbury to remind him that they were waiting for an appointment; and other interviews took place, in which Overbury admitted that he could not complete the purchase before the 14th of January.

On the 14th of January Cameron wrote to the plaintiff's solicitor as follows :

"In consequence of the default of your client to produce the deeds set out in the abstract of title received from you on the 24th ult., we have been prevented examining them in the usual course, and thereby the completion of the contract for purchase is rendered impossible to-day, when possession should have been given to the purchaser. Under these circumstances my client abandons the contract ; and I have to request that you will intimate to Mr. Kingston, the agent, that he may return the £70 deposit paid by Mr. Thomas to him on the 14th ult."

The plaintiff's solicitor still pressed the defendant's solicitor to examine the deeds with the abstract, and after some correspondence, on the 16th of February, 1865, the defendant's solicitor consented to do so "without prejudice to the right exercised by the purchaser to rescind his contract." Accordingly, Cameron, the defendant's solicitor, attended on the 19th of February and examined the deeds, and on the 21st sent requisitions on the title to the plaintiff's solicitor. The principal requisition referred to the production of the lessor's title, on which the purchaser insisted, although the vendor's solicitor urged him to waive it, and to the satisfaction of a mortgage on the premises, which was irredeemable until 1868. On the 13th of April, 1865, the defendant's solicitor wrote again to the plaintiff's solicitor, saying, that unless the further abstract required was produced within a fortnight the purchaser would abandon the contract.

No further abstract having been furnished, the purchaser's solicitor wrote again on the 1st of May, saying that the contract must be considered as abandoned, and asking for a return of the deposit. A further abstract was sent on the 15th of May, and various other negotiations took place between the parties, which were continued after the filing of the bill, and an attempt was made to compromise the matter, which was, however, repudiated by the plaintiff, and formed the subject of argument before the Lord Justices ; but, in consequence of the view which their Lordships took of the merits of the case, it became unnecessary to decide the point.

The Vice-Chancellor decreed specific performance of the agreement, and an account of the damages which the plaintiff had sustained by the defendant refusing to take possession of the house when it was tendered to him. From this decision the defendant Thomas appealed.

*Mr. Bacon*, Q.C., and *Mr. F. H. Warner* for the appellant.

*Mr. Druce*, Q.C., and *Mr. C. Browne* for the plaintiff.

NOV. 11. LORD CAIRNS, L.J. So far as the construction of the memorandum is concerned, there cannot, I think, be any doubt that the words "possession to be given on the 14th of January next" point

to and intend, not a possession on sufferance, or with the risk of eviction, but a possession to be delivered to the purchaser, as proprietor, in exchange for the price, and as Lord Eldon, in *Boehm v. Wood*,<sup>1</sup> puts it, after such a previous manifestation of title as would show that the possession could be safely taken. A contract may indeed be, and sometimes is, so framed as to show by the contrast drawn between possession and the completion of the purchase, that the former possession is intended to be provisional and irrespective of title. It was argued that the words in the receipt given by the vendor for the deposit, "to be returned in event of the sale not being completed through the vendor's fault," were in this case used in contrast to "possession" in the contract. The receipt was, however, given after the contract was written and signed, and I read the words "completed" in the receipt as referring to the period already mentioned for possession in the contract, namely, the 14th of January, 1865, otherwise there would be a stipulation for the return of the deposit, depending on delay in completing the purchase, without any time by which delay might be tested, except the period of reasonable time which the law would imply—a test for such a purpose eminently vague and unsatisfactory.

The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity, the same as in a court of law. A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry* <sup>2</sup>) there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Of the three grounds against interference mentioned by Lord Justice Turner, "express stipulations" requires no comment. The "nature of the property" is illustrated by the case of reversions, mines, or trades. The "surrounding circumstances" must depend on the facts of each particular case.

In this case the property sold was a residential leasehold house, not apparently let or producing rent at the time of sale, and intended by the defendant to be used as his own residence. [His Lordship then referred to the statements in the defendant's answer, and in the affidavit of the plaintiff, and continued:]

Looking to the admitted facts thus stated, I can have no hesitation in

<sup>1</sup> 1 Jac. & W. 420.

<sup>2</sup> 3 D. M. & G. 284.

saying, that in my opinion it was essential, and known to both parties to be essential, that the defendant should have, by the time stipulated, possession of the house for repairs and improvements with a view to his own immediate residence, a possession, therefore, which could not be disturbed—a possession, that is to say, with a title, and that to enforce against the purchaser performance of the contract after a breach of it by the vendor in this respect would be inequitable.

The abstract was delivered two days before Christmas Day, 1864. An appointment to examine the deeds was forthwith made by the defendant's solicitor for the 27th, and the statement in the answer as to what then occurred is not contradicted.

There was, therefore, no delay or waiver on the part of the defendant in asserting and maintaining his rights. It appears that during all this time the vendor could not make a good title, irrespective of the question of his landlord's title to the house; for there was a mortgage irredeemable before 1868, with powers of sale and distress in the mortgage.

I think the defendant was, under the circumstances, entitled on the 14th of January to refuse to perform the contract. Some subsequent negotiation took place as to making out the lessor's title, but it was after this refusal had been distinctly made, and it was expressly without prejudice to the defendant's right so asserted.

It is unnecessary, in the view I take of this case, to consider whether the compromise of this suit alleged to have been afterwards made was or was not binding on the plaintiff. In my opinion the suit for specific performance fails, and the bill ought to have been dismissed, with costs.

SIR JOHN ROLT, L.J. The first question in this case is, what is the true legal construction of the words in the contract, "possession to be given on the 14th of January next." Do they mean possession *simpliciter*, with or without title, or are they to be construed as meaning possession with complete title previously shown? I am of opinion, excluding everything that passed verbally between the parties or their agents at the time of the contract, that the possession referred to must be construed, even at law, to mean possession with a complete title previously shown. As a general rule, I think the word "possession" in such a contract should be so construed. A conveyance previously executed is, probably, not necessary; but it is not material to inquire into this, for here it is admitted that a good title was not previously shown. There may be cases in which, from the nature of the property, or from the context, the word may admit of a different meaning, and that appears to have been Lord Eldon's ultimate decision of the meaning of the expression as used in the agreement in *Boehm v. Wood*;<sup>1</sup>

<sup>1</sup> 1 Jac. & W. 419.



but general possession without a title would, or might be, the source of great embarrassment to a purchaser, and could scarcely have been in contemplation at the time of the contract, and it ought not, therefore, to be generally accepted as the true meaning of the expression standing alone. In this case I think there is nothing in the nature of the property, or in the context, to control what I deem to be the ordinary and general meaning of the word. On the contrary the receipt for the deposit of £70, which was written at the same time as the agreement, if it can be referred to for this purpose, appears to me to confirm this reading of the agreement.

Now, as a matter of construction merely, I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than at law. But in equity there may be circumstances which will induce the court to give relief against the breach, and sometimes even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The defendant is entitled to say that the contract is at an end, and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law, though not necessarily so in equity. The language of Lord Redesdale in *Lennon v. Napper*,<sup>1</sup> cited by Lord Justice Knight Bruce, in *Roberts v. Berry*,<sup>2</sup> fully explains my view on this part of the case.

Then has the plaintiff, who has broken his contract by not giving possession on the day named with complete title previously shown, made out a case for relief against this breach of the contract on his part? Here it will be necessary not only to examine the circumstances which have occasioned the non-performance of the contract by the plaintiff, but the consequences of the breach to the defendant. The breach may have been purely accidental, occasioned by circumstances wholly beyond the control of the plaintiff, but if the relief will work manifest injustice to the defendant it cannot be granted.

Now I will assume that the plaintiff was not guilty of actual negligence, and that the contract was broken in spite of every exertion on his part to perform it. He was, no doubt, imprudent in entering into a contract which a little consideration might have told him he probably would not be able strictly to perform. But put that on one side. Can relief be given without manifest injustice to the defendant? Here it becomes necessary to examine the evidence. The defendant is entitled

<sup>1</sup> 2 Sch. & Lef. 682.

<sup>2</sup> 3 D. M. & G. 284.

to prove, if he can, that the object for which he purchased required possession with a good title on the day named, and that to call upon him to become the purchaser with no title shown till weeks or months after that day would be asking him to do that which, for special reasons, he stipulated against by the contract. And he has entered into evidence for this purpose. The plaintiff, also, was entitled to enter into evidence to counteract this ; and I will examine the effect of the evidence on the original case in the first instance, excluding, for the present, the consideration of the question whether the defendant has, by his subsequent conduct, waived his right, if he ever had it, to resist specific performance.

The answer of the defendant is made an affidavit, and is to be read in evidence. The third paragraph is the most material, and has been already read. In effect, the defendant swears that at the date of the contract he had then recently sold his own residence, and was obliged to find another within a very short period ; that he bought consequently with a view to immediate occupation by himself, and that the plaintiff knew this ; that he, the defendant, was mainly induced to enter into the agreement by the plaintiff's statements that the purchase should be completed, and that he should be let into possession within a month ; and that he, the defendant, understood from the plaintiff and his agent that the meaning of the agreement was, that possession was to be given and the sale completed on the 14th of January.

The plaintiff and his agent, Mr. Elstob, admit, in their affidavit, that the defendant informed them that he wanted possession by the 14th of January, in order that he might make any alterations which he might think desirable in the grounds and gardens, and that he might furnish. Now ought not this to have satisfied them that the possession was necessarily to be preceded by a good title shown ? It is true they go on to deny that anything passed which could warrant the conclusion that the purchase was to be completed on the 14th of January, and as the defendant's affidavit spoke of "the purchase being completed" before the day, and not merely of "a good title being shown," they have no doubt answered the affidavit in terms, and there is a conflict of evidence ; but it is not immaterial to observe that the plaintiff does not insist that he supposed that possession would answer the defendant's purpose without a good title being shown. He knew that the purpose for which possession was wanted would make possession without title valueless.

The correspondence down to and including the 14th of January confirms this view of the understanding of the parties as to the effect of the original agreement. The abstract is sent by the plaintiff's solicitor on the 23d of December. On the 24th the defendant's solicitor makes

an early appointment for examining the abstract with the deeds. The plaintiff's solicitor was not ready with the deeds on the day appointed, and he promised to make another appointment. On the 3d of January the defendant's solicitor reminds him that he is waiting for an appointment. Some interviews subsequently take place, at one of which the plaintiff's solicitor states, for the first time, that he cannot possibly complete by the 14th, and on that day the defendant abandons the contract. Putting subsequent waiver by the defendant out of consideration, I cannot doubt, if my view of the construction of the agreement is right, that the plaintiff could not, under these circumstances, ask to be relieved from his own breach of the contract and claim specific performance against the defendant.

But assume, for the sake of argument, that my construction of the agreement is wrong, and that at law that agreement must be read as requiring possession only on the day named, without reference to title, and that, consequently, the tender of possession actually made on the 14th of January was sufficient at law. Will that support the decree? I am disposed to think that though, no doubt, the defendant is thus placed under much greater difficulty, still, excluding the question whether the defendant has waived his right to resist specific performance by subsequent conduct, the case, upon the same facts, would then stand thus: The plaintiff has, upon this construction, a valid legal agreement which he has not broken at law, and he asks specific performance of it in equity. I think the judicial discretion which this court clearly possesses of refusing specific performance in certain cases of agreements undoubtedly valid ought to be carefully and sparingly exercised. Contracts ought to be performed. To break them, and to propose compensation for the breach by damages, is not complete justice. But the discretion of this court as to granting or refusing specific performance has, nevertheless, been wisely as well as firmly established, and in this case, adding to the evidence on which I have already commented only the fact that it was not shown to the defendant that he could safely take possession with a good title till the following month of May (even if it has yet been shown at all), I think that even should this construction prevail, this is a case in which it would be right to leave the plaintiff to his remedy at law, if he has any. It is, however, unnecessary to pursue this subject further, because my view of the legal construction is different.

There still remains the question, whether the defendant has by his subsequent conduct so acted as to entitle the plaintiff to say in equity that he ought now to be compelled to perform his contract. The subsequent facts are these: The defendant's solicitor, having in the meantime distinctly adhered to the abandonment of the contract which he

had communicated to the plaintiff on the 14th of January, was, on the 16th of February, induced, apparently from deference to the opinion of the plaintiff's counsel, to propose, without prejudice to his right to rescind, to examine the abstract with the deeds. Having done this, he, on the 21st of February, made requisitions on the title, and on the 13th of April, the requisitions not having been complied with, he intimated to the plaintiff's solicitor that if he did not receive a further abstract admitted to have been necessary, and have an appointment for examining the same with the deeds within a fortnight, he should on behalf of the defendant abandon the contract. The further abstract was not sent till the 15th of May.

It is said for the defendant that a protest against an adversary's right is not waived by subsequent negotiation, and *Magennis v. Fallon*<sup>1</sup> was cited for the proposition. I think the proposition thus stated too general, and that the question must, in each case, very much depend upon the terms of the protest, and the nature of the subsequent negotiations, and other facts. In this case, if the plaintiff had at once and promptly, after the defendant's proposal of the 16th of February to examine the abstract, shown a good title, I should have doubted whether the defendant could escape from the contract. But nothing effectual was done before the 13th of April, when the defendant again intimated his intention to abandon. It was argued for the plaintiff, that the fortnight then proposed to be allowed for the delivery of a further abstract was not a reasonable time. Probably not, if it had been the first complaint of delay by the defendant; but having regard to all the dates and facts I have stated, I think the plaintiff was not entitled on the 15th of May to reopen the matter.

This view of the case makes it unnecessary to consider the defendant's contention that there was a subsequent agreement between the parties which relieved him from the original contract. I think no such agreement was ever concluded; but, as I think on other grounds that he ought not to be decreed to perform the original contract, this is immaterial.

The decree appealed from will therefore be discharged, and the plaintiff's bill dismissed with costs.

Solicitor for the plaintiff: *Mr. Overbury*.

Solicitor for the defendant: *Mr. Cameron*.

<sup>1</sup> 2 Moll. 576.

## WEBB v. HUGHES.

IN CHANCERY, BEFORE SIR RICHARD MALINS, V.C., MAY 4, 9, 1870.

*[Reported in Law Reports, 10 Equity Cases 281.]*

THIS was a bill for the specific performance of an agreement entered into on the 13th of February, 1869, by the plaintiff, J. M. Webb, for the sale to the defendant, H. M. Hughes, of a dwelling-house with out-buildings and two acres of land adjoining, known as The Cedars, for the sum of £1,400. By the conditions of sale, it was stipulated that a deposit should be paid upon the defendant signing the agreement, and that the remainder of the purchase-money should be paid and the purchase completed at noon on the 26th of February next; and if from any cause whatever the purchase should not then be completed, the purchaser should pay to the vendor interest, after the rate of £5 per cent. per annum, on the remainder of the purchase-money from that day until the completion of the purchase; the purchaser (having paid his purchase-money) should be entitled to the possession of the property on the 26th day of February next, all outgoing up to that day being cleared by the vendor. The vendor was to deliver an abstract of title within ten days, and there were restrictions as to the requirements which the purchaser was at liberty to make. All objections and requisitions (if any) in respect of the title were to be made in writing within twelve days from the delivery of the abstract; and if any objection or requisition should be made which the vendor should be unable or unwilling to remove or comply with, the vendor was to be at liberty to annul the contract, and in such case the deposit-money was to be repaid within one week.

The defendant by his answer stated that an abstract of title was delivered to his solicitor on the 17th of February, but such abstract being incomplete, the further abstract, with copies of the plans referred to, was not delivered till the 6th of March, whereas he was bound by the agreement to deliver a complete abstract within ten days from the date of the agreement. That the plaintiff had never yet shown a good title to the whole of the property comprised in the agreement; that is to say, he had not shown a good title to one portion of the land, containing about 21½ perches, which was absolutely necessary for the enjoyment of the property; and the defendant believed that a title to such piece of land could not be made out by the plaintiff. The defendant further stated that he attained the age of twenty-one on the 24th of September, 1868, and at the time he entered into the agreement he was in want of a residence for himself and his

mother, who resided with him ; and his object was, as he informed the plaintiff, to occupy the house and premises (which were then in the occupation of the plaintiff) as a residence, and (as he informed the plaintiff) he required immediate possession thereof ; and he intended to occupy the same and take possession (as he was informed by the plaintiff he could do) on the 26th of February, 1869, the day fixed by the agreement for completion of the purchase, and immediately to add to and improve the house and premises. But he was unable to take possession in consequence of the plaintiff's neglect to deliver a complete abstract and to show a good title to the whole of the property within the time prescribed by the agreement ; that he was, therefore, put to great inconvenience and expense, and he submitted that, under the circumstances, time was of the essence of the contract, and that he was justified in refusing to complete the agreement.

On the 17th of March, 1869, the defendant's solicitors sent requisitions on the title, and on the 29th of the same month the plaintiff's solicitors replied to such requisitions. On the 7th of April the defendant's solicitors wrote to the plaintiff's solicitors, stating that the answers to the objections to title had been laid before counsel, who considered that the small piece of  $21\frac{1}{2}$  perches of land was not comprised in the words describing the parcels which were inconsistent with the plan, and that no explanation would be sufficient to make the parcels consistent therewith ; and he was of opinion that the vendor's title to this land was not such as the purchaser could be called upon to accept, and that the vendor had failed to make a good title. Under these circumstances, they requested that the deposit of £100, with interest, might be at once returned, together with £20 15s. 8d., the amount of expenses incurred about the investigation of the title.

On the 20th of April, the defendant's solicitors wrote again, stating that unless the deposit, with interest and expenses, was paid by a day therein named, proceedings would be commenced for the recovery thereof.

In consequence of the plaintiff's solicitors refusing to comply with the request contained in the above letters, an action was commenced by the defendant against the plaintiff on the 26th of April, in the Court of Queen's Bench, for the recovery of the deposit with interest and costs, and the defendant thereby claimed payment of £200.

By an order in this cause made on the 3d of June, 1869, further proceedings in the action were stayed upon the plaintiff paying into court the amount claimed.

The plaintiff in one affidavit stated that he had informed the defendant he could take possession of the premises on the 26th of February if the purchase was completed by that time, but not otherwise.

This bill was filed on the 26th of May, 1869, and since then the plaintiff's solicitors had forwarded a further abstract to the property in question without admitting that a good title had not been already shown; and evidence was put in to prove the identity of the parcels, and the plaintiff's title to the piece of land alleged to have been omitted in the plan accompanying the abstract.

*Mr. Osborne, Q.C., Mr. G. N. Colt and Mr. Platt* for the plaintiff.

*Mr. Glasse, Q.C., and Mr. Nalder* for the defendant.

SIR R. MALINS, V.C. This bill was filed for the specific performance of the contract for sale of The Cedars on the 26th of May, 1869. The case set up by the defendant is that time, if not by terms of the agreement, at all events by the circumstances of the case, was of the essence of the contract. One stipulation in the agreement was that the plaintiff should have possession of the property on the 26th of February if his purchase-money was then paid.

The circumstances were these: The defendant came of age in the year 1868, and required a residence immediately for himself and his mother. It is said that the plaintiff was aware of that fact, and the defendant says he informed the plaintiff that if he could not obtain possession of the property by the time stated in the agreement, it would be of no use to him.

Now, the rules of this court are plain. A purchaser may by the terms of the agreement make time the essence of the contract, but it requires a very strict stipulation to effect that object; or he may make time the essence of the contract, by a notice at any time during the progress of the negotiations. If, therefore, time was not an essential part of the contract, the defendant might have made it so by giving the plaintiff notice to that effect. In my opinion, the agreement in this case did not make time the essence of the contract, because the very condition shows that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase; but upon payment of the money, the purchaser was to be entitled to possession of the property. It was, therefore, evidently contemplated that the time might extend beyond the day fixed for completion. But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated.

But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown. What, then, would have been a reasonable time? What was the defendant's position on the 7th of April? The solicitors had been negotiating from the 26th of February for completion of the contract, and on the 7th of April the purchaser does not give the vendor even twenty-four hours' notice of his intention, but sends a notice of his immediate abandonment of the contract. If, instead of that, he had given notice that if the vendor did not perfect his title within a reasonable time, then he would abandon his purchase and would require a return of his deposit, that would have been sufficient; but he had no right, under the circumstances, to give notice of immediate abandonment. *Taylor v. Brown*<sup>1</sup> is a case I often have occasion to refer to upon this subject. The rule was there laid down by Lord Langdale, that where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract—in such a case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court.

In *McMurray v. Spicer*<sup>2</sup> I had occasion fully to consider the question, and there I stated: “The purchaser is bound to give the vendor a reasonable time for completing his title. No absolute rule can be laid down as to what is a reasonable time. That must depend upon a variety of circumstances. . . . The notice here was a week, which I think was too short a time. He was bound to give him a reasonable time, and I think that a week, or even a month, was too short; and the notice was ineffectual for the purpose of rescinding the contract, upon the ground of the time not being a reasonable time.” On this rule, therefore, it was not competent for the purchaser to give notice of immediate abandonment of his contract.

In the course of the argument the case of *Tilley v. Thomas*<sup>3</sup> was cited in support of the defendant's contention, but that was a totally different case. The stipulation there was that possession should be given on the 14th of January next, and the property was required for a residence. If the purchaser had gone on negotiating after the 14th of January, he could not have made time the essence of the contract; but he gave notice on that very day of his abandonment of the contract, on the ground that the title was not completed, and possession could not be given on that day, in pursuance of the agreement; so that the purchaser having made his stand on that very day, the decision was that

<sup>1</sup> 2 Beav. 180.

<sup>2</sup> Law Rep. 5 Eq. 527.

<sup>3</sup> Law Rep. 5 Eq. 543.

<sup>4</sup> Ibid. 3 Ch. 61.



time was of the essence of the contract. It is true that negotiations had gone on after the day fixed for the abandonment of the purchase, but these negotiations were entered into without prejudice to the purchaser's right, and the judgment depended on that fact. The decision, therefore, does not in any way trench upon the general rule, as it turned upon the purchaser making his stand on the very day fixed for completion.

In this case, if time had been of the essence of the contract, the purchaser might have given notice on the day appointed for completion that he would abandon the contract; but after going on negotiating, he should have given a reasonable notice.

It is my duty, therefore, to make a decree for specific performance, with the usual reference as to title; and the defendant must pay the costs of the suit up to the hearing.

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JOHN A. HUBBELL, APPELLANT, *v.* PAULINE VON  
SCHOENING ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, MAY 3, 1872.

[*Reported in 49 New York Reports 326.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming judgment in favor of defendants entered upon the decision of the court at Special Term.<sup>1</sup>

The action was brought to compel the specific performance of a contract for the sale of three lots on One Hundred and Twenty-first Street in the city of New York.

Defendants were husband and wife; the property belonged to the wife. By the contract, plaintiff was to pay \$1,180 on the 24th day of January, 1868, and was to assume a mortgage upon the premises for the balance of the purchase-money. Defendants, on receiving such payment at the time stated, agreed to convey the premises by warranty deed, the deed to be delivered at the office of Z. W. Butcher, defendants' attorney.

On the 23d of January, the day before the time named in the contract for the payment of the purchase-money, the plaintiff applied to the defendants' attorney for an extension of time of performance, to enable him to complete his searches against the property.

The attorney then promised the plaintiff to send him word as soon

<sup>1</sup> Reported below 58 Barb. 498.

as the defendants came to his office, if they arrived the next day, so that he might see them about it.

The defendants or one of them was at the office of their attorney, where the deed was to be delivered, from before twelve o'clock of the said day.

The attorney did not, according to his promise, notify the plaintiff of the arrival of his clients.

The plaintiff, after waiting for such notification until about four o'clock, went around to the office of defendants' attorney, where he met Dr. Von Schoening, and was informed by him that Mrs. Von Schoening, who owned the property, had been there at twelve o'clock, and, as I was not there, she had gone home, and would have nothing more to do with it.

The plaintiff was then informed that he could not see Mrs. Von Schoening that evening, for she would not be at home; but that she would be at home the next morning, when she could be seen.

The defendants lived far up town, at the corner of One Hundred and Tenth Street and Broadway. The plaintiff went there the next morning, but did not find Mrs. Von Schoening. On the same day the plaintiff tendered the amount due on the contract, at the office of the defendants' attorney. The tender was refused by Mr. Butcher, the attorney, on the ground that "it was a day too late." This was on Saturday. The plaintiff sought defendants on Monday. He saw Dr. Von Schoening at Mr. Butcher's office, and was informed by him that Mrs. Von Schoening had sold the lots. He was unable to see her personally.

*Samuel Hand* for the appellant.

*A. Lansing & George W. Van Slyck* for the respondents.

ALLEN, J. There were no laches on the part of the plaintiff, nor any delay in the assertion of his rights. He has shown himself, in the language of the cases, "ready, desirous, prompt and eager" to carry out the contract and have a performance of it. The brief delay of a few hours in making a formal tender of the purchase-money and demanding a conveyance of the property was explained and excused. He had not, for some reason, completed his searches, and satisfied himself as to the title, and the day before that appointed for the performance of the contract he applied to the attorney of the defendants, at whose office the parties were to meet, for an extension of the time to enable him to complete his searches, and the attorney promised him that he would send him word as soon as the defendants came to his office if they arrived the next day, so that he might see them about it.

Not receiving any message from the attorney the next day, he had reason to believe, either that the parties had not arrived or that they had assented to his request. He might reasonably and properly rely

upon this promise of the attorney, and it should not be imputed to him as laches or as evidence of an indifference to, or an unwillingness to perform the contract, that he did so. The plaintiff had all of the 24th of January within which to perform the contract, as no hour was named for that purpose. He did not wait for the promised notice from the defendants' attorney, but during the business hours, and late in the afternoon of that day, went to the office and there found Mr. Von Schoening, one of the contracting parties, and was told by him that he would have nothing more to do with him ; that he did not pay the money that same day, he did not fulfill his agreement and he would have nothing more to do with it. The *feme* defendant had been there in the earlier part of the day but had left, and the plaintiff was told he could not see her that night. The next morning the plaintiff sought the defendants early at their own house at Harlem, with the money to make the tender of the purchase-money, and was told they were not at home. He then tendered the money to the attorney at his office, and this being Saturday, on the Monday following he again sought the defendants to tender the money to them personally, but was unable to find Mrs. Von Schoening, who was the owner of the property. She evidently kept out of the way, and the complaint was verified on the same day. In *Duffy v. O'Donovan*,<sup>1</sup> we held the plaintiff entitled to a specific performance against the vendor and the person to whom he had conveyed the premises with notice of the contract, although the money was not paid or tendered at the hour, the purchaser acting in good faith and intending to perform, and supposing, from the acts and declarations of the agent and attorney of the seller, that the money would be received at a later hour in the day.

Time, in the performance of an agreement either for the sale or purchase of real property, is always material, and a court of equity will not, any more than a court of law, excuse laches and gross negligence in the assertion of a right to a specific performance. But time is not of the essence of the contract unless made so by the terms of the contract ; and, therefore, although there may not, when time has not been made essential, be performance at the day, if the delay is excused, and the situation of the parties or of the property is not changed so that injury will result, and the party is reasonably vigilant, the court will relieve him from the consequences of the delay and grant a specific performance.<sup>2</sup> Each case must be judged by its own circumstances.

A party may not trifle with his contracts and still ask the aid of a court of equity. Neither will the law be administered in a spirit of

<sup>1</sup> 46 N. Y. 223.

<sup>2</sup> *Radcliffe v. Warrington*, 12 Vesey 326 ; *Moore v. Smedburgh*, 3 Paige 600 ; *Edgerton v. Peckham* 11 id. 352.

technicality, and so as to defeat the ends of justice. In this instance there is no vexation, no room for suspicion of any trick, on the part of the plaintiff; at most, it was a mistake in depending upon the promise of the defendant's attorney to advise him when the defendants arrived, if they should arrive on the day fixed for the performance of the contract.

It was assumed by the learned judge on the trial that one of the parties could, by notice to the other, make time of the essence of a contract, when, by its terms, it was not made so. This may be questionable, but need not be considered. The party in such case, if the operation and effect of the contract are to be essentially changed so as to vary his rights or duties at the volition of the other, should have reasonable notice in advance of the time when he will be called upon to act. Here no such notice was given, but, on the contrary, the plaintiff was put at ease by the promise of the attorney of the defendants. Doubtless, a party may be held to a strict performance as to time and put in default for non-performance, that is, a default in law; and whether equity would relieve would depend on circumstances. But to do this, the party seeking to put the other in default must not only be ready and willing to perform, but he must tender performance at the time and demand performance from the other. Von Schoening testified that a deed had been prepared and was ready, but the plaintiff was not notified of the fact, and it was not shown or offered to him. The defendants took especial pains to prove by the *feme* defendant, the owner of the premises, that she had never authorized any one to complete the contract or to receive the money for her, and she was not at the place of performance when the plaintiff called. The plaintiff was not in default, and was not put in default by any acts or offers of the defendants. The judge, before whom the cause was tried, has not found that the defendants put the plaintiff in default by an offer and a demand of performance, and the evidence would not have justified such a finding. But he has found that the plaintiff had failed to perform, and, therefore, was not entitled to relief merely by reason of a casual and justifiable delay of a few hours in making a formal tender of performance. In this, we think, there was error.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

BROWN v. GUARANTEE TRUST AND SAFE DEPOSIT  
COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 19, 1888.

*[Reported in 128 United States Reports 403.]*

IN EQUITY. This litigation arose from a creditor's bill, filed in one of the courts of Illinois, by Edward R. Knowlton against the City of Joliet Water Works Company, Jesse W. Starr and Harriet Brown, for the enforcement of a judgment against the first-named two defendants; for the appointment of a receiver of the property used by that company in its business; and for an accounting with the remaining defendant, Harriet Brown, who, it was alleged, asserted a vendor's lien upon some of the property of the Water Works Company, sold by her to Starr, and by him to that company.

The Guarantee Trust and Safe Deposit Company, a corporation of Pennsylvania, being made a defendant, the cause upon its motion was removed to the United States Circuit Court for the Northern District of Illinois, upon the ground of the diverse citizenship of the parties. Subsequently that company filed its cross-bill for a foreclosure of a mortgage held by it upon the property of the Water Works Company, and for specific performance by Harriet Brown of her contract of sale to Starr.

The cross-bill alleged, in substance, that by certain instruments in writing, bearing date, respectively, the 15th and 17th of June, and the 9th of October, 1880, Starr undertook with the city of Joliet to construct and maintain a system of water works for that city and its citizens, in consideration of which it agreed to grant to him and his successors certain franchises, rights and rentals connected therewith; that on the 4th of October, 1880, he entered into a written agreement with Harriet Brown, by which, in consideration of \$1,000 to be paid to her, she agreed to convey to him a certain parcel of land in Joliet; that subsequently he entered into a verbal agreement with her for the purchase of other parcels of land, making in all 9.60 acres, for which he was to pay a total price of \$4,800; that on the 10th of December thereafter, Mrs. Brown, by warranty deed, conveyed all of said parcels to Starr, placing the deed in the hands of one Hobbs, for delivery to Starr, upon the payment of the balance of the purchase-money; and that on the 3d of November Starr paid to her, on that purchase, the sum of \$500, and on the 17th of February, 1881, the further sum of \$1,000.

It was also alleged, in the cross-bill, that immediately after said

agreements, and with full knowledge and consent of Mrs. Brown, Starr took actual and open possession of all the premises so purchased, and immediately began to make permanent and expensive improvements thereon for water works purposes; that he and his assignee, hereinafter mentioned, continued to make such improvements at a cost of about \$50,000, and remained in uninterrupted possession of the premises until they were delivered to the receiver appointed in this litigation; all this within the daily sight of Mrs. Brown, and without objection or molestation on her part; that to supplement his individual resources, which were insufficient to carry out his agreement with the city, Starr resorted to the plan of creating a corporation under the local laws of the State, and by means of its negotiable bonds and stocks raising money sufficient to complete said water works; and that to accomplish this purpose The City of Joliet Water Works Company was organized, with a capital stock of \$200,000, of which amount Starr subscribed for \$195,000, in his individual name.

It is further alleged in the cross-bill, that immediately upon the organization of that corporation, and on the 9th of December, 1880, Starr conveyed to it and its assigns his contracts with the city of Joliet, as well as the rights, franchises and property, real and personal, connected therewith, including the property purchased from Mrs. Brown, and agreed with the company to complete the system of water works contemplated by his contract with the city, and deliver them to the company within a reasonable time; that by the agreement last mentioned the company, Starr being a director and the principal manager, as well as the subscriber for all of its capital stock except \$5,000, agreed to credit him forthwith with \$195,000 on his subscription to its capital stock, and to deliver to him its bonds to the amount of \$140,000, par value, and also to secure their payment by executing to the complainant in the cross-bill a mortgage upon all the property, rights and franchises then owned, or thereafter to be acquired by it; that said bonds were accordingly delivered to Starr, and the mortgage was duly executed to the complainant in the cross-bill; that after getting the bonds in his hands he forthwith placed them upon the market, and they are now held by a large number of persons and corporations; that the Water Works Company has made default in the payment of the interest coupons due on said bonds, and for more than four calendar months has continued to make default; and that, in obedience to the request made to it, according to the terms of the mortgage, by a majority in interest of the holders of bonds, the complainant in the cross-bill as trustee files its cross-bill foreclosure. The bill still further avers that, in consequence of the assignment of Starr to the Water Works Company and the execution of said mortgage, the trustee was invested with

the right, upon the payment of the purchase-money due to Mrs. Brown, with interest thereon, to demand of her a specific performance of her agreement with Starr; that, as such mortgagee, the Guarantee Trust and Safe Deposit Company has always been willing to perform the agreement of Starr and to pay his vendor the residue of the purchase-money due to her, with interest, on having a proper deed of conveyance, and is still ready and offers to pay the said residue; and that the Water Works Company is hopelessly insolvent, having no property, except that covered by the mortgage. The bill prays for a foreclosure and sale; that the proceeds thereof, after paying certain fees and current expenses, may be distributed in payment of said bonds and coupons; that an account may be taken of the amount due on account of the purchase-money due to Mrs. Brown from Starr; and that she be decreed to specifically perform her agreements to convey, so that said mortgage shall be a valid and first lien on the property.

Mrs. Brown filed a demurrer to the amended cross-bill, alleging specifically that the same was multifarious. This demurrer having been overruled, she thereupon answered, averring her ignorance of the contracts between Starr and the city; admitting the entering into the written contract with Starr, but alleging that it was thereafter wholly and completely abandoned by him, and that neither he nor any person or corporation had ever offered or claimed the right to carry out that contract; admitting that he afterwards verbally negotiated for the purchase of a larger tract of land, but alleging that said negotiation, as a contract, was void, under the Statute of Frauds; that by its terms the payment of the entire purchase price was a condition precedent to the vesting in him of any title whatever; that the possession and the improvements were made without her consent, express or implied, and with his eyes open, and that she is entitled to the whole, augmented in value as it is by the improvements; that she had made a great many efforts to secure the balance of the purchase-money due from Starr, but had been unsuccessful; that the negotiation and transaction, so far as he and those claiming under him or acting with him were concerned, had been a fraud upon her; that by reason of such failure on his part, and that of his successors and assigns, to comply with the terms of her contract with him, it had become broken, and was void; and that the amended cross-bill was multifarious; and praying the same benefit of her answer as if she had specifically demurred to the bill. To this answer a replication was filed.

Pursuant to a decree of the court on the 31st of March, 1883, upon the petition of John D. Paige, receiver, all the property and effects of the Water Works Company which it obtained from Starr, and all the rights accruing to it by virtue of the contract with Mrs. Brown, were

sold, and bought by Joseph H. Foster, of Portsmouth, N. H. On June 9, 1883, a decree of foreclosure was entered upon the cross-bill against the fund realized by the sale.

After some other proceedings, not necessary to be stated, a further decree was entered, August 12, 1883, adjudging that there was justly due to Harriet Brown, on account of said purchase-money of the premises sold to Starr, including interest, the sum of \$3,964, and that her said agreement with Starr be performed and carried into execution.

From this decree Mrs. Brown prayed and perfected the appeal which brought her case here.

*Mr. Charles A. Dupee* and *Mr. Monroe L. Willard* for appellants.

*Mr. J. L. High* for appellees.

MR. JUSTICE LAMAR, after stating the case as above reported, delivered the opinion of the court.

The appellant further claims that, as to Mrs. Brown, the case made out below was not such a one as calls for specific performance, and in support of this view relies on alleged unreasonable delay in the payment of the purchase-money. The legal propositions applicable to this question are well settled in this court.<sup>1</sup>

In *Secombe v. Steele*<sup>2</sup> it is said: "Time may be made of the essence of the contract by express stipulation, or it may become essential by considerations arising from the nature of the property or the character of the interest bargained. And the principle of the court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case. But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it."

In *Holgate v. Eaton*,<sup>3</sup> the court say: "In the case of *Taylor v. Longworth*,<sup>4</sup> Mr. Justice Story uses language which has since become a legal maxim in this class of cases. 'In the first place,' he says, 'there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of circumstances, affecting the rights, interests, or ob-

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

<sup>2</sup> 20 How. 94, 104.

<sup>3</sup> 116 U. S. 33, 40.

<sup>4</sup> 14 Pet. 172, 174.



ligation of the parties ; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust.' "

Apply these principles to the contract between Starr and Mrs. Brown, and what will be the result ?

It was not even claimed that there was any express stipulation between the parties that time should be of the essence of the contract ; nor, on the other hand, that such obligation arose from the nature of the property or the avowed object of the seller.

It is asserted that there was an understanding that Starr should have no right or title to the land, or the right to any conveyance of the land, until the full purchase price should be paid. But that is a very different proposition. It has relation to the security reserved, and not to the time of payment. It is true, that in his deposition of April 18, 1883, Hobbs, the agent of Mrs. Brown, states that Starr agreed to pay cash, and that such was "the basis of the contract." But no such claim was presented by the pleadings ; and, moreover, Hobbs's testimony shows that there was an agreement for the postponement of the payment while Starr should go to Philadelphia ; and, finally, in the same deposition, and in a subsequent one, he states that Starr had agreed to pay eight per cent. interest on the purchase-money—a proposition manifestly inconsistent with the theory of appellant's insistence on a cash transaction. Without stopping to array them, it will suffice to say, that numerous matters in the record show, to the satisfaction of the court, that Mrs. Brown consented to Starr's delay of payment, reluctantly perhaps, but nevertheless consented. Even were it granted that time was of the essence of the contract, the conduct of Mrs. Brown would have been a waiver of that fact. Her acceptance of a partial payment of \$1,000, on the 17th of February, 1881, was certainly not a disaffirmance of the contract, but the contrary. So, again, her demand for performance on the 27th of November, 1881, shows very plainly that up to that day it had not been abandoned. Hobbs in his first deposition states that there was a subsequent demand made by him on Starr for the money ; and his second deposition shows that he sought an interview with the attorney of the committee of the bondholders on the 26th of January, 1883, for the purpose of getting the money due to Mrs. Brown on the contract with Starr.

The answer of Mrs. Brown declares that the contract was abandoned and cancelled in November, 1881, in Philadelphia. Even if she had the power so to do under the circumstances, still it was not done. The averments of the answer are not only not proved, but are even disproved by Hobbs himself. Hobbs was an officer of the Water Works Company. In his first deposition he gives this version of the

transaction relied on in the answer. He says: "I got on the train and went to Philadelphia and told Mr. Starr we insisted upon the payment of that amount and others, and if it was not paid or absolutely provided for while I was there in the city for a day or so, that I should return to Joliet, and the understanding was that Mr. Knowlton and myself would withdraw from the company; Mr. Starr failed, after various plans he had made, to produce the money; he failed in furnishing it, and I returned, he following me back within a few days, and we then withdrew from the company."

The witness is here speaking, as elsewhere appears, of not only this debt, but also of the general liabilities of the concern. Subsequently to this, he still demanded the money from Starr.<sup>1</sup>

As between the appellant and the bondholders, represented by the trustee, it would be inequitable to refuse the consummation of her bargain.

The decree of the Circuit Court is affirmed.

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EDWARD P. DAY, RESPONDENT, *v.* EDWARD TAYLOR HUNT,  
AS EXECUTOR, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 15, 1889.

[*Reported in 112 New York Reports 191.*]

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department entered upon an order made July 1, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The action was brought by the plaintiff to procure a construction of a written contract embodying certain conditions on the sale of lands, and, when construed, a specific performance of it.

The answer admitted the execution of the contract, and, denying some of the allegations of the complaint, set up as an affirmative defense the refusal of the plaintiff to execute a bond and mortgage as required by the agreement. The Special Term gave the relief asked for by the plaintiff, upon condition that within twenty days he pay the sum called for by the contract, with interest, execute the bond and mortgage referred to, pay \$10 for preparing them and the costs and expenses of the action, and \$30 extra allowance.

The facts found by the trial judge as justifying this conclusion were, that on the 6th of November, 1885, the defendant put up the

<sup>1</sup> Pomeroy on Specific Performance, 395, 396; *Reynolds v. Nelson*, 6 Madd. 18, 19.

lands mentioned in the complaint for sale by public auction on certain terms, of which the following only are material :

1. Payment of ten per cent. of the purchase-money on the day of and immediately after the sale.

2. The residue of said purchase-money will be required to be paid to the said executor at the office of Bergen & Dykman, No. 189 Montague Street, in the city of Brooklyn, on the 25th day of November, 1885, when the executor's deed will be ready for delivery.

3. The executor is not required to send any notice to the purchaser ; and if he neglects to call at the time and place above specified to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, unless the executor shall deem it proper to extend the time for the completion of said purchase.

4. Relates to taxes and incumbrances.

5. Requires the conditions to be signed.

6. The biddings will be kept open after the property is struck down ; and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale under the direction of said executor under these same terms of sale, and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale and that for which they may be purchased on the resale, and also for any costs or expenses occurring on such resale.

7. Seventy per cent. of the purchase-money may remain on bond and mortgage (containing the usual interest, insurance, tax and assessment clauses), at the option of the purchaser, for the term of three or five years, with interest at five per cent. per annum, payable semi-annually, the bond and mortgage to be drawn by the counsel of the seller, at an expense of \$10 to the purchaser, who shall also pay for recording the said mortgage.

That the plaintiff purchased two of the lots for \$600, paid the required ten per cent., and signed the conditions of sale. That the property consists of vacant lots, with no improvements of any kind thereon, and no property of any kind which could be the subject of insurance. That the mortgage tendered to the plaintiff for execution as a compliance with the conditions of sale contained the usual insurance clause, and plaintiff declined to execute it as not called for by his agreement. That the defendant still retains all the amounts paid by the plaintiff in part performance of said contract, and defendant has never offered to return or refund the same to the plaintiff. That the plaintiff did not at any time intend to abandon or relinquish his rights under the said contract.

*William N. Dykman* for appellant.

*J. Newton Williams* for respondent.

DANFORTH, J. The remedy of specific performance is discretionary, and to be given upon a consideration of all the circumstances before the court, and where neither hardship nor injustice result to the defeated party, a court of review will not interfere with a judgment which requires its enforcement. The defense against it in this case is, that time was of the essence of the contract; that the plaintiff was in default, and that, during the delay between that default and the bringing of this action, the property in question had so advanced in value that performance would now be detrimental to the defendant's interest by depriving him of the opportunity to make a fresh sale of the subject-matter of the contract at an advanced price. These objections cannot prevail. On the contrary, the very fact that the plaintiff has not strictly performed his part, and so is without remedy at law, is frequently a sufficient reason for the interposition of courts of equity, where relief is given, notwithstanding the lapse of time according to the actual merits of the case.<sup>1</sup> In that before us there is no express stipulation making prompt performance, or performance upon a day named, any part of the substance of the contract. The terms of the sale really require a different construction.

The first condition is explicit in requiring payment of the ten per cent. of the purchase-money at a time fixed; the second provides for payment of the balance upon a subsequent day named, "when the deed will be ready for delivery," while the third condition at one and the same time relieves the vendor from the necessity of sending notice to the purchaser and provides a penalty for the purchaser's neglect to call for the deed, by imposing "interest thereafter on the whole amount of his purchase"; the sixth anticipates the case of actual non-compliance by providing for a resale at the expense of the purchaser, and his liability for deficiency. In none of the conditions is to be found any statement making time the essence of the contract, and all that can be gathered from them is the intention of the vendor that the transaction should be completed within a reasonable time. Nor does the notice given on the twelfth of February have a different effect. It treats the contract as then subsisting, says "the balance still remains unpaid," and adds, "unless you complete your purchase on or before the 26th of February, 1886," the lots will be offered for sale.

There is nothing to show that either party abandoned the contract, or wished or intended to do so. They differed merely as to the form

<sup>1</sup> 1 Story's Eq. Jur., § 776.

of the mortgage, and, so far as appears, that difference only prevented the completion of the sale. Although wrong in his construction as to its proper force, the plaintiff cannot be said to be wholly without excuse. He never had the contract in his possession, and seems to have thought it quite unreasonable that he could have been required to provide for insurance in a mortgage given upon vacant and unimproved property. As there is nothing in the words of the contract, so there is nothing in the nature of the case, nor in the surrounding circumstances which makes it inequitable for the court to interfere, for the intention of the purchaser was at all times to take the property and pay the balance of the price, and the wish of the vendor has at all times been to sell. The property is still in his possession, and the judgment gives him full indemnity for the delay.

It should, we think, be affirmed, with costs.

All concur.

Judgment affirmed.

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SUSAN B. SOWLES v. B. C. HALL AND WIFE.

IN THE SUPREME COURT OF VERMONT, JANUARY TERM, 1890.

[*Reported in 62 Vermont Reports 247.*]

BILL in chancery to compel the defendants to specifically perform a certain written contract for the sale of the premises in question, or to foreclose the defendant's equity of redemption therein, as might be equitable. Heard upon pleadings and a Master's report at the September Term, 1888, TAFT, Chancellor, dismissed the bill, *pro forma*. The oratrix appeals.

The oratrix was the daughter of E. A. Sowles, and in all the transactions referred to the said E. A. Sowles acted as the agent of the oratrix. The defendant Ida A. Hall was the wife of the defendant B. C. Hall, and in these same transactions B. C. Hall acted as the agent of his wife. Previously to and at the time of these transactions B. C. Hall occupied the same office with E. A. Sowles, was his agent and attorney in many matters, and enjoyed his confidence in a high degree.

In 1876 Catherine Mann owned certain premises in the village of St. Albans which were mortgaged to the Ottauquechee Savings Bank. On the 15th of November of that year she and her husband executed a second mortgage of the same premises to one J. C. Babbett, and on the 11th of December of the same year a third mortgage to E. A. Sowles. Catherine Mann had erected three houses on these premises, and on December 26, 1876, she conveyed one of these houses

with the lot on which it stood to one Michael McGiff by deed warranty.

Subsequently the Babbett mortgage was assigned to A. P. Cross and foreclosed in his name. E. A. Sowles was made a party defendant, and the decree was to become absolute April 26, 1881. E. A. Sowles procured, for the purpose of protecting himself, an assignment of the decree by Cross to Albert Sowles, cashier of the First National Bank. On the 27th of April the bank conveyed the premises described in the decree to E. A. Sowles, and on the same day Sowles quit-claimed to McGiff that portion of the premises which had previously been conveyed to him. Sowles immediately went into possession of the balance of the premises and so continued until September 1, 1881, when he conveyed by deed warranty to Marcia P., Cornelia H., and Lucia Walker one of the two remaining houses with the lot on which it stood. The Walkers at once took and have ever since remained in possession.

At the September term of the Franklin County Court, 1885, the savings bank began a foreclosure of its mortgage against the entire premises. Sowles had in the meantime become financially embarrassed, and his interest in the property had been attached by several creditors. The owners of the several parcels and the attaching creditors were made parties to the foreclosure, and a decree was obtained which was to become absolute as to all the defendants previous to October 18, 1886.

Before the commencement of the foreclosure proceedings the Walkers, who were poor people, had become anxious lest they should lose the premises conveyed to them, and the cashier of the savings bank had represented the hardship of the case to Sowles, and asked him if he could not pay the bank the amount its due and so release the Walkers. Sowles had replied that the property was so encumbered by attachment that he could raise nothing on it as the title then stood, but that if the bank would foreclose and clear up the title he might; and the foreclosure was accordingly begun, and the decree allowed to become absolute upon the understanding that upon payment to it of the amount of its decree the bank should convey the property to whomsoever Sowles should designate.

During this time Hall and wife occupied the third one of the houses erected by Catherine Mann, and being that portion of the premises remaining after the conveyances to McGiff and the Walkers. The Walkers frequently applied to Sowles and to the defendants to save their house for them. It was finally arranged that one Rich would loan \$3,000 on the house and lot which the defendants occupied if Sowles would raise the balance of the savings bank decree. B. C.

Hall was conversant with this arrangement and with all the negotiations which led up to it. For some reason this arrangement was not carried out, but the following was substituted: The savings bank decree amounted to about \$4,250. Of this Rich furnished \$2,000, Ida M. Hall \$1,000, and E. A. Sowles the balance. The savings bank deeded the whole property to A. P. Cross. Cross quit-claimed to McGiff the premises already conveyed to him, to the Walkers the premises already conveyed to them, and to the defendant, Ida A., the balance. Ida A. mortgaged to Rich for \$2,000. The funds furnished by Sowles belonged to the oratrix, being held by him as her trustee.

There was some difference between the parties as to what right of redemption the oratrix was to have in the premises. Upon this point the Master found:

“During the negotiations about the raising of the money to pay the said savings bank decree it was talked between the said E. A. Sowles and B. C. Hall that said Sowles or the oratrix should have the right to pay the \$3,000 which the said Ida A. Hall had furnished as aforesaid and have the property; but the terms and conditions were not agreed to specifically as in what way it was to be secured to the oratrix, and this part of the business was left in this indefinite shape until the money had been raised and paid over and the deeds delivered and filed for record. The said E. A. Sowles and B. C. Hall met in the office of A. P. Cross before the deeds were delivered, and said E. A. Sowles presented a writing for the said B. C. Hall and wife to sign respecting the property. The writing was not produced, but it was conceded that the substance of the writing was that the oratrix had the right to redeem the property by paying to the said Ida A. Hall the amount she had advanced on the property. I find that this was what E. A. Sowles understood the agreement was to be, but I do not find that the said B. C. Hall so understood it. The said B. C. Hall and wife refused to sign the writing so presented, but after some talk the said B. C. Hall procured the said A. P. Cross to draw up a writing to sign, and which they afterwards did sign and deliver. The said E. A. Sowles, after the said other business had been completed, accepted of the writing so signed, as he testified ‘it was the best he could get.’

“The writing so drawn up by Mr. Cross was that referred to as the contract of October 18, 1886, and was as follows:

“‘In consideration of one dollar to us paid by Susan B. Sowles, of St. Albans, we hereby agree to sell and convey to said Susan or her assigns certain premises described in a deed from Albert P. Cross to Ida A. Hall, dated October 11, 1886, at any time prior to the first

day of January, 1888, upon tender to said Ida A. on or before said date of the sum of \$3,000 in money, and unless such tender be made on or before said first day of January, 1888, this agreement shall be absolutely null and void.

“IDA A. HALL. [L. S.]

“BENNETT C. HALL. [L. S.]

“St. Albans, Vt., October 18, 1886.”

Prior to January 1, 1888, E. A. Sowles applied to the defendant B. C. Hall for an extension of the time limited in the contract. The Master did not find that the defendants agreed to give this extension, but did find that Sowles understood that they would grant such extension.

On the 31st of December, 1887, the oratrix tendered to the defendant Ida A. \$1,000 in money and a sufficient bond of indemnity in the sum of \$3,000. The tender was not accepted. The oratrix did not then know and was not informed by the defendants that they had paid anything on the Rich mortgage, but in fact they had paid \$414.

The mortgage given by Catherine Mann to A. E. Sowles had never been assigned. Two of the notes secured by it had been, in 1884, endorsed in blank by Sowles and delivered to the oratrix, who still held them. The defendants had no knowledge whatever of this when they took their deed from Cross, and took that conveyance supposing their title to be a perfect one.

The Master reported that at the date of that conveyance the premises were reasonably worth \$3,500.

*E. A. Sowles* for the oratrix.

*Cross & Start* for the defendants.

The opinion of the court was delivered by

ROYCE, Ch. J. This cause was heard on the pleadings and Master's report, from which it appears that the mortgages given to Babbett and to the Ottauquechee Savings Bank were foreclosed, and Edward A. Sowles, who held a subsequent mortgage upon the same premises, was made a defendant in the foreclosure proceedings. Decrees were entered in both of the suits, and the equity of redemption was allowed to expire. Sowles' equitable interest in the agreements subsequently made with the owner of the title by which Sowles acquired the title did not have the effect to reinstate his mortgage as a lien upon the property. If Sowles had an equitable interest in the property, the report shows that he had parted with his interest in all of it except that portion that was deeded to the defendant Ida A.

The oratrix cannot stand upon her ownership of the notes described in the mortgage to Sowles, for the reasons above stated; and if she



has any right under the bill to the relief prayed for, it must be upon the ground that she has paid in a part of the amount decreed to be paid to the Ottawaquechee Savings Bank, or that she is entitled to a specific performance of the agreement executed October 18, 1886.

Whatever right the oratrix had by virtue of the payment made by her was merged in, and settled by, the contract of October 18, 1886. Whether that contract is construed as recognizing the right of the oratrix to redeem, or as giving her a right to purchase, the duty which it was made incumbent on her to perform in order to make the contract available was expressed in clear and unambiguous language. By that contract the defendants agreed to sell and convey to the oratrix or her assigns the premises described at any time prior to January 1, 1888, upon tender to said Ida A., on or before that date, of the sum of \$3,000 in money; and unless such a tender should be made on or before said January 1, 1888, the agreement was to be absolutely null and void.

The oratrix undertook to make the tender required in the manner reported by the Master, but it is not seriously claimed that the tender was a legal one, and no such tender as the contract called for has ever been made. The only importance to be attached to the facts found in relation to the tender that was made is as tending to show a recognition by the oratrix of the necessity for making one.

The right of the oratrix to relief depends upon the construction to be given to the contract executed October 18, 1886, and the acts of the parties under it. The oratrix had no equitable lien by virtue of the assignment of the notes described in the bill, and so the only right she had was the one secured to her by the contract. The contribution made by her to the payment that was made to the Ottawaquechee Savings Bank, upon the decree in its favor, did not give her any equitable right to the premises described in the decree, and the contract of October 18 was evidently made to give her an opportunity to reimburse herself for the payment so made by a purchase of the property, and the terms upon which she was to be allowed to make the purchase were clearly and definitely stated. No such tender having been made as was required by the contract, is the oratrix entitled to have a specific performance of it decreed upon the offer made to perform on her part at this time? That depends upon the question whether the time fixed by the parties for the making of the tender is to be regarded as conclusive.

It was held in *Longworth v. Taylor*<sup>1</sup> that time may be of the

<sup>1</sup> 14 Pet. 372.

essence of a contract for the sale of property, and that it may be made so by the express stipulation of the parties; and a large number of cases are cited in the notes to *Seton v. Slade*, in *White and Tudor's* cases in equity, showing that to be the general rule in equity in England and this country. The distinction is noted that has been made on the point of the materiality of time between cases of proposed sale and of pledge of property, like a mortgage.

It was competent for the parties to make time of the essence of the contract, and they could not have done so in language more pertinent to express such intention than that used. The agreement was to be absolutely null and void unless the tender was made as agreed. The cases referred to by the counsel for the oratrix have generally been determined upon their peculiar circumstances, and in most of them the court have found that there was an express waiver of the requirement as to time, or that there was evidence upon which a waiver should be presumed. There is no finding here that there was any express waiver, and although the Master has found that E. A. Sowles understood, a short time previous to January 1, 1888, that the time for performance on the part of the oratrix would be extended, the fact is not found that it was extended; and the fact that E. A. Sowles, as counsel for the oratrix, within the time named for the performance of the contract made the tender which it is found that he did make tends strongly to show that he did not then understand that the time had been extended.

In *Benedict v. Lynch*<sup>1</sup> the contract contained an express stipulation that if the purchaser failed in either of his payments the contract should be void, and it was held that the parties had made time of the essence of the contract and that it might be laid down as a general rule that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient excuse for his delay, the court will not decree a specific performance.<sup>2</sup>

No such excuse has been found by the Master in this case, and specific performance cannot be decreed. If the oratrix has lost the right to purchase the property, it resulted from her own negligence in not complying with the terms upon which she was to be allowed to exercise it, and she cannot invoke the aid of a court of equity to afford her relief for a loss so incurred.

The decree of the Court of Chancery is affirmed and cause remanded.

<sup>1</sup> 1 John. Ch. 370.

<sup>2</sup> 3 Pom. Eq. Jur. 457.

## KING v. BARDEAU.

IN THE COURT OF CHANCERY OF NEW YORK, MARCH 13, 1822.

[*Reported in 6 Johnson, Chancery, 38.*]

PETITION of John Whitehead, a purchaser at the Master's sale, under a decree in this cause, on the foreclosure of a mortgage. The mortgaged premises, which were sold under an order of the 6th of June, 1821, pursuant to public advertisement and notice, consisted of two lots, No. 42 and No. 43, on Broome Street, each 25 feet wide, in front and rear, No. 42 being 100 feet deep, and the other 75 feet deep. There were two buildings on lot No. 42, one in front and the other in the rear, which projected on lot 43 about 20 inches. The petitioner stated that his object in making the purchase was to build on the vacant lot a house 22 feet wide, leaving an alley three feet wide to the rear, where he intended to build a stable. That he was at the time of sale unacquainted with the premises, not having examined them until after the purchase ; but relied on the advertisement and declaration of the auctioneer, that the premises were free from all incumbrances, except a lease of the lot on which the buildings were situated. That after the sale, he objected to take the purchase, on account of the buildings encroaching on the vacant lot. That in November last it was referred to a Master to inquire and report whether a good and sufficient title could be made to the petitioner. That on the inquiry, the Master examined several witnesses, who were of opinion that the value of the premises was diminished, by the projection of the buildings, from \$100 to \$200. That the Master reported the title good without deciding upon the evidence as to the damage arising from the encroachment of the buildings, and refused to report specifically the facts, not deeming himself authorized to inquire relative to the incumbrance and encroachment of the buildings on this lot upon the other. The petitioner prayed that the Master might be directed to receive testimony as to any incumbrance upon the lots, separately, and to report his opinion thereon.

The Master, in his report of the sale, stated that the terms of the sale, which were made known and proclaimed at the auction, were, that the mortgaged premises were to be sold free of all taxes, assessments and incumbrances, except a lease upon lot No. 42, which would expire on the 1st of May, 1828, the conditions of which were stated ; and that the two lots would be sold together, as one lot or parcel. That the premises were sold accordingly in one lot, to the petitioner, as the highest bidder, for \$1.400. That after the sale, the petitioner said he could not pay the ten per cent., required by the condition of sale, and

that his friends said that he had made a bad bargain. That he afterwards objected to take the purchase, because the buildings on lot No. 42 encroached on lot 43.

The Master further reported, that at the sale he had no knowledge of the encroachment of the buildings, except from the assertion of a person owning the adjacent lot, in the rear of 43, who mentioned incidentally a day or two before the sale, that the building in the rear of lot 42 encroached a little on his lot, as well as on 43. That he did not think it necessary to mention the circumstance at the sale, as both lots were to be sold together as one parcel; that he had inquired into the value of the premises, and found that they were well worth \$1,400.

The Master, on the 6th of March, pursuant to the order of the 16th of November last, reported that he had heard the purchaser, and taken proof, etc. That a good and sufficient title to a part of the premises in possession, and a good and sufficient title to the residue in reversion, after the expiration of a lease for a term of years, subject to which expressly the premises were sold, could be made; and the mortgaged premises as now inclosed, and may be conveyed, are of the same dimensions as mentioned in the advertisement of sale.

*S. M. Hopkins* in support of the prayer of the petition.

*S. Jones* and *E. W. King*, *contra*.

THE CHANCELLOR.<sup>1</sup> This sale was marked by good faith. It was unknown to the plaintiff and to the Master at the sale, as well as to the purchaser, that the front building on lot 42 projected over upon lot 43. The observation that was made to the Master a few days before the sale, that the building in the rear of the lot encroached in a very small degree on the neighboring ground, was too light and trivial a circumstance to affect the *bona fides* of the transaction. The purchaser was informed at the sale, and it was one of the terms of sale repeatedly read over and publicly proclaimed, that the two lots would be sold together as one lot or parcel, and that they were free of all incumbrances, except the lease upon lot 42. The terms of that lease and the disposition of the buildings at the expiration of it, under the covenants in the lease, were also explained. But the buildings were stated to be on lot 42, and it turns out that they do project a little over upon lot 43, and this is the variation in the condition or quality of the lots, which, it is contended, ought to vacate the sale. As the purchaser purchased both the lots together for one consolidated price, and as one entire parcel of land, it would seem not to be very material to him if the buildings on one lot did encroach a few inches on the other. But he says he purchased with intention to build a house upon the vacant lot twenty-two feet wide, leaving an alley of three feet to pass to the rear of his lot. The disap-

<sup>1</sup> James Kent.—ED.

pointment in the case, then, is that he will be obliged to build his house two feet narrower if he intends to have the alley of the width of three feet. He is not disappointed in the main object of his purchase. He has the lots of the dimensions described, and with a perfect title; but his house will be a little narrower, if he will not contract his alley, or will not wait until the lease expires, or will not compel the tenant to withdraw his buildings on to lot 42.

This is clearly not such a material defect in the subject, or variation from the terms of the description at the sale, as will permit the purchaser to abandon his contract. If we were to allow such very nice and critical objections to prevail, we should expose to great hazard the efficiency and value of public judicial sales. If the sale be fair, and the title good, and the quantity of land exist, and the substance of the description be true (and all those circumstances exist in this case), it is as much as ought to be expected or required. Some care and vigilance must be exacted of the purchaser. In this case the purchaser lived near the lots, and they were open to his daily examination; and one of the witnesses says he might have observed by the eye, without even the trouble of measurement, that the house on the front of lot 42 projected a little upon lot 43.

In *Calcraft v. Roebuck*,<sup>1</sup> a farm sold at auction was advertised as a freehold estate, consisting of about 186 acres, of which 45 acres were described to be a compact farm, and the rest a park. It turned out that two acres in the centre of the park were not freehold property, but land held at will only. On a bill for a specific performance, Lord Thurlow observed, that where an estate was sold at auction it was difficult to state specifically all the little particulars relative to the quantity, title and situation of the estate, so as not to call for some allowance and consideration when the bargain comes to be executed. He considered that the binding force of the contract and the consideration of enforcing it depended essentially upon the good faith with which it was made. In that case he gave the party some compensation for the failure of title as to the two acres, and referred it to a Master to consider what, under all the circumstances, ought to be allowed as a deduction from the price when the money ought to have been paid.

The English rule has been very strict in requiring the specific performance of these sales at auction when the case was free from misrepresentation and fraud, and it casts upon the purchaser the duty of informing himself of matters within his means of information in respect to the quality, condition, situation and circumstances of the subject sold. Thus, in *Oldfield v. Round*,<sup>2</sup> there was a bill for a specific performance of an agreement to purchase a meadow sold at auction. The

<sup>1</sup> 1 Vesey, Jr., 221.

<sup>2</sup> 5 Vesey 508.

defendant objected, that the premises were described as a meadow consisting of 15 acres, without taking notice of a footpath across it. But Lord Loughborough, while he admitted that the meadow was very much the worse for a road going through it, said he could not help the carelessness of the purchaser who does not choose to inquire, and that the path in that case was not a latent defect. He accordingly decreed a specific performance, with costs. This case was afterwards shaken by Lord Manners,<sup>1</sup> who said it was not well received at the time, though he admitted that the purchaser, in that case, if he had used ordinary caution, would have discovered the easement. In *Dyer v. Hargrave*<sup>2</sup> there was a bill also for a specific performance of a purchase at auction. The particular preceding the sale described the house as in good repair, and that the farm was all within a ring fence. The defendant objected on the ground that the description was not true. It was admitted that there was a variation from the description, but a minute examination might have discovered the defect. The Master of the Rolls decreed a performance and said it was much too late to contend that every variance from the description would enable a man to resist the performance. If he gets substantially that for which he bargains he must take a compensation for a deficiency in the value.

This last case establishes what I apprehend to be the true doctrine on the subject, and many of the old cases which required a performance when the subject was substantially different from what it was supposed to be have been justly questioned. Lord Eldon, in *Drewe v. Hanson*,<sup>3</sup> mentioned a number of hard cases in which performance had been enforced, though there was a very essential variance between the actual and the supposed circumstances of the subject, and when those circumstances were wanting, which were the strong inducement to the contract. The counsel, in 10 Vesey 507, considered those cases as going to an excessive length upon the point of compensation, and Lord Erskine afterwards declared 'that he would not follow those decisions, nor decree specific performance, even under the allowance of compensation.

In the present case there is no pretense that the substantial inducement to the purchase has failed by reason of the projection of the house. There is no analogy whatever between this case and that stated by Lord Eldon, of a contract for a house and wharf. The object of the purchase being to carry on business at the wharf, and though the title to the wharf had failed the court compelled the purchaser to take the house. Here are the lots, and a good title, and the lease as disclosed, and all the disappointment is that the purchaser may be obliged to

<sup>1</sup> *Ellard v. Lord Llandaff*, 1 Ball and Beatty 241.

<sup>2</sup> 10 Vesey 505.

<sup>3</sup> 6 Vesey 678.

<sup>4</sup> *Halsey v. Grant*, 13 Vesey 78, and *Stapylton v. Scott*, 13 Vesey 426.

compel his tenant to remove his house a few inches, or to make his own intended building or alley a few inches narrower than his original plan. The main inducement to the purchaser cannot be said to be defeated by that circumstance. Nor is there anything in the case to prevent the conclusion that the purchaser can, by ejectment, recover possession of the land so encroached upon by the buildings.

But, while the case most clearly requires that the contract of sale should be fulfilled, yet the fact of the encroachment of the buildings on lot 43 was not such a patent and obviously visible circumstance as to conclude the purchaser from compensation, if the case should otherwise entitle him to it. The strongest ground for compensation is that the vendor himself, in his notice, declared that the two dwelling-houses were on lot 42. Now, it turns out that they are partly on lot 43, and if a person, as Lord Thurlow observed,<sup>1</sup> however unconversant in the actual situation of his estate, will give a description, he must be bound by it, whether cognizant or not. I shall, therefore, declare that the purchaser is held to perform his contract, and shall direct an inquiry by a Master as to the amount of compensation, if any, which ought to be made. It appears from one of the cases already referred to, and from that of *Hornblower v. Shirley*,<sup>2</sup> that such is the course of the court in cases where compensation is to be made for incumbrances or defects in the subject.

The following order was entered: "It is declared that the sale and purchase, in the documents and proofs stated and shown, were fair, and that the quantity of land existed, and the title as declared existed, and that the description given of the premises was substantially true; and that the fact that the buildings, stated to be on lot 42, being part and parcel of the premises which were sold entire, and for one entire price, do project, in a small degree, on lot 43, being another part and parcel of the said premises, is not sufficient, nor are any of the circumstances stated in the case sufficient to set aside the sale, or to exempt the purchaser from being holden to the performance of the contract of sale. But as the circumstance of that projection may diminish the value of the purchase below what would be its value if such projection did not exist, and may entitle the purchaser to compensation by a deduction from the price he gave: It is thereupon ordered, that it be referred to a Master to ascertain and report what, in his opinion, under all the circumstances of the case, is the diminution in value, if any, of the premises, as one entire parcel, by means of the projection, below what it would be if no such projection existed, and assuming the value thereof, if the projection did not exist, at \$1,400 dollars; and the question of costs is reserved," etc.

<sup>1</sup> 1 Vesey, Jr. 210.

<sup>2</sup> 13 Vesey 81.

## PERKINS v. EDE.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., NOVEMBER 9,  
1852.

[*Reported in 16 Beavan 193.*]

SOME property, consisting of a residence and about four acres, was sold in the suit to Mr. Forbes. The question was, whether a good title could be made. It appeared that part of the property consisted of a slip of ground between the house and public highway, which the vendors claimed as part of an allotment under an inclosure. This they failed in establishing.

*Mr. Roupell, Mr. Shebbeare and Mr. Rudall* for the vendors.

*Mr. R. Palmer, Mr. Lewis and Mr. Forbes* for the purchaser.

THE MASTER OF THE ROLLS. I think it clear that the strip of land, consisting of thirty-eight poles, is not included in the award. It is argued that twenty years' possession gives a sufficient title, but *Edwards v. McLeay*<sup>1</sup> decided the contrary, and here there is evidence that the door which separated it from the road was bricked up within that time.

Under ordinary circumstances this would be a case of compensation, but here is a house with a long strip of land between it and the road, to which there is no title, so that the people in passing can look in at the window. This is not a case for compensation.<sup>2</sup>

<sup>1</sup> Sir Geo. Cooper 308.

<sup>2</sup> I must discharge this purchaser. The law is this: In case of a contract to purchase the vendee has a right to insist on the entire thing contracted for, and to get it on the day on which it was agreed to be given. This is the strict rule, and in failure of title made as contracted for specifically, the vendor is disabled by the rule at law from recovering damages for non-performance. The hardship of particular cases, and the reasonableness of relieving against partial inadvertence in the vendor have led to the establishment of another principle in courts of equity. That principle I take to be, that if substantially the purchaser can have the thing contracted for a slight variation in the qualifications of it will not disable the vendor from having a decree for specific performance, when compensation can be made pecuniarily for the difference.

This is the sole principle on which the court assumes jurisdiction to permit deviation in any degree from the strict right to have exactly the precise thing agreed for. We are all aware of the anomalous cases. There have been some very wild—(*Shirley v. Davis*)—animadverted on by Lord Eldon more than once (*Drewe v. Hanson*, 6 Ves. 678); the title free land case, Lord Stanhope's case (cited 6 Ves. 678), and especially the house and wharf case, and the case of the manor with the right of shooting. But those cases are not to be followed. (*Binks v. Lord Rokeby*, 2 Swan. 225; 2 Mad. 227).

I consider the rule of equity to be now established as I have stated it. To



## IN RE ARNOLD.

## ARNOLD v. ARNOLD.

IN THE COURT OF APPEAL, APRIL 10, 17, 1880.

*[Reported in Law Reports, 14 Chancery Division 270.]*

UNDER an order in this action estates were put up for sale in various lots. Lot 12 was described in the particulars as "a highly productive and compact small farm in Wingfield or Bottlesey Green."<sup>1</sup>

The 14th condition of sale was as follows :

"Every lot is believed and shall be taken to be correctly described as to quantity, tenure, and otherwise, and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors or purchaser in respect thereof, except such (if any) as the Judge in Chambers shall be pleased to direct."

Thomas Girling bid for, and on the 29th of August, 1878, was certified to be the purchaser of, Lot 12. He was, in fact, only the

meet the hardship of particular cases of inadvertence by the vendor if the purchaser has substantially the thing contracted for, deficiency or variation will not disentitle the vendor from getting specific performance, when compensation can be made in money for the difference. This is the sole principle to permit a deviation in any degree from the strict right : the capacity to give the purchaser substantially the thing, and the difference being such as may be compensated in money. There is accordingly now no case which is of authority deciding, that in case of a contract for a peculiar object, having in the eye of the purchaser a particular value from circumstances not capable of pecuniary compensation, the purchaser can be compelled to perform it, if these be taken away. Let us see what was held out for sale, and what contracted for in this case. We find there was a representation made by printed bills of sale describing this as a residence fit for a respectable family, with a *demesne* tastefully laid out. So far as the house, the purchaser might see it and judge for himself, and he cannot complain when ordinary diligence would have enabled him to make sure. Therefore, if the house appears in fact not to be such as we should understand by that description, nothing can be made of that. That is merely puff. But it states that the *demesne* was tastefully laid out, and this is explained by a map having delineated upon it clumps of trees and shrubs, and showing the house surrounded with ornamental timber, constituting a feature of beauty and attraction. In some respects this is more material than the house, because a purchaser could remodel the building but not replace the timber. Clarke takes that representation and acts upon it, and I am bound to say that nothing appears to show me that he would have refused if the actual state of the place had corresponded with what it had been, to perform his contract, or endeavored to get out of the purchase. The defendant remained in possession ; it must be taken with the

<sup>1</sup> The description of the property has been omitted.—Ed.

agent of Mr. Borrett, the owner of the property adjoining the south-east side of this lot.

On investigating the title it was discovered that the testator in the cause was only entitled to four undivided sevenths of the piece of land numbered 490a, and that Lord Waveney was in receipt of the rent of the other three-sevenths.

The plaintiffs' solicitors proposed that a partition of this piece of land should be effected without expense to the purchaser. The purchaser declined this offer, and on the 30th of September, 1878, wrote refusing to complete his purchase. On the 4th of October, 1878, he took out a summons to be discharged from his purchase, as Mr. Borrett considered that it was of great importance to him to have the whole of the parcel 490a.

With a view to removing Mr. Borrett's objection the trustees of the will of the testator in the action entered into an agreement with Lord Waveney that an application should be made to the Inclosure Commissioners for effecting an exchange of Lord Waveney's share in 490a for a piece containing four acres, being the northerly part of the parcel numbered 429, the agreement being made conditional on the

consent of the plaintiff. She is suffered to go on cutting down the timber; the *demesne* is dismantled, and changed in its character for the purpose of a residence. I have no ground to say that the devastation was resorted to as a means to rid the purchaser of an unwelcome bargain. It may be true that he was aware of the waste that the inheritrix was committing, but he was an unauthorized person, and the receiver who was paid for protecting the estate was the person who should have put a stop to it. Now the receiver was the plaintiff's agent, and the plaintiff cannot be exculpated when the receiver was in default. It makes no difference that the sale was under a decree in a creditor's suit, because it behooved the creditor to take care of the estate, and see that it continued when possession was given, or at least until title was shown in the same state, or in as good a state as it was in when sold. This is not even accidental destruction, or injury done by a person punishable criminally. I shall not go into the quantum of despoliation of ornament. The destruction of one beautiful tree would be sufficient, and the question is, is it such an accident and appendage as admits of pecuniary compensation? Clarke swears he did not buy this estate for income to be derived by farming the land, but for a residence. By reference to the map, it appears an attractive place of residence. For that purpose it might have a value beyond the real value. But that adventitious value is taken away, and there is no instance of a court of equity under such circumstances as these compelling a purchaser contracting for the purchase of a house and *demesne* fit for residence, and embellished with ornamental timber, where ornamental timber has been cut down between the contract and possession given, or title shown, to complete the purchase. I say ornamental trees, for ordinary timber cut down would be matter of compensation. Ornamental timber is essentially different.—Sir Anthony Hart, L.C., *Magennis v. Fallon*, 2 Moll. 588-590.—Ed.

sale being carried into effect, and on the purchaser being desirous that the agreement should be carried out.

Mr. Borrett not being willing to complete on this footing, the summons came on to be heard before the Master of the Rolls on the 29th of January, 1880.

Borrett deposed that before instructing Girling to bid on his behalf he had perused and examined the particulars and plan, and fully believed that the whole of 490a was offered for sale, and that it contained 4A. 38P., and that the rest of Bottlesey Green lay on the other side of the road. He stated that he did not suppose the whole 7A. 1R. 27P. to be included in 490a, it not having occurred to him to scale the plan. By a further affidavit he went on to say that as he understood the plan and particulars the purchase would give him the whole of the land up to the two roads, except the piece belonging to Miss Walker; that the possession of 490a was important to him on account of its frontage to the road, its situation with respect to his other property, and its being the only pasture ground in Lot 18.

Evidence was given on behalf of the plaintiffs that the auctioneer, in answer to a question put to him in the saleroom, explained that the testator was entitled only to four-sevenths of 490a; that this piece of land contained 7A. 1R. 27P.; and that the 4A. 0R. 38P. mentioned in the particulars was equivalent to four-sevenths of it. Girling denied having heard any of this conversation. He was orally cross-examined and re-examined, and stated that he was a land agent and not a surveyor; that he had ridden over the land, but was not able to judge by eye as to the acreage of a field; that when he bid he considered that he was buying the whole of 450a; that he had not noticed that 490a, as laid down on the plan, appeared by comparison with the other closes to contain much more than four acres; that he supposed it to contain 4A. 0R. 38P., and the rest of Bottlesey Green to be on the other side of the road; that when there was a plan before him he took it to be correct, and took the quantities as stated on it, and had done so in this instance, and that until after the sale he had no idea that he was buying only four-sevenths of 490a.

*Ince*, Q.C., and *Holland* for the appellant.

*Chitty*, Q.C., and *Smart* for the vendor.

JAMES, L.J. I am of opinion that the order of the Master of the Rolls in this case ought not to be affirmed.<sup>1</sup> It appears to me that the purchaser is well warranted in asking to be relieved from the necessity of performing, not the contract into which he had entered, but another contract which the court has made for him by giving what is

<sup>1</sup> The opinion and rules of the Master of the Rolls have been omitted.—ED.

called compensation. Lord Eldon, in *Knatchbull v. Grueber*,<sup>1</sup> expressed his opinion that the court was becoming more and more in the habit of holding people to the contracts they had made, and not holding them to contracts that they had not made, and I hope that the court will continue in that course. There is no doubt that if a man purchases a property, and what I may call an infinitesimal portion cannot be given him, then he may be obliged to complete with compensation, and here there is a condition which would oblige him to complete with compensation in such a case. But it has never been held that a man is obliged to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he bought.

In my opinion it can make no difference whether you take the purchaser as being Mr. Borrett or Mr. Girling. Mr. Girling, no doubt, was, so to say, the purchaser on the record; he was the person who appeared at the auction-room and bound himself. But, as we know for a fact, Mr. Girling was buying for Mr. Borrett, and was only an agent for Mr. Borrett, and he is entitled to say anything that Mr. Borrett, if he had been the purchaser in his own name, could have said, and anything that can be said respecting Mr. Borrett's motives or objects which could be considered material to the case if Mr. Borrett were the purchaser in his own name must be, to my mind, equally material when said by Mr. Girling purchasing as his agent. I, therefore, propose to consider the case exactly as if Mr. Borrett had been the nominal as well as the real purchaser.

Now, what Mr. Borrett says is that there was a small property, said to contain a little more than forty-one acres, which lay between his property and two roads; and that there was one particular close, marked 490a, which anybody who was acquainted with property would at once see to be very material. There can be no doubt that the loss of 490a would be very inconvenient to Mr. Borrett, for he would have interposed between his estate and the road a long strip belonging to somebody else, with a possibility of a nuisance being erected on it by the owner; or, if Mr. Borrett were minded to be a game preserver, the absence of that strip would materially diminish the value of the estate, for the owner might grow upon it buckwheat, or anything of that kind, which would induce the pheasants to come to it for the purpose of being poached. Indeed, one does not know to what extent a strip of that kind might be an inconvenience. There is then, to my mind, a very substantial difference between the property with 490a and the property without 490a, and the purchaser, if

<sup>1</sup> 3 Mer. 146.

he cannot get that strip, has a right to say, "What you offer me is substantially a different thing from that which I was minded and intended to buy"; and Mr. Borrett and Mr. Girling both depose to the importance of this parcel. That being so, it seems to me that the purchaser is entitled to be relieved, on the ground that he does not get substantially the thing for which he contracted.

Then, it is said, "If you had looked at the plan and looked at the property itself, and then read the particulars, you must have seen that there was some mistake, and you ought to have inquired and ascertained what that mistake was, and you would have found at once that you were not getting the whole of 490a, but only a share of it." That is not, to my mind, a very acceptable suggestion on the part of a vendor. If a man makes a description calculated to mislead, I do not think it is well for him to say, "If you had been very careful, you would have found out the blunder." How was it that he did not himself find it out? How can the vendors be heard to say that the purchaser ought to have found out for them that very blunder which they never found out for themselves? Mr. Girling says he rode round the property and looked at it, and looked at 490a, but never thought whether it was four acres or seven acres. It would not be according to the ordinary course of business to go and inquire into the details of the acreage, and see whether they exactly fitted into the particulars referred to, and I have no doubt that he took it for granted, and reasonably and properly took it for granted, that the farm contained 41A. 3R. .31P, and consisted of the closes shown on the plan. It appears to me there was nothing in the particulars or the representations made on the particulars which bound Mr. Girling or Mr. Borrett to take something other than the 490a which he considered himself to be buying. In my opinion he certainly was not obliged to take four undivided sevenths of it, nor to take what was offered him by way of compensation. It is, to my mind, new to insist on a man taking an undivided portion of a close or a farm instead of the close or farm itself; and we cannot look at what is a reasonable compromise, or compel a man to accept a reasonable compromise or deprive him of his rights because he does not accept what the vendors call a reasonable compromise. The case must stand exactly as if no attempt had been made to settle with Lord Waveney.

If that is so, how does the matter stand? The purchaser says, "I wanted to buy Lot 18, and you cannot give me what is shown to be a very important part of Lot 18." In my opinion the purchaser is entitled to be relieved from the contract.

BAGGALLAY, L.J. I also think that the appeal should be allowed.

Whether we regard Mr. Borrett or Mr. Girling as the purchaser, the purchaser was induced to bid for Lot 18 by the mistake which had been made by the vendors in the particulars of sale ; and in considering what the particulars of sale are, it is, in my opinion, impossible to exclude the plan which is attached to them, and by which, as everybody knows, purchasers are often as much guided as by the printed portion of the particulars.

The mistake in the particulars appears to me to be a mistake of a serious character, and the judgment of the Master of the Rolls seems to be founded on his not giving credit to the statements made by Mr. Girling in his affidavit. It appear to me that an impression which has been stated to have been entertained by the vendors, that Mr. Girling was aware of the state of the title to 490a, was conveyed somehow or other to the Master of the Rolls' mind ; for unless this was the case, I cannot understand several of his observations upon Mr. Girling's conduct. Mr. Girling had in his affidavit as clearly as possible stated that he was not aware of the mistake, but believed that he was purchasing the whole of 490a, but the Master of the Rolls, after commenting on his evidence, winds up by saying, "I do not like to say I disbelieve him, but I do say I do not give credit to his affidavit. He has, somehow or other, done what so many people do—that is, with a view to get his employer off the purchase, he has worked himself up into a belief which I cannot think that he originally entertained." I am bound to say that I cannot take that view of Mr. Girling's conduct or of the statements made by him. I give the fullest credit to the statements and the representations he has made.

Then, is this a case in which specific performance with compensation ought to be ordered? It has been suggested that compensation may be given in one of three several ways, and first by a partition by the court. I am by no means satisfied that if a partition had been effected before the time for completion, and four acres out of the estate had been allotted to the vendors, that the purchaser would have been bound to complete ; for in any proceeding to enforce the contract against him, I am disposed to think that he would have been entitled to say that it was a contract to sell the whole of the piece of land surrounded by the mauve color on the plan. But, be that as it may, no such partition has been obtained, and it might take weeks or months to obtain it. It is then said that it may be attained by a partition or exchange through the Inclosure Commissioners. Both those proceedings may, and probably would, take a long time, and is the purchaser to complete and take the chance of his being able to obtain such partition or exchange after he had completed

his purchase, or is he to postpone the completion of his purchase till it is done? As far as regards exchange, it appears to me monstrous to say, "We will let you have the seven acres at the bottom of your property, but you shall give up the four acres in another material part of your property comprising a frontage on the road." As regards the only remaining mode in which compensation could be given, viz., pecuniary compensation, that is only adopted in a case where there is a trifling difference between the actual state of the property and the state in which it was represented to be by the vendors. When the property conveyed falls short of the right number of acres to a small extent, or comprises a larger number of acres, pecuniary compensation may be given or taken by the one side or the other, but no case is present to my mind in which pecuniary compensation has been given when the property to which a title cannot be made is a material part of the property bought. If there had only been a want of title to a little bit of land in a remote part of the property, the purchaser might be ordered to complete with compensation; but this piece with a long frontage to a high road is so material to the enjoyment of the rest, that I am satisfied it is not, according to the authorities, a proper case for compensation. I agree that the appeal must be allowed.

BRAMWELL, L.J. I am of the same opinion. I should like to deal with the case as though the question were whether any action would have been maintainable at common law to recover damages against Mr. Girling for refusing to complete. I am clearly of opinion that no such action could have been maintained.

The contract into which the purchaser entered is contained in the conditions and particulars of sale. It struck me at one time that if he had seen the discrepancy between the plan and the contents, and had said to himself, "I see there is some mistake, but I will buy, taking my chance as to the contents," he might have been held to be bound to complete. When a man signs a contract he is bound to see the whole terms of it and find out its meaning, and I do not think that it would be of any use for him to say that he understood it in a particular sense if its proper construction were otherwise. But it seems to me that, looking at the plan and particulars, the true construction of the contract is that the purchaser has bought the estate shown on the plan, subject to a question whether 490a contained four acres or seven acres. Neither can be conveyed to him its entire, but only an undivided four-seventh of the whole piece. The purchaser's objection then is, that you cannot give me the thing I bought, and it is admitted that they cannot, and in my opinion there ought to be an end of the matter.

But it seems that a practice sprang up in the courts of equity of disregarding the old sensible rule that a bargain is a bargain, and that

people should be held to it, and of making bargains for the contracting parties which they never would have made for themselves. Lord Eldon said that in his time the court was becoming more and more in the habit of holding people to the contracts they had made. That is what I humbly venture to think should be the rule, and I trust that this case will be a step further in that direction. I desire to say on my own part that, looking at the reasonableness of the thing, it would be monstrous to make Mr. Borrett take this estate without giving him the whole of 490a. I think it would be wrong to make Mr. Girling take it, even if he purchased on his own account.

The only other observation I wish to make is, that I entirely concur in what Lord Justice Baggallay has said with regard to the evidence of Mr. Girling. I do not see the least ground for distrusting his *bona fides*.

JAMES, L.J. As regards Mr. Girling's evidence, I wish to state that I most implicitly believe all he has said.

An order was accordingly made discharging the applicant from his purchase, with costs both at the Rolls and in the Court of Appeal, and ordering a return of the deposit with interest. The appellant asked for interest at £5 per cent., as that was the rate at which under the conditions interest was to run in case of delay in completion, but the court held that only £4 per cent. should be given.

Solicitors: *White, Borrett & Co.; E. Bromley.*

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GEORGE PEABODY WETMORE, APPELLANT, v. CATHARINE  
W. BRUCE, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK (SECOND DIVISION),  
JANUARY 14, 1890.

[*Reported in 118 New York Reports 319.*]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of December, 1886, which affirmed a judgment in favor of the defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts are sufficiently stated in the opinion.

*William Man* for appellant.

*Charles Jones* for respondent.

PARKER, J. This action was brought to compel the defendant to specifically perform an agreement made by her to purchase the house and lot, No. 19 Washington Square, north, in the city of New York, which



the plaintiff agreed to sell and convey free and clear of all incumbrances.

The defendant in her answer, among other objections to the title, averred that the former owners of the land in the block in which the house and lot are situated had mutually covenanted and agreed that twelve feet of the front of the lot in question, and of the other lots in the block, should not at any time be built upon, but should forever be left open for court-yards.

That such agreement was in full force and constituted a restriction and incumbrance which depreciated the value of the property.<sup>1</sup>

The title, then, which the plaintiff tendered was not free and clear from all incumbrance, for certainly a covenant, valid and enforceable in equity, which so limits and restricts the use of twelve feet in depth along the entire front of a city lot as to prevent building thereon is an incumbrance.

Upon the trial the plaintiff, by evidence tending to show that the existence of the agreement did not depreciate but rather enhanced the value of the premises, sought to bring the case within the decision of the court in *Riggs v. Pursell*.<sup>2</sup> In that case the purchaser at a judicial sale refused to take title. The court said, "while the agreement requires that a court-yard shall be left in front of this lot, for the benefit of the other lots on the street, it also requires that a court-yard shall be left in front of all the other lots for the benefit of this; and all the houses on the street have been built in conformity to this agreement. While this agreement may in one sense be regarded as an incumbrance upon this lot, it cannot be assumed, without proof, that it injuriously affects its value to any extent whatever." And it was held to be an immaterial defect. But in the case before us the trial court found that the restriction and incumbrance created by the covenant and agreement did, in fact, damage the property, and injure its salability and marketability. The General Term having affirmed the finding, it cannot be reviewed here as there is some evidence to support it. As the case is now presented, therefore, *Riggs v. Pursell* cannot be invoked in aid of the appellant, and it is unnecessary to consider whether the doctrine of that case would be applicable to a private sale, where the vendor contracts to give a good title in fee simple free and clear of all incumbrances. It follows that the refusal of the court to decree specific performance must be sustained.

The judgment should be affirmed.

All concur, except HAIGHT, J., not voting.

Judgment affirmed.

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

<sup>2</sup> 66 N. Y. 193.

## CHARLES E. FLEMING ET AL., RESPONDENTS, v. ELBERT L. BURNHAM ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 6, 1885.

[Reported in 100 New York Reports 1.]

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made May 8, 1885, which reversed an order of Special Term, discharging Mayor Sternberger, a purchaser on sale under the judgment herein from his purchase, and which directed the executors of said purchaser, he having died after the making of the Special Term order, to complete the purchase.<sup>1</sup>

The action was for partition: the parties claimed under the title of John McKie, who died in 1828 seized of the premises, leaving a will by which he devised said premises to his five children named, "their heirs, executors, administrators and assigns forever, share and share alike."

The further material facts are contained in the opinion.<sup>2</sup>

*Samuel Hand* for appellants.

*Alexander Bain* for plaintiffs, respondents.

*M. L. Townsend* for respondent Burnham.

ANDREWS, J. The most serious objection made by the purchaser relates to the sufficiency of the deed of February 14, 1833, from Thomas McKie and Andrew Stark, two of the four executors named in the will of John McKie, to Gerardus DeForest, to pass title to the premises in question. It is insisted that William McKie, one of the executors named, duly qualified, and should have joined in the execution of the deed. It is conceded that John McKie died seized in 1828. The answer made to the objection is two-fold, first, that the deed was a valid execution of the power of sale vested in the executors of McKie by his will, and second, that the five children of the testator took under the will a title in fee-simple to the land, and that conceding that the conveyance by the two executors was not a valid exercise of the power of sale, nevertheless the title of DeForest as to four-fifths of the premises was ratified and confirmed by the quit-claim of April 29, 1835, executed by all the children of the testator, except his son William, and that the title to the share of William, who died in 1836, is barred by adverse possession. It is further claimed that it must be presumed that William received his proportion of the purchase-money on the sale to DeForest, and that the acceptance by him of his share of the consideration, operated as an estoppel, and precluded him, or those claiming under him, from questioning the validity of DeForest's title.

<sup>1</sup> Mem. of decision below, 36 Hun 456.

<sup>2</sup> A portion of the statement of facts has been omitted.—Ed.

The sufficiency of the first answer, if true, needs no argument. But if the conveyance by the two executors was not a good execution of the power of sale contained in the will, the sufficiency of the second answer depends upon the correctness of the assumption on which it proceeds, viz. : that under the will the five children of the testator took an absolute fee in the premises. If they took a fee-simple, the quit-claim of April 29, 1835, vested in DeForest a good title to four-fifths of the land, and as to the one-fifth devised to the testator's son William, his title and that of his heirs is apparently barred by adverse possession. On the other hand, if under the will the children of the testator took only a base or qualified fee, determinable upon their death, leaving issue, or upon their death under twenty-one years of age, without issue, and the fee on the happening of the contingent event was given over to their issue, or to the brothers and sisters as the case might be, then manifestly the quit-claim deed did not bar the right of the issue of the children or cut off the ultimate fee given to them on the death of the parent. The deed might become the foundation for an adverse possession, as it purported to be a conveyance in fee, but in this way only could it affect their rights. But an adverse possession under the deed could not be deemed to commence as against the ultimate devisees, until the determination of the precedent estate and the accruing of their absolute title in possession. For it is well settled that the statute does not commence to run against a person entitled after the determination of a prior estate, during the continuance of that estate.<sup>1</sup> Upon the assumption, therefore, that the issue of the children of the testator took under the will, upon the death of the parents respectively, an estate in fee, as purchasers, in the share of their parents, it is clear, upon the conceded fact that Thomas, one of the sons of the testator, lived until 1875, and that he died in that year, leaving issue, one of whom was an infant of the age of ten years, that as against such issue no title by adverse possession had been acquired under the deed of April 29, 1835. There was no right of entry in the children of Thomas until his death. The deed conveyed his title to DeForest, whatever it was, with the right of possession during his life. His children could maintain no action to recover the premises until their right to the possession accrued. The questions, therefore, presented for consideration are, first, as to the validity of the deed from the two acting executors, as an execution of the power of sale, and the further question as to the quality of the estate devised by the will of John McKie to his children, and also the question of adverse possession.

<sup>1</sup> Jackson v. Schoonmaker, 4 Johns. 390; Jackson v. Sellick, 8 id. 262; Jackson v. Johnson, 5 Cow. 74.

It is material, in the first place, to consider the principle upon which objections to title on a judicial sale are to be treated and adjudicated. The purchaser is entitled to a marketable title, free from reasonable doubt. The purchaser bids on the assumption that there are no undisclosed defects. The purchaser pays and the seller receives a consideration, regulated in view of this implied condition. Objections which are merely captious or mere suggestions of defects which no reasonable man would consider, although within the range of possibility or those which are clearly invalid by the law as settled, whatever doubts may at a former time have existed as to the questions raised, are not available to a purchaser, and will be disregarded. But the question presented to the court on an application to compel a purchaser on a judicial sale who raises objections to the title tendered to complete the purchase, is not the same, as if it was raised in a direct proceeding between the very parties to the right. Where all the parties in interest are before the court and the court has jurisdiction to decide, they are concluded by the judgment pronounced, so long as it stands unreversed, however imperfectly the evidence or facts were presented upon which the adjudication was made, or however doubtful the adjudication may have been in point of law. If the controversy involves a disputed question of fact, or the evidence authorizes interferences or presumptions of fact, the finding of the tribunal makes the fact what it is found to be for the purpose of the particular case, although the evidence of the fact may be weak and inconclusive, or although it is apparent that there are sources of information which have not been explored, which if followed might have removed the obscurity. The parties are nevertheless concluded in such a case, because they were parties to a judicial controversy before a tribunal constituted for the very purpose of deciding rights of persons and property and before which they had an opportunity to be heard. But the court stands in quite a different attitude where it is called upon to compel a purchaser to take title under a judicial sale, who asserts that there are outstanding rights and interests not cut off or concluded by the judgment under which the sale was made. The objection may involve a mere question of fact or it may involve a pure question of law upon undisputed facts. In either case it may very well happen that the question is so doubtful that, although the court would decide it upon the facts disclosed, in a proceeding where all the parties interested were before the court, nevertheless it would decline to pass upon it in a proceeding to compel a purchaser to take title and would relieve him from his purchase. The reason is obvious. The purchaser is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact, or a doubtful

question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud upon the purchaser's title would remain, although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences. There must doubtless be a real question and a real doubt. But this situation existing, the purchaser should be discharged.<sup>1</sup>

The power of sale in the will of John McKie was vested in his executors named in the will, "or such one or more of them as shall take upon him or themselves the burden of the execution of the will." There were four persons named as executors. On the probate of the will in 1828, as a will of personal estate, letters testamentary were issued to three of the executors, viz.: Thomas McKie, William McKie and Andrew Stark. The will was proved as a will of real estate in 1833. William McKie did not join in the deed to DeForest of February 14, 1833. If he qualified as executor, and, with his co-executors Thomas McKie and Andrew Stark, undertook the burden of the execution of the will, and was not subsequently discharged, or did not renounce his executorship, or refuse to act as executor, then it seems to be conceded that the power of sale was not well executed by the conveyance of his two co-executors, in which he did not join. The court below inferred a renunciation or refusal to act on the part of William McKie, from certain facts which appeared, prominent among which are the circumstances: that in 1832 Stark and Thomas McKie took from the city of New York a release of certain quit rents charged on the premises in their names as acting executors; that the deed of February 14, 1833, describes the grantors as acting executors, and recites the authority conferred by the will; the advertisement and sale of the premises at public vendue to DeForest for \$16,150; that DeForest in 1833 entered into possession of the premises under the deed from the two executors, and continued in possession until his death in 1873, and that the premises continued to be occupied under his title until the commencement of the present action in partition in 1881, without any question having been raised as to the validity of the executors' deed. On the other hand, it may be plausibly urged that the issuing of letters testamentary to William McKie, in connection with Stark and Thomas

<sup>1</sup> *Shriver v. Shriver*, 86 N. Y. 575 and cases cited; *Hellreigel v. Manning*, 97 id. 56.

McKie, creates a presumption that William McKie did take upon himself in 1828 the execution of the will ; that there is no evidence of any actual renunciation of his office as executor, or refusal to act ; that the explanation of the quit-claim of April 29, 1835, may be, that it was procured to remove a doubt or to remedy some supposed defect in respect to the execution of the power by the deed of February 14, 1833 ; that it was not until the death of the children of John McKie that any persons were in a position to question the title of DeForest and his grantees, except the testator's son William, and he received, as may be supposed, his share of the consideration of the sale by the executors, and had no interest to question the title. We do not intend to say that a jury might not be justified, upon the facts presented on the application in this case, in finding that William McKie did renounce his executorship or refuse to act as executor prior to February 14, 1833.<sup>1</sup> But such a finding would depend upon inferences and presumptions by no means incontrovertible; and would not bind the issue of the children of the testator, claiming title as against the purchaser in this proceeding, and there is, we think, such a doubt in respect to the fact that the court ought not to compel the purchaser to complete his purchase upon the assumption that Stark and Thomas McKie were the only executors authorized or required to join in the execution of the power. In an action of ejectment by the children of Thomas to recover their interest, would the court be authorized to direct a nonsuit against them on the ground that the facts (as now presented) conclusively established a good execution of the power of sale? We think this question must be answered in the negative.

The question whether the children of the testator, John McKie, took under the will an absolute fee, or only a fee determinable on their death, leaving issue, is one of law purely arising on the construction of the will. It is a question which, under the decision of this court in *Chrystie v. Phyfe*,<sup>2</sup> would require grave consideration before pronouncing against the claim of the issue to take as purchasers. The quit-claim of April 29, 1835, does not, therefore, remove the doubt cast upon the title growing out of the execution of the power of sale. The answer to the claim that DeForest and his grantees have acquired a title by adverse possession has been indicated. The possession did not commence to be adverse against the issue of the testator's son Thomas until his death in 1875, and it is the question as to the rights of the issue of the children of John McKie which creates the doubt as to the title tendered to the purchaser in this proceeding.

<sup>1</sup> See *Doyle v. Blake*, 2 Schoales & L. 229; *Wasson v. King*, 2 Dev. & B. 262.

<sup>2</sup> 19 N. Y. 344.

These views lead to a reversal of the order of the General Term, and the affirmance of the order of the Special Term, discharging the purchaser, etc.

All concur.

Ordered accordingly.

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HELEN A. MOSER, EXECUTRIX, ETC., APPELLANT, v. THOMAS  
B. COCHRANE, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 4, 1887.

[*Reported in 107 New York Reports 35.*]

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 17, 1885, which affirmed a judgment in favor of defendant, entered upon the decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

*Sol Kohn* for appellant.

*James R. Marvin* for respondent.

DANFORTH, J. The complaint sets out an agreement in writing by which the plaintiff undertook to buy and the defendant to sell certain premises in the city of New York for the sum of \$20,500, payable \$1,000 down, and the residue in installments at and subsequent to the delivery of the deed, which it was agreed should be made the 10th day of June, 1882. The \$1,000 was paid and in due time the deed tendered, but the plaintiff refused to receive it and commenced this action on the 11th of August, 1882, to recover the money back on the grounds as stated in the complaint:

"First. That the property was part of the estate of James Cochrane, who died intestate on or about the 28th day of December, 1880, and that as the administration of the estate has not been closed, and three years had not elapsed since letters of administration were granted, the plaintiff would have to take the property subject to the debts of the intestate, if any there were, after the personal estate was exhausted.

"Second. That four years have not elapsed since his death, and if within four years thereafter a last will and testament of his property be found, it would govern the disposition thereof, and the conveyance to plaintiff be void."

The defendant by answer averred many things not now necessary to refer to in denial and avoidance of the plaintiff's claim, but among other things that all the demands owing by the said James Cochrane

had in fact been paid by the administrator, and declaring his readiness and ability to carry out the agreement, prayed that the plaintiff be required to specifically perform it on his part. Upon trial before a court and jury the plaintiff's case was dismissed, but the issue upon the answer retained for hearing at Special Term, where the trial judge found all the facts in favor of the defendant "and that at the time fixed by the agreement for the delivery of the deed, all the debts of the deceased had been paid." He ordered judgment for the defendant according to the prayer of the answer, and this judgment was affirmed by the General Term.

We think the case on both branches was well decided.

Before the real estate of a decedent can be applied to the payment of his debts, it must be made to appear that the personal estate is insufficient for their payment. The complaint sets up the difficulty, which seemed insuperable to the plaintiff, that if he executed the agreement he "would have to take the property subject to the debts of the ancestor, if any there should be after his personal estate was exhausted." To entitle him to relief, therefore, he was required to show that the title of the defendant was not such as he was bound to accept, and to carry out the theory of the complaint two facts must appear: First, debts; second, an insufficient personal estate left by the defendant's ancestor. As to both, being the moving party, suing to recover back money paid—he held the affirmative. He utterly failed to show either. Indeed he offered no evidence having the slightest tendency to establish these circumstances. Nor was there any error in excluding evidence of the plaintiff's inability to procure a loan upon the property, nor that the reasons assigned by the lawyer to whom application was made were those stated in the complaint as objections to the title. Other evidence offered was to the effect that members of the legal profession familiar with such questions regarded a title derived from an heir within the periods named in the complaint non-marketable. If the facts proved justified the inquiry, the question was one for the court to answer. The opinion of conveyancers against it is quite immaterial.<sup>1</sup> The learned trial judge, therefore, properly excluded this evidence, and the plaintiff omitting to produce any other, he could only hold that no cause of action had been made out.

On the other hand the answer set up a counter-claim, and the findings of the court upon competent evidence sustained it. The defendant's claim arose out of the contract or transaction set forth in the complaint and without which the plaintiff would have had no standing as a litigant. The case, therefore, is within the Code,<sup>2</sup> and no reason is perceived why the defendant, if he established the counter-claim, should

<sup>1</sup> Sugden on Vendors 174.

<sup>2</sup> §§ 501, 502.



not have the affirmative judgment demanded in the answer.<sup>1</sup> At the close of the evidence on the part of the defendant on this branch of the case, the plaintiff moved for a dismissal on "the grounds (1) that no counter-claim is set up in the answer, and (2) that the case as made out does not entitle the defendant to specific performance, as it appears that the entire purchase-money was to have been paid in cash." Neither of these propositions are now presented by the appellant, nor could they, with any propriety, be insisted upon. The answer admits the contract as set out in the complaint, states every fact entitling the defendant to its performance, and asks for the appropriate relief. The only foundation for the other suggestion is evidence called out by the plaintiff that after the time fixed for the tender of the deed and consummation of the contract, and after the deed had been tendered and refused, he applied to the defendant and "asked him if he would as lief take all in money, and the defendant replied it would make no difference." The defendant then said he would pay the entire amount in money instead of giving a bond and mortgage. But there was no change in the agreement, nor any pretense that the money was in fact paid.

The learned counsel for the appellant on this appeal formulates and argues the question "whether a purchaser can be compelled to take title to real property within three years from the granting of letters of administration upon the estate of the party from whom the vendor inherited the property." As applied to the appellant's case it offers for consideration a mere abstraction, and it is not necessary now to pass upon it. The doubt as to the title, as the case was presented to the trial court, was upon matter of fact.

The appeal is resisted on evidence and findings which allow no reasonable doubt as to the title offered, even if they do not exclude the possibility of injury to the vendee. It was conceded that the deceased died intestate, and in addition to other evidence on the part of the respondent, proof was given of the regular issuance of letters of administration and compliance with the statute respecting claims against the deceased, a consummated advertisement for them and the payment of all, leaving a balance of personal estate amounting to about \$10,000, and the court finds not only that the personal estate left by the deceased was large in amount and in excess of all his indebtedness, but also that all his debts were paid before the time fixed for the delivery of the deed. At the time this finding was made the deceased had been dead more than three and a half years; nearly three years had elapsed from the appointment of the administrator. Even then there could at most be said to be merely a bare possibility that the title would be affected by

<sup>1</sup> Howard v. Johnston, 82 N. Y. 271.

debts thereafter to be discovered, but of whose existence the plaintiff did not express a suspicion, much less a belief.

The question arising on similar facts was presented in *Spring v. Sanford*,<sup>1</sup> where the same propositions were submitted on behalf of a purchaser wishing to be relieved of his bargain, but they were not sustained. *Schermerhorn v. Niblo*<sup>2</sup> is to the same effect, the learned judge saying: "As the law does not regard trifles, a bare possibility that the title may be affected by the existing causes which may subsequently be developed, when the highest evidence of which the nature of the case admits, amounting to a moral certainty, is given, that no such cause exists, will not be regarded as a sufficient ground for declining to compel a purchaser to perform his contract." As the case stands it must be deemed settled that the defendant's ancestor died intestate, that the debts owing by him were paid by his administrator in due course of administration, and that none remained which could be the means of impairing the title which the deed tendered did in terms convey.

The objection that the deed calls for a frontage of twenty-eight feet, more or less, while the contract calls for a frontage of twenty-eight feet two inches, "more or less," is not tenable. The same description of the property is given in both instruments, bounding it on either side by the walls of adjoining tenements and with such particularity that no mistake could arise as to either its location or dimensions. In such a case quantity is not a material part of the description.

We think there is no error in the judgment appealed from, and that it should be affirmed.

All concur.

Judgment affirmed.

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GEORGE B. ABBOTT, PUBLIC ADMINISTRATOR, ETC., APPELLANT,  
v. JOHN F. JAMES, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 15, 1889.

[*Reported in 111 New York Reports 673.*]

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made May 14, 1888, which affirmed a judgment entered upon an order sustaining a demurrer to the plaintiff's complaint.

This action was brought to compel specific performance on the part of defendant, the purchaser, of a contract to purchase certain real estate.

The complaint alleged, in substance, that Augustine Barker died in

<sup>1</sup> 7 Paige 550.

<sup>2</sup> 2 Bosw. 161.

1877, leaving no personal property, but seized of the real estate in question; that he left him surviving no parent, child, or descendant but his widow and certain nephews and nieces, his heirs-at-law.<sup>1</sup>

Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

*William Ives Washburn* for appellant.

*William N. Dykman* for respondent.

FINCH, J. The majority of the court are of opinion that the question upon which the validity of the purchaser's title depends is so doubtful that we ought not to decide it and compel an acceptance of the deed in the absence of and without hearing the heirs-at-law whose rights depend upon the same question. We have acted upon that basis many times—generally, it is true, where the doubt arose upon the facts, but sometimes, I think, where the question was one of law.<sup>2</sup> The ultimate inquiry here presented is whether the power of sale given by the will failed as to so much of the real estate as could not pass to the three charitable societies named as legatees in the will. The testator gave to his wife during her life or until her remarriage the use of all his property, real and personal. He had no children, and his only heirs-at-law were nephews and nieces. Upon the death or remarriage of his wife he gave the whole of his property to the three societies named, and then provided that if at the date of the distribution any of his property should consist of real estate, that should be sold and converted into money and the proceeds divided among the societies. It is conceded that, by force of chapter 360 of the laws of 1860, the testator could not give to the charitable societies more than one-half of his property, so that the half which they could not take was undisposed of by the will.

Two opposite theories have been argued as solutions of the difficulty. The courts below have held that the absolute title to one-half of the estate vested in the testator's heirs-at-law, and, the purpose of the power having failed as to that half, the direction to sell failed to the same extent and the title of the heirs became freed from its incumbrance. This view assumes that the power of sale was given solely for convenience of division among the three societies. But the appellants contend that the failure of the attempted legacies beyond one-half of the estate does not affect or destroy the power of sale; that such power was both absolute, imperative, and independent; that it was supported by the peremptory mandate of the testator, and not by some ulterior purpose to which it was accessory or a necessary or convenient incident; and that even if its purpose be declared to have been to facilitate division among the societies, that purpose has not wholly failed, and we cannot say that

<sup>1</sup> A portion of the statement of facts has been omitted.—ED.

<sup>2</sup> *Jordan v. Poillon*, 77 N. Y. 518; *Fleming v. Burnham*, 100 N. Y. 8.

the direction would have been withheld if the testator had known that one-half of his property would not pass under his will.

Numerous authorities are cited on both sides and many considerations are advanced not necessary to be repeated. While upon the inquiry involved I have, perhaps, formed some decided opinion, I am obliged to admit that the question is doubtful and debatable, and justifies the differences of opinion which have arisen among us. Those differences have not been wholly founded upon questions of law, but have rested somewhat upon the uncertain and undisclosed character of the facts; for while they are settled in this case by the complaint and demurrer, the heirs may show them to be entirely different and will be at liberty to do so if they can.

If, at the death of the testator, they should show that only one-quarter of his property was real estate, and the value of that could be fixed by proof or by agreement, the share going to the societies would be easily ascertained and payable out of the personal estate without need of a resort to the land, and no purpose or necessity would exist for the power of sale. Possibly, in that event, the heirs would have a right to hold their share in land by the exercise of an option, even if the power of sale was not otherwise extinguished. But if, at testator's death, the situation was different and three-quarters or the whole of his estate was realty, a sale of the land would be needed for payment to and division among the charitable societies, and the argument in support of the power of sale would be much stronger. What the facts are we do not know, beyond the admission of the present parties, and they might easily prove to be such as at least to affect the decision, if not to dictate it. So that even if, in a case dependent upon a bare question of law, we ought to decide it and adjudge the title tendered to be good or bad, we have not before us a case wholly independent of unknown facts and certain not to be affected by them.

In such an emergency we must remember that if we force this title upon the purchaser he may have to confront the heirs-at-law in a future litigation. They are not before us and will not be bound by our decision. They will have a right to be heard, both as to the facts and the law, and since the question is doubtful and quite evenly poised, we think we ought not to expose the purchaser to the possible risks of the situation. We have, therefore, briefly stated the question sufficiently to disclose its general character, and without any argument upon it, which would be improper in view of our conclusion.

For the reason given, and without deciding the question involved, we think the judgment should be affirmed, with costs.

All concur except EARL, J., not voting.

Judgment affirmed.

MAURICE MOORE, RESPONDENT, *v.* PERRY P. WILLIAMS,  
IMPLEADED, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 8, 1889.

*[Reported in 115 New York Reports 586.]*

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 23, 1887, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

*George Zabriskie* for appellant.

*Maurice S. Cohen* for respondent.

EARL, J. The defendants, describing themselves as trustees, on the 8th day of December, 1884, entered into a written contract with the plaintiff to sell to him a lot of land known as No. 247 Fulton Street, in the city of Brooklyn, for the sum of \$25,000. The plaintiff at the time of executing the contract paid upon the purchase price the sum of \$250, and he was to pay \$2,250 more upon execution and delivery to him of the deed on the 15th day of January, 1885; and he was to take the lot subject to a mortgage thereon for \$22,500. The defendants agreed to give him a proper deed of bargain and sale for the conveyance, and assuring to him the fee simple of the lot subject to the incumbrance of the mortgage. The plaintiff subsequently refused to complete his purchase on the ground that the title tendered to him by the defendants was not clear and perfect, such as he was entitled to receive under the contract, and he commenced this action to recover the installment of \$250 paid by him and \$406.14, the amount paid by him to counsel for examining the title.

The title came to the defendants from William H. Guion by a deed dated August 1, 1884, which recites that the firm of Williams & Guion, in liquidation, is indebted to the estate of John S. Williams, deceased, in the sum of \$105,000 and interest from August 2, 1882, and that Guion and the firm are desirous to provide for the payment thereof; and also contains the following recital: "Whereas the said William H. Guion is seized of the lands and premises hereinafter described in his own name, but in the right of and for the use and benefit of the said firm of Williams & Guion." Then, by apt and proper words, the deed conveys the premises in question, with other real estate, to the defendants in trust to sell the same and pay the recited indebtedness out of the proceeds. Guion's title to the lot came from Anson B. Moore and George E. Apsley, who conveyed the same to him by a deed dated, acknowledged and recorded in February, 1883. While the title was

thus in Guion, on the 2d day of February, 1884, Demis Barnes recovered and docketed a judgment against him for \$4,035.14, and that judgment became an apparent lien upon the lot.

The claim of the plaintiff is that on account of the existence of that judgment the defendants were unable to give him such a title as he had the right to demand, and that, therefore, they could not perform their contract, and that he was entitled to recover the amount of his payment and the expense of examining the title. The defendants claim, and gave evidence tending to establish, that Guion took title to the lot for the firm of Williams & Guion, and paid for the same with firm property, and that the lot, at the time of the recovery of the judgment, although the title thereof stood in the name of Guion, was, in fact, as between him and the firm, the property of the firm; and they, therefore, contend that the judgment never became a lien on the lot, and that the title tendered to the plaintiff in performance of their contract was, in fact, perfect.

The defendants attempted to get Barnes to release the lien of his judgment upon the lot, but he refused to do so, and it still remains an apparent lien thereon. There is no record or document which precludes Barnes from enforcing his judgment against the lot. The recitals in the deed of Guion to these defendants do not bind him, and are not evidence against him, a prior incumbrancer. All the evidence to defeat his lien rests in parol and depends upon the memory of living witnesses. Whenever Barnes attempts to enforce his lien against the lot, he can be defeated only by a resort to the evidence of such witnesses who may then be dead or inaccessible. He may, at any time within ten years, issue execution upon his judgment and sell the lot, and after the lapse of many years the purchaser, at the execution sale, may bring an action of ejectment to recover the lot, and the burden would be upon the defendant in that suit to establish, by the parol evidence, the invalidity of the title of such purchaser.

We will assume that the lot, while the title stood in the name of Guion, actually belonged to the firm of Williams & Guion; that thus the defendants actually had a good title to the lot, and that the judgment was not, in fact, a lien thereon. But is a purchaser bound to take a title which he can defend only by a resort to parol evidence, which time, death or some other casualty may place beyond his reach? By the terms of the contract of sale the plaintiff was entitled to a deed conveying and assuring to him the lot in fee simple; and, by a fair construction of the language used, we think he was entitled to the lot free from any incumbrance except the mortgage specified. The express stipulation that he was to take the lot subject to an incumbrance specified shows that in the minds of the parties there was to be no other incumbrance upon

the lot. But, aside from the language used in the contract it is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such a title, knowing its defects. His right to an indisputable title clear of defects and incumbrances does not depend upon the agreement of the parties, but is given by the law.<sup>1</sup> Within the meaning of this rule, at least, according to the decisions in this state, a good title means not merely a title valid, in fact, but a marketable title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence, or when there is an apparent incumbrance which can be removed or defeated only by such evidence; and, so far as there are any exceptions to this rule, they are extraordinary cases in which it is very clear that the purchaser can suffer no harm from the defect or incumbrance. In *Swayne v. Lyon*,<sup>2</sup> Sharswood, J., said: "It has been well and wisely settled that, under a contract for the sale of real estate, the vendee has the right not merely to have conveyed to him a good title, but an indubitable one. Only such a title is deemed marketable; for otherwise the purchaser may be buying a law suit which will be a very severe loss to him both of time and money, even if he ultimately succeeds. Hence it has been often held that a title is not marketable when it exposes the party holding it to litigation." In *Dobbs v. Norcross*<sup>3</sup> it was held that "every purchaser of land has a right to demand a title which shall put him in all reasonable security and which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him and probably take from him the land upon which money was invested. He should have a title which should enable him, not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

If the plaintiff had been a purchaser at a judicial sale, and this had been a proceeding against him to compel him to take the title, or a proceeding by him to be relieved from his purchase and to have his deposit refunded, it cannot be doubted that the title would have been held so defective or doubtful that the court would have granted him relief.<sup>4</sup> If the vendors here had brought an action against the vendee

<sup>1</sup> Sugden on Vendors (13th ed.) 14; Rawle on Cov. 430; *Burwell v. Jackson*, 9 N. Y. 535; *Delavan v. Duncan*, 49 id. 485.

<sup>2</sup> 67 Pa. 436.

<sup>3</sup> 24 N. J. Eq. 327.

<sup>4</sup> *Jordan v. Poillon*, 77 N. Y. 518; *Fleming v. Burnham*, 100 id. 1; *Ferry v. Sampson*, 112 id. 415.

to compel specific performance of this contract, it is equally clear that they would have failed in the action. The court would not compel the vendee to take the title with the cloud of this incumbrance resting thereon.<sup>1</sup>

But this is an action at law, and it has sometimes been held that the distinction between good and marketable titles is peculiar to courts of equity; that it is unknown in courts of law, and that there the question is simply, is the title good or bad? The earliest case which has come to our attention, holding such a doctrine, is *Romilly v. James*,<sup>2</sup> decided in 1815. That was an action to recover back the deposit paid on a contract for the purchase of lands upon the alleged insufficiency of the title tendered, and there Gibbs, Ch.J., said: "It is said that the plaintiff will have made out the claim to recover back his deposit if a cloud is cast on the title. That is not so in a court of law; he must stand by the judgment of the court as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit. If he had gone into a court of equity it might have been otherwise. I know a court of equity often says this is a title which, though we think it available, is not one which we will compel an unwilling purchaser to take; but the distinction is not known in a court of law." In that case, however, there was no question of fact depending upon parol evidence. The sole question was one of law whether a devisee took a defeasible fee simple with an executory devise over, or an estate tail, and the court held that he took an estate tail, and that, therefore, the vendor could, as matter of law, make a good title. The vendor clearly had such a title as a court of equity would compel a purchaser to take. In *Sugden on Vendors*<sup>3</sup> it is said: "A court of law can, of course, decide upon the validity of a title, however ambiguous or doubtful the construction may appear to be. Whether courts of law were at liberty to follow in the footsteps of equity and to hold that a title may be too doubtful to be forced on a purchaser, is a question upon which eminent judges have differed with each other, and even with themselves. But it appears to be ultimately settled that courts of law cannot adopt the equitable rule, and are bound to decide the legal question upon which the right to recover must depend." The learned author here evidently had in mind titles depending upon disputed questions of law, which a court of law could certainly and finally solve, but not titles depending upon questions of fact to be solved by the parol evidence of witnesses, and which, in the absence of the parties to be

<sup>1</sup> *Marlow v. Smith*, 2 P. Wms. 201; *Sloper v. Fish*, 2 Ves. & Bea. 149; *Shapland v. Smith*, 1 Brown's Ch. 67; *Jeffries v. Jeffries*, 117 Mass. 184; *Seymour v. De Lancey*, Hopkins' Ch. 436; *Hinckley v. Smith*, 51 N. Y. 21; *Freetly v. Barnhart*, 51 Pa. 279; 3 Pom. Eq. Jur. § 1405.

<sup>2</sup> 6 Taunt. 274.

<sup>3</sup> 13th ed. 332.



bound, could never be said to be finally settled ; and he cites as authority that a purchaser will be entitled to a marketable title at law,<sup>1</sup> and as authority that he is entitled at law to only a good title, although not marketable.<sup>2</sup>

In *Jeakes v. White*,<sup>3</sup> decided in 1851, the action was brought to recover the expenses incurred by the plaintiffs in investigating the defendant's title to mortgage certain lands, and the plaintiffs recovered. Pollock, C.B., writing the opinion of the court, said : "The question really is whether this was such a title as a vendee has a right to expect, and which would justify him in concluding the purchase. We think that when a question arises between parties who are about to enter into the relationship of vendor and vendee, as to the meaning of a good or sufficient title, there must be such a title as the court of chancery would adopt as a sufficient ground for compelling specific performance." In *Simmons v. Haseltine*,<sup>4</sup> decided in 1858, after the thirteenth edition of *Sugden on Vendors* was published, it was held that when the ability of the vendor to make a good title to a purchaser of the premises sold depends upon a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor and vendee. There A bought certain premises, the description of which in the particulars included a stall which was claimed by the purchaser of the adjoining house under the same vendor, and it was doubtful, as a matter of fact, whether the description had been corrected at the time of the sale to A, so as to include the stall, and, as a matter of law, whether the stall was included in the conveyance to the purchaser of the adjoining premises, and a court of equity had refused to decree specific performance against A ; and it was held that A was entitled to receive back his deposit and interest, and the expenses of investigating the title, in an action at law against the vendor. So we do not perceive how it can be said that the law has been finally settled in England according to the text of *Sugden*.

In this State, in *O'Reilly v. King*,<sup>5</sup> *Methodist Episcopal Church Home v. Thompson*,<sup>6</sup> *Bayliss v. Stimson*,<sup>7</sup> the New York Superior Court held that in an action by a vendee of real estate against the vendor to recover back a deposit made on account of the purchase price, it was not sufficient for him to show that the title tendered was doubtful, but that he

<sup>1</sup> *Hartley v. Pehall*, 1 Peake's N. P. 131 ; *Wilde v. Fort*, 4 Taunt. 334 ; *Curling v. Shuttleworth*, 6 Bing. 121.

<sup>2</sup> *Boyman v. Gutch*, 7 Bing. 379 ; *Oxenden v. Skinner*, 4 Gwil. 1513 ; *Maberly v. Robins*, 5 Taunt. 625 ; *Romilly v. James*, 6 id. 274.

<sup>4</sup> 5 C. B (N. S.) 555.

<sup>3</sup> 6 Ex. 873.

<sup>5</sup> 2 Robt. 587.

<sup>6</sup> 20 J. & S. 321.

<sup>7</sup> 21 id. 225.

was bound to show that it was, in fact, bad, and that the doctrine of equity courts, as to marketable titles, had no application. The latter case was affirmed in this court, not upon the law, however, as announced in the court below, but upon the ground that the objections to the title were baseless. There is also some countenance for the doctrine of the Superior Court cases cited in the opinion of Folger, J., in *Murray v. Harway*.<sup>1</sup> There, however, the learned judge was of opinion that upon the facts a court of equity would have adjudged specific performance against the vendee, and it is clear that whenever such is the case the vendee cannot, in a court of law, rescind the contract and recover back a payment of purchase-money. It has been settled in Pennsylvania that a vendee can defeat an action at law brought by the vendor for an installment of purchase-money, under an executory contract for the sale of lands by showing, not that the title tendered is actually bad, but that it is doubtful and unmarketable.<sup>2</sup> In *Allen v. Atkinson*,<sup>3</sup> an action at law, Cooley, J., said: "The vendee had an undoubted right to a good title, and to a deed with proper covenants; and he had a right, also, to insist that the title should be a marketable one, not open to reasonable objection."

The case of *Methodist Episcopal Church Home v. Thompson* (*supra*) came to this court and the judgment was here affirmed upon the facts.<sup>4</sup> But the doctrine of the Superior Court cases above cited, as well as that of *Romilly v. James* (*supra*), was distinctly repudiated. Peckham, J., writing the opinion here, said: "We disagree with the court at General Term upon the necessity, in such a case as this, of showing that the title is absolutely bad. We think that if there was a reasonable doubt as to the vendor's title, such as to affect the value of the property and to interfere with the sale of the land to a reasonable purchaser, the plaintiff's cause of action would be sustained." While what was thus said was not necessary to the decision of that case, it is more than a mere *dictum*. The opinion concurred in by the entire court was written to set right what was deemed an erroneous view of the law taken in the court below, and which might otherwise have been supposed, from the opinion or the judgment, to have received the approval of this court.

It has sometimes been said that the reason why a court of equity will not compel an unwilling vendee of real estate to take a title which, although good, is not marketable, is that such a court is not competent to decide, or is, at least, unwilling to decide, doubtful questions of law and fact in such cases, at the hazard of what might afterwards be deter-

<sup>1</sup> 56 N. Y. 337.

<sup>2</sup> *Colwell v. Hamilton*, 10 Watts. 413; *Ludwick v. Huntzinger*, 5 Watts. & S. 51; *Swayne v. Lyon*, 67 Penn. 436.

<sup>3</sup> 21 Mich. 351.

<sup>4</sup> 108 N. Y. 618.

mined in a court of law.<sup>1</sup> Courts of law, with jurors as triers of the issues of fact, were deemed more competent than courts of equity to solve the doubts. But whatever foundation the reason may once have had, it has none now in this state since the union of law and equity in the same courts, and since equitable defenses can be set up in legal actions. Courts in equitable actions are just as competent here to deal with both the law and the facts of a case as they are in legal actions. If the conscience of a judge in an equitable action needs information, he can obtain the findings of a jury by submitting the issues of fact to them.

So, now, there is no longer any reason whatever for the distinction which some judges have made as to marketable titles in courts of law and equity. If a vendor cannot, by an action for specific performance, compel a vendee to take a conveyance of land because the title is doubtful and unmarketable, why should he be permitted to compel him, in an action at law, to pay for the land, both actions being triable in the same tribunal? Why should a purchaser be compelled to pay for a title which he is not bound to take? If a vendee, who has paid part of the purchase-money, sues to recover it back because the title tendered to him is unmarketable, the vendor, in the same action, can set up as an equitable defense or counter-claim a cause of action for the specific performance of the contract ;<sup>2</sup> and it would be quite an absurd administration of the law if the same court, at the same time and upon the same evidence, should deny the defendant specific performance, on the ground that his title was doubtful and unmarketable, and yet permit him to retain the purchase-money because his title was, in fact, good, although doubtful and unmarketable.

Dealings in real estate generally involve large pecuniary values, and large amounts are frequently invested in buildings and other improvements. The law is such that an adverse claim need not be asserted for many years until after time has closed the mouths of living witnesses and destroyed ancient muniments of title. For many purposes a doubtful title is a worthless title. Hence it is generally the expectation of vendees entering into executory contracts for the purchase of land that they will receive a good title not only, but one free from reasonable doubt and damaging infirmity ; and such a title it must be assumed that every fair, honest vendor expects to give unless he is freed from the obligation by some express stipulation in the contract ; and this understanding should be respected and enforced by both courts of law and equity. As said by Selden, J., in *Burwell v. Jackson* :<sup>3</sup> " Executory agreements for the purchase of lands are frequently made under circum-

<sup>1</sup> Rawle on Covenants, 433, *note*.

<sup>2</sup> *Morse v. Cochrane*, 107 N. Y. 35.

<sup>3</sup> 9 N. Y. 535.

stances which afford neither time nor opportunity for a thorough examination, and the purchaser cannot assume, prior to entering into such agreement, to have investigated the title." He pays his money in reliance upon the understanding that he is to have a title both good and marketable, and if the vendor does not tender him such a title there is absolutely no reason why he should not receive back the money paid, and he should not be compelled to take an unmarketable title at the peril of losing what he has paid. Take the case where a vendee has made an executory contract of sale, paid the entire purchase-price, and the vendor, at the time of performance by him, tenders a title which, by the record, appears to be in another, and yet, where he can show by parol evidence a lost deed or will vesting him with the title, shall the vendee be compelled to lose the money paid, or take an infirm and, for many purposes, a worthless title? It is true that even courts of equity have, in some cases, compelled purchasers to take titles resting upon adverse possession. But in such cases the adverse possession was established beyond any reasonable doubt. It is a fact usually open and notorious and generally known to many witnesses. Such a title is strengthened by every passing hour. Such cases bear little analogy to one like this, where the lapse of time operates in a different way, and may speedily wipe out the only evidence competent to cure or remove the defect in the title tendered.

Here, Barnes insists upon his lien and refuses to cancel it. The vendors should be at the expense of clearing the title of this cloud, and it is not just that they should cast that burden upon the vendee, and require him to take an unmarketable title.

We, therefore, conclude that the judgment below is right and should be affirmed, with costs.

All concur, except GRAY, J., not voting.

Judgment affirmed.

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### LAVINIA E. HUNTING v. CHARLES E. DAMON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 15,  
1894.

[*Reported in 160 Massachusetts Reports 441.*]

BILL in equity, filed on April 3, 1893, for the specific performance of an agreement to buy land.

The bill alleged that, by an agreement in writing, under seal, dated March 15, 1893, the plaintiff agreed to sell and convey certain real

estate in Malden to the defendant within ten days from that date, by a good and sufficient warranty deed, conveying a clear title to the real estate free from all incumbrance, and the defendant agreed to purchase the real estate and to pay to the plaintiff therefor the sum of \$1,755.09, of which \$100 was to be paid at the date of the agreement, and the remainder by the defendant's note, dated March 17, 1893, payable in six months from date, and secured by a mortgage upon the premises; that afterwards the plaintiff tendered to the defendant a good and sufficient warranty deed of the premises, conveying to him a clear title to the same free from all incumbrance, and duly demanded from him the note and mortgage described in the agreement; that the defendant utterly refused to accept the deed, or to give the note and mortgage as stipulated in the agreement, alleging as the reason for his refusal, that, according to the terms of the will of the plaintiff's deceased husband, she could not convey a clear title to the real estate, or any indefeasible title thereto; that the real estate belonged to the plaintiff's husband, James Hunting, at the time of his decease, and her title thereto and right to convey the same were derived from his will, which was duly admitted to probate, and which, by the first article, gave all his property to his wife in fee, and provided, in the second article, that if she should die intestate, "or without having made other disposition thereof, then all my said estate, or the proceeds thereof," should go to his brother and sister; and also provided, in the third article, as follows: "It is my will that, in case my said wife shall remove for the purpose of permanently residing out of the limits of the United States, or if she shall remove any considerable portion of my said estate or the proceeds thereof out of said limits, then all the provisions of this will for her benefit shall cease to have effect."

The bill further alleged that the plaintiff was duly appointed executrix of the will, and gave bond for the performance of her duties, and also gave due notice thereof, as required by the Probate Court, and that there were no existing debts, claims, or demands against the estate; that she had never removed for the purpose of permanently residing out of the limits of the United States, and had never removed any considerable portion of the estate which was of her husband, or the proceeds thereof, out of said limits; and that she had no intention or purpose of so doing.

The prayer of the bill was, that it might be decreed that upon the plaintiff offering or tendering to the defendant a good and sufficient warranty deed of the real estate, the defendant should accept the same, and make and give to her his note for \$1,655.09, dated March 17, 1893, payable in six months from its date, and secured by a mortgage upon the premises, as stipulated in the agreement.

Hearing before HOLMES, J., who ordered a decree for the plaintiff, and the defendant appealed.

*C. D. Adams* for the defendant.

*W. S. Stearns* for the plaintiff.

HOLMES, J. There is no doubt that the limitation over in the second article of the will of James Hunting is void.<sup>1</sup> There seems to be equally little doubt that the shifting clause in the third article is valid. Nevertheless, it well may be that, notwithstanding the liability of the plaintiff's interest in the fund to forfeiture, she has the power to give a good title to any specific property in her hands, and that the condition will attach to the proceeds in place of the property sold. Such a disposition is familiar to the law.<sup>2</sup> There is a strong argument that the words "without having made other disposition thereof" in the second article, and the words "or the proceeds thereof" in that article and also in the third, imply a power to sell which would be maintained and futile, and not at all what the testator meant if limited to such defeasible title as the plaintiff has.<sup>3</sup> But against this view it may be argued that the power of disposition in the plaintiff assumed by the testator is assumed to be incident to the estate devised, not a new power superadded by the words quoted;<sup>4</sup> and that if the plaintiff can sell only by virtue of her ownership, the purchaser will get no better title than she has. Some cases, as to which we express no opinion, have gone far in this direction.<sup>5</sup>

Although a decision of this court upon the point would be authority, if the question subsequently should be raised by persons not now before the court, it would not be *res judicata*, and the practice of the court has been not to decree specific performance if there is a reasonable doubt on the construction of the instrument on which the plaintiff's title depends, and if there are persons not parties who would have a right to dispute the defendant's title.<sup>6</sup> We cannot pronounce the construction of James Hunting's will to be free from reasonable doubt, and although the ultimate devisees could not dispute the defendant's title unless the

<sup>1</sup> *Kelley v. Meins*, 135 Mass. 231; *Damrell v. Hartt*, 137 Mass. 218.

<sup>2</sup> *Hemhauser v. Decker*, 11 Stew. 426; *Gray, Perpetuities*, § 268.

<sup>3</sup> See *Johnson v. Battelle*, 125 Mass. 453; *Paine v. Barnes*, 100 Mass. 470, 471; *Harris v. Knapp*, 21 Pick. 412, 416; *Shaw v. Hussey*, 41 Maine 495, 500; *Burleigh v. Clough*, 52 N. H. 267; *Clark v. Middlesworth*, 82 Ind. 240; *Henderson v. Blackburn*, 104 Ill. 227, 232; *In re Oertle*, 34 Minn. 173; *Jarm. Wills* (Bigelow's ed.), 378, *note*; 11 Stew. 427, *note*.

<sup>4</sup> *Damrell v. Hartt*, 137 Mass. 218, 220.

<sup>5</sup> *Giles v. Little*, 104 U. S. 291. Compare *Little v. Giles*, 25 Neb. 313. See *Kaufman v. Breckinridge*, 117 Ill. 305, 313.

<sup>6</sup> *Butts v. Andrews*, 136 Mass. 221; *Cunningham v. Blake*, 121 Mass. 333. Compare *Fry on Spec. Perf.* §§ 889, 890.

plaintiff should do the acts specified in the third article of the will, in that case they could do so, so that a purchaser would assume the risk of litigation. The principle of the Massachusetts decision applies.

Bill dismissed.

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BELLAMY *v.* DEBENHAM.

IN THE COURT OF APPEAL, JANUARY 15, 16, 1891.

[*Reported in Law Reports, 1 Chancery Division (1891) 412.*]

THIS was an appeal by the plaintiff, a vendor, from a judgment of North, J., dismissing without costs his action for specific performance or damages.<sup>1</sup>

The contract was sought to be made out from the following letters :

April 17, 1889. Defendant to Bridgman, plaintiff's agent : "Effingham Place. I am prepared myself to offer you £800 for the freehold, with possession at Midsummer. I am assuming, of course that the title is satisfactory and that all the ground now occupied with the house is included."

April 18. Bridgman to defendant : "Effingham Place. I am obliged by your letter of the 17th instant, and am instructed by Mr. Sanders (another agent) to accept your offer of £800 for the freehold therein contained, subject to the owner's ratification, of which he entertains no doubt and for which he will at once apply."

April 25. Defendant to Sanders : "Effingham Place. I have no wish to press you unduly, but I cannot allow my offer to stand over indefinitely, and . . . if I do not hear that the owners accept it before 5 P. M. to-morrow I must consider myself at liberty to withdraw it."

April 25. Sanders to defendant : "Effingham Place. I am pleased to inform you the owner confirms the sale above to you for £800. Possession to be given at Midsummer next. Kindly let me know if the contract shall be prepared in your name or that of the committee."

The defendant having replied that the contract must be in his name, a draft contract was sent to his solicitor, who struck out various special conditions contained in it and returned it as altered to the plaintiff's solicitors, who, on the 14th of May, wrote to defendant's solicitor : "We return draft agreement. We cannot consent to all your alterations, which, in fact, make the contract almost an open one."

On the 17th the defendant's solicitor wrote to the plaintiff's solicitors, returning the draft and saying : "I am sorry I cannot advise Mr. Debenham to go on with the negotiation."

<sup>1</sup> 45 Ch. D. 481.

The plaintiff's solicitors made some alterations in the draft and sent it back to the defendant's solicitor, with the abstract of title. The defendant's solicitor, on looking at the abstract, discovered that the property was an enfranchised copyhold, and that the minerals were reserved to the lord, and on the 20th of May wrote a letter saying: "I see there is this fatal objection—that your client has not the mines and minerals. . . . I am very sorry not to do business, but I cannot possibly advise my client to go on with the matter. I return the draft contract and abstract."

On the 25th of May the plaintiff's solicitors wrote to the defendant's solicitor a letter saying: "The rights of the lord of the manor are, we understand, worthless; but, to avoid any question with your client, Mr. Bellamy has agreed to purchase them, so that we shall be able to convey the fee simple on the 24th of June, as agreed. Please return the contract (inclosed) approved at your early convenience."

On the 27th the defendant's solicitor wrote to the plaintiff's solicitors: "I take leave to remind you that I wrote to you on the 17th instant that I could not advise my client to go on with the negotiation, and I so informed him, and he has given up all idea of the purchase. He is away from home, and I really cannot reopen the matter. I return the draft."

The defendant persisting in his refusal, the present action was commenced on the 22d of June, 1889.

The statement in the letter of the 25th of May that the defendant had agreed to purchase the rights of the lord of the manor was not correct, the plaintiff having only obtained a verbal promise from the lord to sell them and no price having been fixed. On the 3d of June, 1889, the plaintiff's agent, Mr. Bridgman, wrote to the agent of the lord of the manor a letter which, after referring to the property and its enfranchisement, proceeded: "The present owner, Mr. Bellamy, is desirous of acquiring the reserved rights, if they can be obtained by payment of such a sum as ten guineas, with the attendant expenses of conveyance and a small fee to yourself. I need hardly say there are no minerals known to exist. I shall be glad to hear at your earliest convenience what sum would be accepted and how long the conveyance would take."

The agent replied, on the following day, that the lord was out of London, but the agent would try to see him.

On the 8th Bridgman wrote again to the agent, pressing for an early reply. Ultimately, on the 18th of June, the agent wrote to Mr. Bridgman: "I have seen Sir G. Prescott" (the lord); "he agrees to the minerals being acquired on the payment of £10 10s. Please communi-



cate with Mr. Alderson to complete the conveyance. My fee will be £2 2s."

On the 19th Mr. Bridgman replied: "I am obliged by your letter of yesterday, and telegram also, and have sent them to my client, whose solicitors will doubtless communicate with Mr. Alderson at once."

The conveyance of the minerals to the plaintiff was completed on the 2d of September, 1889.

Mr. Justice North, on the 15th of July, 1890, decided that the letters of April, 1889, constituted a complete contract, which was not affected by the subsequent correspondence. His Lordship, however, considered that the plaintiff had so put himself in the wrong by insisting on the insertion in the formal contract of terms to which he had no right that it would not be fair to give him specific performance, and that the action must be dismissed, without costs. His Lordship declined to decide whether the defendant had effectually rescinded the contract on the ground of the want of title to the minerals; for that, if he were to decide that point in the defendant's favor, he still should not give the defendant any costs.

*Napier Higgins*, Q.C., and *Medd* for the appellant.

*Cozens-Hardy*, Q.C., and *MacSwinney* for the respondent.

LINDLEY, L.J. This is an appeal by a vendor who seeks specific performance of an agreement alleged to have been entered into by the defendant for the purchase from the plaintiff of a house at Cheshunt, and asks in the alternative for damages if he cannot obtain a decree for specific performance.

The contract between the parties is to be found, if at all, in a series of letters which have been read and carefully considered by all of us. Having regard to the point to which I will allude presently, I do not think it necessary to spell through those letters for the purpose of seeing whether they do or do not amount to a concluded agreement. I have, to say the least, very considerable doubt about it. Looking at the whole correspondence, which we are bound to do in order to see whether the two or three letters fixed upon by the vendor amount to a concluded contract, I think that, having regard to the vendor's letter of the 14th of May, there is very considerable doubt about that point. I shall, however, assume that the letters do amount to an agreement for the sale and purchase of this property, and I will consider whether on that assumption the plaintiff is entitled to specific performance, and if not whether he is entitled to damages for breach of contract.

The position of affairs is this: The contract, if there was one, was a contract for the sale of this house at the price of £800, the house being treated as freehold, since there is nothing to the contrary mentioned in any of the letters. There was in terms no day fixed for completion, but

the contract was made in April, 1889, and the 24th of June was the time fixed for the delivery of possession. Now, having regard to the nature of the property, to the time which had elapsed, and to that stipulation about possession, it appears to me that the 24th of June was the end of a reasonable time for completing the contract. I do not think that any judge would say that a longer time for completion ought to be allowed.

Now, the real truth was that this was not an ordinary freehold house. It was a house built upon a piece of land containing about a quarter of an acre which was formerly copyhold and which had been enfranchised. Under the Copyhold Acts the mines, minerals, clay, gravel, etc., were reserved to the lord of the manor and did not belong to the vendor. The defendant, it is said, was a person well acquainted with the locality. He is an old auctioneer, whose name is familiar to us all, and it is said that he knew this was enfranchised land. He probably did know that; but that would not acquaint him with the fact that the minerals had not been acquired by the vendor, and there is nothing to show that he knew that he was buying anything else than an ordinary freehold house. It is plain that the vendor had not got what he contracted to sell. The purchaser does not see that until the abstract is sent in, and when it is sent in he says, "I shall not complete." The defendant's solicitor in his letter of the 20th of May says that, as the plaintiff cannot give his client the mines and minerals, he cannot advise his client to complete, and that advice is communicated to the client and adopted by him. It appears to me, therefore, that there was on the 20th of May a plain repudiation on the part of the defendant of all liability to complete, and he has never flinched from that position.

Now, what effect has that upon the plaintiff's right to specific performance? I shall not go through the authorities, but shall content myself by saying that, having regard to the cases of *Hoggart v. Scott*,<sup>1</sup> *Forrer v. Nash*,<sup>2</sup> *In re Head's Trustees and Macdonald*,<sup>3</sup> and *Weston v. Savage*,<sup>4</sup> the purchaser was justified in taking up that position and saying, "I will not complete." That appears to me to be a complete answer on the case of specific performance.

Now, as to damages, I am not sure that the repudiation on the 20th of May is by itself an answer to the plaintiff's claim for damages. The plaintiff had, if I am right in the assumption I have made, a time allowed for completion which did not expire until the 24th of June, and if he had been ready and willing on the 24th of June to complete his contract and to give to the defendant such a conveyance as the defendant was entitled to, I am not prepared to say that the defendant would not have been liable to damages if he refused to complete.

<sup>1</sup> 1 Russ. & My. 293.

<sup>2</sup> 45 Ch. D. 310.

<sup>3</sup> 35 Beav. 167.

<sup>4</sup> 10 Ch. D. 736.

But what are the facts? The facts are that on the 24th of June the plaintiff had no more got the property than he had in April. He had begun to negotiate for it, but he did not get it until September. If you look at this action, therefore, as an action by the vendor for damages for non-completion, the purchaser's defense is, "You, the vendor, were not in a position at the time for completion to give me that which I bargained for." That is a complete defense to an action at law for damages.

It appears to me, therefore, that both the equitable remedy and the legal remedy fail, and the appeal ought to be dismissed.

LOPES, L. J. With regard to the question whether there was here a concluded agreement I express no opinion. Like my Brother Lindley, I have doubts in my mind upon the matter. But I assume, for the purposes of this decision, that there was a concluded agreement.

Then the question arises, Was there a repudiation of that agreement?

It has been said that the letters which are relied upon as supporting that repudiation are not sufficient to support it. I think, looking at the letters of the 17th and the 20th of May, the defendant did repudiate the contract. But the question arises whether he had any power to repudiate or to rescind. I am dealing now with the action for specific performance. The state of things at that time was this, that the vendor had not a freehold title to the property which the defendant had agreed to purchase. The mines and minerals under the house and the lands did not belong to the vendor, but were reserved to and vested in the lord of the manor. There was, therefore, it appears to me, an absolute want of title to a material part of the subject-matter of the defendant's purchase. That being so, had he a right to repudiate the contract? It appears to me that the authorities on this subject are clear, and I will read the end of the judgment in the case of *Forrer v. Nash*,<sup>1</sup> which appears to me to be very much in point. The learned judge says: "I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold." That appears to me entirely to cover this case. There are other decisions to the same effect, viz.: *Hoggart v. Scott*,<sup>2</sup> *In re Head's Trustees and Macdonald*,<sup>3</sup> *Weston v. Savage*,<sup>4</sup> and other cases which

<sup>1</sup> 35 Beav. 167.

<sup>2</sup> 1 Russ. & My. 293.

<sup>3</sup> 10 Ch. D. 736.

<sup>2</sup> *Ibid.* 171.

<sup>4</sup> 45 Ch. D. 310.

have been referred to during the argument. There appears, therefore, to me to be a complete answer to the action for specific performance.

But then it is said by Mr. Napier Higgins: "Yes; but I have a right to damages; there has been a breach of contract by the defendant; I am entitled to sue him for non-completion on the 24th of June." Without expressing any opinion whether such an action would lie—and I have very grave doubts in my own mind whether it would—it seems to me that the answer to Mr. Napier Higgins' contention is perfectly clear. The plaintiff would be non-suited. In order to maintain that action he would be compelled to prove that on the 24th of June he was in a position to make a good and valid conveyance of this property; whereas, as a fact, we know perfectly well from the evidence that it was not until a much later period that he acquired those mines and minerals which alone would enable him to fulfill his contract and to convey that which he had contracted to convey to the defendant.

I think, therefore, that on all grounds the decision of the learned judge below is right, although I am not prepared to say that I come to that conclusion on the same grounds, nor am I prepared to say that I altogether follow many of the observations made by the learned judge in the court below.

KAY, L.J. I entirely agree with the other Lords Justices. I have followed closely what Lord Justice Lindley said in his judgment. I am not able to add to it, and I agree with every word of it. I therefore shall content myself by saying that I am not satisfied that there was a complete contract in this case; but, assuming that there was, I think that it has been validly rescinded, and that no claim either for specific performance or for damages can possibly be sustained. We are resting our judgment upon different grounds from those relied upon by the learned judge in the court below, but that will make no difference as to the costs. The appeal must be refused, with costs.

Solicitors: *R. W. Childs, Batten & Harling; T G. Bullen.*

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EMMA V. PYATT ET AL., APPELLANTS, v. JAMES J. LYONS,  
RESPONDENT.

IN THE COURT OF ERRORS AND APPEALS, JUNE TERM, 1893.

[*Reported in 51 New Jersey Equity Reports 308.*]

ON APPEAL from a decree advised by Vice-Chancellor Bird, reported in *Lyons v. Wait*.<sup>1</sup>

*Mr. Woodbury D. Holt and Mr. Fergus A. Dennis* for the appellants.  
*Mr. John F. Hageman, Jr.*, for the respondent.

<sup>1</sup> 6 Dick. Ch. Rep. 60.

The opinion of the court was delivered by

ABBETT, J. The bill in this case was filed for specific performance of a contract for the sale of lands. On December 12, 1891, Mrs. Pyatt and Mrs. Wait, two of the defendants below, believed themselves and were supposed to be the owners in fee of a lot of land located at the corner of Nassau and Witherspoon Streets, in Princeton. The lot in question was twenty-two feet six inches in width on Nassau Street, with a building thereon, which extended over upon and encroached three feet eleven inches upon Witherspoon Street. On that date Mrs. Wait gave to Ollie H. Hubbard, a real estate broker, a memorandum signed by her in the names of Wait and Pyatt. This memorandum is headed "Property of Mrs. Wait and Pyatt for sale or exchange." Under the head of description it says :

"1. Situation corner Nassau and Witherspoon Streets, Princeton, N. J. 2. Size of house and lot, 13 rooms, lot  $22\frac{1}{2}$  x 129. Price, \$8,500. Amount in cash, all. 3. Possession given April 1st, 1892."

The agreement says that on December 12, 1891—

"I have placed in the hands of and under the control of Ollie H. Hubbard, of Princeton, New Jersey, for the term of ——— months, the above-described premises, and for his work in the matter I hereby agree to pay him the sum of ——— dollars, price aforesaid, the following commissions, viz.: Five per cent. on the first two thousand dollars, and two and a half per cent. on the excess thereof.

"Signed, WAIT and PYATT.

"Signed and sealed in the presence of A. A. Wait."

On February 12, 1892, Hubbard entered into an agreement with James J. Lyons, which says :

"An agreement between Ollie H. Hubbard, for Mrs. Emma Pyatt, of New York City, and Mrs. Mary F. Wait, of Princeton, Mercer County, New Jersey, of the first part, and James J. Lyons, of Princeton aforesaid, of the second part, witnesseth, that the said Emma Pyatt and Mary F. Wait, for the consideration of eight thousand five hundred dollars, to be paid as hereinafter mentioned, doth agree with the said James J. Lyons that they will convey, with covenants of general warranty and against incumbrances, to the said James J. Lyons, his heirs and assigns, on or before the first day of April next ensuing, all that tract and lot of land and premises situate on the corner of Nassau and Witherspoon, in Princeton aforesaid, and known as the Henry B. Dur-  
yee property, and numbered 90 Nassau Street.

"And the said James J. Lyons, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said Emma Pyatt and Mary F. Wait, their heirs and assigns, that he, the said

James J. Lyons, shall and will, on executing the said conveyance, pay or cause to be paid to the said Emma Pyatt and Mary F. Wait, their heirs or assigns, the said sum of eight thousand and five hundred dollars, as and for the purchase-money of the said premises, as follows :

“The sum of five hundred dollars when this agreement is signed, and the remaining eight thousand dollars when the deed is delivered, and it is further agreed that the said James J. Lyons shall have full possession of the said premises as soon as the said deed has been delivered, subject, nevertheless, to the conditions and covenants of a certain lease made by and between Emma V. Pyatt and Mary F. Wait and Rachel and Mary A. Harvey, for one year at twenty-three dollars per month,” etc. It also states, “and for the due performance of all and singular the covenants and agreements aforesaid, the said Emma V. Pyatt and Mary F. Wait and James J. Lyons do bind themselves, their heirs, executors and administrators and assigns, in the sum of five hundred dollars, firmly by these presents, the said sum to be considered as liquidated damages.”

The witness clause states that the parties to these presents have interchangeably set their hands and seals thereto the date first above written. It is signed by Ollie H. Hubbard and James J. Lyons, without a seal. There were also two extensions of time of said agreement, for the performance thereof, the first to April 11th and the second to May 18th. Five hundred dollars were paid Hubbard by Lyons at the date of the execution of the agreement.

The bill in this case alleges the before-mentioned agreement, and then states that on the 1st of April, 1892, part of the building was in the possession of George O. Vanderbilt, guardian of William A. Duryee, the brother of the said Wait and Pyatt, and was being used by him as a hardware store, and for the sale of other goods. It then alleges the extension of the agreement as to the time of performance, and further, that on the 18th day of May, 1892, the defendants, Mr. and Mrs. Pyatt and Mr. and Mrs. Wait, gave the complainant possession of the store, and delivered to him the keys thereof, and assigned to him the lease which they held, mentioned in the contract of sale. The bill then proceeds to set out by description the lot of land mentioned in the agreement of sale, in which he makes it twenty-six feet and five inches wide instead of twenty-two and one-half feet. It further alleges that, on or about the 18th day of May, he discovered a defect in the title to a part of the land. He then proceeded to allege a defect in the title as to the three feet and eleven inches in excess of the twenty-two and one-half feet, and he claims a depth of one hundred and thirty feet and eight inches instead of one hundred and twenty-nine feet. The bill then alleges that upon discovering this defective title he informed Mrs. Pyatt and

Mrs. Wait and their respective husbands of the same, and insisted that they should take proper steps to have the defect in the title of the said strip of land removed, and that he could not accept the deed for the said land, or any part thereof, and pay the balance of the purchase-money until it was discharged of every incumbrance or defect. The bill then alleges that on the 23d of May, 1892, Mrs. Pyatt and Mrs. Wait, by Fergus A. Dennis, their attorney, and Ollie H. Hubbard, tendered a deed of conveyance to him, in and by which they sought to convey to him all the land, tenements and buildings, excepting the said strip three feet and eleven inches wide and one hundred and thirty feet and eleven inches deep, and that this strip of land, which is the "narrow strip," the title of which is defective, was not included in the conveyance tendered, and the bill says "this deed your orator refused to accept, as it did not convey the amount sold by agreement to your orator." The bill also alleges that the dwelling, store and building stand partly upon this narrow strip of land, and are built up to the western side of Witherspoon Street, so that if said strip of land should be lawfully seized by persons other than the defendants, the buildings purchased as aforesaid by the complainant would be accordingly injured and almost destroyed. He then alleges that he frequently applied to Mrs. Pyatt and Mrs. Wait, and urged them to make a good title to said strip of land, and offered to assist them in doing so, and that they at times pretended to be doing all in their power to perfect said title to said narrow strip. That they finally ceased their efforts and failed to do what would have enabled them to convey the entire tract, including this strip. It further alleges that he frequently demanded a conveyance from Mrs. Pyatt and Mrs. Wait and their respective husbands, and from their attorney and agent, assuring them that he was willing to perform his part of the agreement and have a good and sufficient conveyance of the said land and premises in fee simple made to him, discharged of all incumbrances, and to pay the residue of said purchase-money. The bill then alleges the conveyance to George O. Vanderbilt on October 3, 1892, for the sum of \$9,000, conveying a part of the land claimed by the complainant, to wit, twenty-two feet and six inches on Nassau Street; that he has asked Vanderbilt to convey the same; that he had knowledge of all the facts, and that he is chargeable in equity with such knowledge as to entitle complainant to a decree against him, to make him a conveyance of the premises he took by his deed from the defendants.

The affidavit of the complainant, annexed to the bill, says:

"On the twenty-third day of May Fergus A. Dennis and Ollie H. Hubbard tendered me a deed for the strip of land, which is twenty-two feet and six inches fronting on Nassau Street, and one hundred and thirty

feet deep, which deed did not include the strip three feet and eleven inches on the Witherspoon Street side. I refused to accept this deed. About this time I discovered that there was a cloud upon the title to the narrow strip fronting three feet and eleven inches, and bounded on the east by Witherspoon Street, and told the defendants and their attorneys that it must be removed before I would accept the deed. . . . I am now ready to pay the balance of the purchase-money as soon as the deed for the entire tract fronting twenty-six feet and five inches on Nassau Street is delivered to me with all clouds removed from the title of any part of said land."

The evidence shows that a deed dated March 28, 1892, was tendered the complainant on May 23, 1892, and that he refused to accept the same and pay the balance of the consideration money because the grantor did not have title to this narrow strip of land in question, which was within the lines of Witherspoon Street.

Several months were spent in endeavoring to get the borough authorities to give a quit-claim deed for this "narrow strip," but they failed on account of the objections of the mayor of the borough. In this effort both complainant and defendants, or some of them, united. When this effort had failed the defendants again, in the latter part of September, offered to deliver the deed and demanded the balance of the purchase-money. Lyons refused to take any deed and pay the balance of the purchase-money unless such deed embraced all the property he claimed under the agreement, which was twenty-six feet eleven inches in width on Nassau Street. He was at this time told by one of the defendants that they could not give any other deed than the one already tendered. After this second refusal on the part of Lyons to take a deed unless it embraced the narrow strip described in the bill, the defendants, October 4th, executed and acknowledged a deed, conveying to the defendant Vanderbilt the same property described in the deed tendered to Lyons, and which he had refused to accept.

The bill, affidavit and evidence clearly show that the position taken by complainant, both in his suit and prior thereto, was that he was entitled to a deed, not only for the premises described in the deed tendered to him May 23, 1892, and afterwards again offered to him in September, but also to this "narrow strip" of three feet eleven inches, within the lines of Witherspoon Street, and that so believing he refused to pay the balance of the purchase-money he had agreed to pay, unless he got a deed with covenants of general warranty and against incumbrances, which would give him a good title to twenty-six feet eleven inches, a part of which (three feet eleven inches) was within the lines of Witherspoon Street.

The defendants could not give title to this "narrow strip" to either



complainant or Vanderbilt, but after the sale to Vanderbilt they or one of them offered to complainant the \$500 he had paid Hubbard on account of the purchase-money, and also \$500 for the liquidated damages named in the contract.

There are serious questions presented in this case which affect the right of complainant to the relief prayed for in his bill, but we do not deem it necessary to discuss or express an opinion upon any of them, except the one upon which we shall decide this case.

In this case, if the contract is to be enforced, the complainant was entitled, in equity, to a conveyance of a lot on the corner of Nassau and Witherspoon Streets, in Princeton, twenty-two feet six inches wide, and one hundred and twenty-nine feet deep, and he was not entitled, in equity, to the "narrow strip" of three feet eleven inches, which was part of Witherspoon Street.

The learned Vice-Chancellor reached this conclusion, and determined correctly upon the evidence in this case, that this complainant never had any right, in equity, to have a conveyance of a lot of more than the twenty-two feet six inches in width. The defendants offered to convey such a lot, and twice, once in May and again in September, 1892, tendered the deed of March 28, 1892, containing a proper description of a lot twenty-two feet six inches wide by one hundred and twenty-nine feet deep, on the corner of Nassau and Witherspoon Streets. The complainant refused to take any deed unless it gave him a lot twenty-six feet five inches in width, and refused to pay the balance of the purchase-money unless he got a good title to such a lot as would include the "narrow strip" of land in Witherspoon Street.

The relief invoked is not a matter *ex debito justitiæ*; the bill for specific performance is addressed to the extraordinary jurisdiction of a court of equity to be exercised according to its discretion, and he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt and eager to perform the contract on his part.<sup>1</sup>

The complainant has not presented a case which brings him within the above rules, and no case has been shown where a court of equity decreed specific performance after such a refusal as complainant admits in this case. He refused to perform the contract on his part, unless the defendants would do what in equity they were not bound to do.

The complainant cannot, after such a refusal, and after the defendants have sold the premises to another, seek in a court of equity the relief prayed for in this suit. He must be left to his remedy at law.

<sup>1</sup> Meidling v. Trefz, 3 Dick. Ch. Rep. 644; Page v. Martin, 1 Dick. Ch. Rep. 589; Blake v. Flatley, 17 Stew. Eq. 231.

The decree below should be reversed with costs.

For reversal—The CHIEF-JUSTICE, ABBETT, DEPUE, DIXON, REED, VAN SYCKEL, BROWN, CLEMENT, KRUEGER, SMITH—10.

For affirmance—None.

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CHARLES M. RICE, APPELLANT, v. E. C. GIBBS, APPELLEE.

IN THE SUPREME COURT OF NEBRASKA, JANUARY TERM, 1894.

[Reported in 40 Nebraska Reports 264.]

REHEARING of case reported in 33 Neb. 460.

*Marston & Nevius* and *T. M. Stuart* for appellant.

*Calkins & Pratt, contra.*

IRVINE, C. This was an action for the specific performance of a contract for the sale of land. The action was brought by an assignee of the vendee in the contract relied upon. Upon a consideration of the case this court reached the conclusion that the decree of the district court dismissing the case was erroneous, reversed that decree and ordered a decree in accordance with the prayer of the petition. Subsequently a rehearing was allowed. The former opinion is found in 33 Neb. 460, where the pleadings and decree are set out, and where the general question of the assignability of contracts for the sale of land in the nature of options is discussed at length.

Upon a reconsideration of the case we are satisfied that upon the former hearing the opinion was based upon too broad a question, and that the questions which should control the decision were not there considered. If the former opinion be consulted it will be found that among the conditions of the contract relied upon, which was entered into by the defendant Gibbs as vendor and one Archibald as vendee, were these: That within the time limited by the contract the vendee should declare his option to take the property, and that a conveyance should be made to him upon the vendor's being requested in writing; that \$1,500 in cash should be paid upon execution of the deed, \$1,000 in one year and \$1,000 in two years from the date of the deed, with interest at ten per cent. on deferred payments. The contract concluded with the following sentence: "It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties hereto." The precise point in the construction of this contract is not whether it is in its nature assignable, so that its conditions being performed, an assignee might enforce it, but whether or not the plaintiff in

this case as assignee did perform or tender a performance of those conditions. In the enforcement specifically of contracts courts of equity usually undertake simply to enforce the contract as made by the parties, not to compel the performance of acts upon other conditions than those agreed upon by the parties. If the contract in this case had provided for a payment of the entire purchase price in cash upon the execution of the deed, we would have no doubt that the assignee might, upon tender of the purchase money, compel the execution of the deed to him. But the contract did not contemplate such a payment. It expressly provided that \$1,000 should be paid in one year and \$1,000 in two years after the date of the deed, without providing in what manner, if at all, these deferred payments should be secured.

In *Arkansas Smelting Co. v. Belden Mining Co.*<sup>1</sup> it was said: "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'" In that case the following language in *Pollock on Contracts* was quoted with approval: "Rights arising out of contracts cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Many of the cases cited in the former opinion reflect this same principle, and, indeed, it is not too broad a statement to say that the rule has been recognized in every case where the question has been discussed.

In *Wagner v. Cheney*<sup>2</sup> specific performance was enforced in favor of an assignee under somewhat similar circumstances, the defense there being that the contract forbade the assignment without the assent of the vendor; but it appears from the opinion in that case that the vendor held the notes of the original vendee, so that, in enforcing the contract, the personal liability which the vendor had a right to rely upon was not lost to him. So in this case, if the plaintiff had tendered the cash payment and the personal obligations of Archibald, the contract would have been substantially complied with and perhaps specific performance might have been enforced; but he did not do so. He did not even tender his own notes. The transaction was as follows: The plaintiff having an assignment of the option and being in New York, not intending to return until after the option would expire, he instructed Mr. Frank to act for him in the premises and "do whatever was necessary." Mr. Frank returns to Kearney, procures Mr. Scoult, an entire stranger to the transaction, to make his notes and mortgage to secure

<sup>1</sup> 127 U. S. 379.

<sup>2</sup> 16 Neb. 202.

the same, then draws a deed from Miss Gibbs' execution conveying the land to Scoutt, and then procures Mr. Elmendorf to make the tender to Miss Gibbs of these papers, together with Mr. Frank's check for \$1.500, and Elmendorf does not even make this kind of a tender. Miss Gibbs seems to have declined an interview with him, whereupon Mr. Frank addressed her a letter stating that he and Mr. Elmendorf had been at her residence and other places named with \$1 500 and the two notes and the mortgage and deed, and that she would find the papers at the Kearney National Bank to be delivered to her upon the execution of the deed. No other request in writing and no other tender was made to her. These acts in several respects fail to comply with the conditions of the contract. There had been no election by Archibald to take the property and no action on his part to obligate him for the deferred payments. No notes or other obligations of Archibald had been tendered. In a contract of sale, where payment of a portion of the purchase-money is deferred and there is no provision for securing such payment, it is a necessary inference that the character and solvency of the vendee was an inducement to the contract, and the contract cannot be assigned so as to permit the assignee to enforce it and compel the vendor to substitute the obligation of any other person for the obligation of the one with whom the contract was made. Aside from this fatal departure from the contract, the plaintiff failed to tender the cash payment. Nothing was offered the defendant in person. She was merely informed by the letter of a third person that the check of that third person was at a bank for her acceptance upon the execution of the deed. Still further, she was asked to accept as security for the deferred payments the notes of still another stranger, neither the assignee of the contract nor the agent of the assignee, nor any person connected therewith, and the deed that she was called upon to execute was not a deed to the vendee, to his assignee, to his agent, but to a total stranger to the transaction.

Further discussion is unnecessary. The finding of the trial court contained in the second paragraph of the decree quoted in the former opinion was not only sustained by the evidence, but was the only finding which the evidence would sustain. The former judgment of this court is overruled and the judgment of the district court is affirmed.

M. A. BODWELL, GUARDIAN, ET AL. v. IDA A. BODWELL.

IN THE SUPREME COURT OF VERMONT, JANUARY TERM, 1894.

[*Reported in 66 Vermont Reports 101.*]

BILL for specific performance. Heard upon the pleadings and a Master's report at the September Term, 1893, Orleans County. Taft, Chancellor, decreed for the orators, *pro forma*. The defendant appeals.

The defendant, Ida A. Bodwell, was the wife of the intestate, E. B. Bodwell, and so being husband and wife, these parties, on Feb. 2, 1891, executed the following written agreement :

"Articles of agreement made and concluded this 2d day of February, A.D. 1891, by and between Ida A. Bodwell, of Barton, in the county of Orleans, of the one part, and E. B. Bodwell, being the husband of said Ida A., of the other part, witnesseth :

"The said Ida A. Bodwell, for the consideration hereinafter mentioned, hath agreed and doth hereby covenant, promise, and agree that she will sign a deed of the place where they now live in Barton village ; that she will leave her husband, the said E. B. Bodwell, and hereafter live separate and apart from him, and that she will never trouble him again ; that she will relinquish all right, title, and interest in and to his property and estate, and will never hereafter make any claim upon said E. B. Bodwell, or his heirs or assigns, for any part of his property or estate ; that she will never hereafter claim any support from him, or contract any debts upon his account.

"And the said E. B. Bodwell, in consideration thereof, hath agreed, and doth hereby covenant, promise, and agree that he will pay said Ida A. Bodwell, his wife, the sum of three hundred dollars, in money, and let her have certain articles of household furniture to be agreed upon between the parties, her own clothing, Burleigh W. Bodwell, her son by said E. B. Bodwell, and in case she should fail to properly provide and care for said Burleigh W. Bodwell, the said E. B. Bodwell has the right to take charge of him and provide for him."

In pursuance of this agreement, E. B. Bodwell paid the defendant the sum mentioned. and she took the boy Burleigh, left the house of the said E. B., and maintained herself without expense to him down to the time of his death.

Some little time after their separation, E. B. Bodwell, by stealth and against the will of the defendant, took possession of the boy Burleigh, and kept possession of him afterwards. The Master found that up to that time the defendant had properly cared for and maintained him.

*F. W. Baldwin* and *W. W. Miles* for the orator.

*E. A. Cook* and *J. W. Redmond* for the defendant.

Ross, C.J. This is a bill, brought by the guardians of the minor children of E. B. Bodwell, deceased, praying to have Ida A. Bodwell, the widow of the deceased, compelled specifically to perform a post-nuptial agreement, entered into by her while covert with the deceased, in regard to living separate and apart from the deceased, and relinquishing "all right, title, and interest in and to his property and estate." The orators, as the representatives of the minor children, stand upon the rights of E. B. Bodwell, as they existed at the time of his decease. Without attempting to determine whether the contract is such that equity would specifically enforce it, under any circumstances, or whether it is fair and just in its provisions for the defendant; or whether its proper construction would debar the defendant of homestead and dower and other provisions of the statute for her benefit in his estate, it is elementary that "he who seeks equity must do equity," or that a party to a contract, or those standing on his rights, to entitle himself to a specific performance of the provisions of the contract, which are to be performed for his benefit, must affirmatively establish that he has faithfully kept and performed, or is ready and willing to keep and perform, all the provisions of the contract resting upon him to perform, for the benefit of the other party. The deceased had not kept and performed one of the essential provisions of the contract which rested upon him to perform. By the contract the defendant, Ida A. Bodwell, was given the care and custody of their minor son, Burleigh W., so long as she should properly provide and care for him. The Master has found that she did properly provide and care for him, and that the deceased did not regard this provision of the contract, but very soon after it was entered into, against her wish, stealthily took the son from her, and not only detained him from her so long as he lived, but in the meantime brought a bill of divorce against her, and therein prayed to be given the custody of the son. He put her to the trouble and expense of defending herself not only from the charges in the libel, but also from obtaining a decree for the custody of the son. Under these circumstances E. B. Bodwell, at the time of his decease, did not stand in such relations to the contract that he could call upon a court of equity to enforce it specifically in his favor. Neither do the orators, who stand on his right.

Decree reversed, cause remanded, with a mandate to the Court of Chancery to dismiss the bill with costs to the defendant in this court.

## SECTION IV.—DEFENSES (CONTINUED).

### (h) *Lapse of Time.*

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#### TALMASH *v.* MUGLESTON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., MAY 31, 1826.

[*Reported in 4 Law Journal, Chancery, 200.*]

THE bill was filed for the specific performance of an agreement, dated in 1806, by which the defendants agreed to sell certain premises to the plaintiff; £100 had been paid as deposit. Great mutual delays had taken place; and the bill stated a correspondence between the solicitors of the parties, which continued at intervals throughout several years. The last letter was dated in 1815, and was written on the subject of the title by the solicitor of the plaintiff to the solicitor for the defendants. The bill averred that the contract had not been rescinded or abandoned.

To this bill, the defendants put in the following plea: These defendants, etc., for plea, say: That by an act of Parliament, made and passed in the 21st year of his late Majesty, King James I., entitled "an act for limitation of actions and for avoiding of suits at law," it was, among other things, enacted, that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover* and replevin, for taking away of goods and cattle; all actions of account and cipouttre case, (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt, grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said action upon the case other than for slander; and the said actions for account; and the said actions for trespass, debt, detinue, and replevin, for goods or cattle; and the said action of trespass *quare clausum fregit*, within three years after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; and these

defendants do aver that the said bill was filed in this honorable court on the 15th day of October, 1825.

*Mr. Koe* appeared in support of the plea.

The contract was made nearly twenty years ago ; and the last transaction, mentioned in the bill, precedes the institution of the suit by much more than six years. If the plaintiff brought an action of damages for non-performance of the contract, the statute would be a bar to him ; and, by analogy, it will be a defense to a suit in equity. It is not the practice of the court to decree a specific performance, if the party has lain by for more than six years.

He cited *Lloyd v. Collett*,<sup>1</sup> *Harrington v. Wheeler*,<sup>2</sup> *Marquis of Hertford v. Boore*,<sup>3</sup> *Alley v. Deschamps*,<sup>4</sup> *Moore v. Blake*.<sup>5</sup>

*Mr. Shadwell, contra.* The plea of the statute of limitations cannot by itself be a good plea ; it must always be supported by averments bringing the case within the statute. In this plea there is nothing which meets the allegation in the bill, that the contract has never been abandoned or rescinded.

The only averment in it is that the bill was filed on a certain day.

VICE-CHANCELLOR It was not necessary to plead on what day the bill was filed ; that is apparent on the record. But what has the statute of limitations to do with the specific performance of a contract ? The rule of this court, which refuses to enforce the specific performance of a contract after a certain interval, does not result from the statute of limitations. Suppose the rule to be adopted by analogy to the statute, that would not enable the defendant to plead the statute.

The statute of limitations never can be made available in any court, unless pleaded ; for a party may abandon the protection which it throws round him. But this court, like every other, is bound to take notice of every public statute for the purposes of analogy, and of the statute of limitations among the rest. Where a court of equity proceeds by analogy to the statute, it is bound to know the statute, in order to apply the analogy. It is not necessary, therefore, to plead the statute ; nor can the rule of the court, and the analogy on which it is founded, enable the party to protect himself by such a plea. If the case stated in the bill is of such a kind, that the court, according to its known rules, will refuse to decree specific performance, the defendant ought to demur. It can serve no end for him to put in a plea, which only states an act of Parliament, to which the court, in applying its rules by analogy to that statute, would be bound to advert. It is impossible that the statute can be a bar to a species of suit to which it has no reference.

If the case appears sufficiently on the bill to lay a proper foundation

<sup>1</sup> 4 Bro. C.C. 469

<sup>2</sup> 4 Vesey, jun., 686.

<sup>3</sup> 5 Vesey, jun., 720, in the note. <sup>4</sup> 13 Vesey 225. <sup>5</sup> 1 Ball & Beattie 62.



for the application of the principle alluded to in the cases which have been cited, the defendant ought to have demurred ; and, in support of that demurrer, the argument would have been, that it appears by the plaintiff's own showing, that, if he were to proceed at law, he could not recover damages, and consequently the court, adopting by analogy the legal rule, will refuse to assist him.

If the circumstances did not appear on the bill so as to warrant the application of the rule, it would then be necessary to plead the facts, which were suppressed by the bill, and which were supposed to bring the case within the range of the equitable principle.

*Mr. Roe* submitted, that, in *Hony v. Hony*,<sup>1</sup> where that which might have been the subject of an action was made matter of complaint in a bill in equity, it was not even attempted to be argued that the plea, though bad for another reason, was bad on the ground now suggested ; namely, that the statute of limitations, which would have been a bar at law, would not be a bar also to the equitable relief.

VICE-CHANCELLOR. In that case this court had a concurrent jurisdiction with a court of law ; and, consequently, what would be a good plea at law would be a good plea in equity. But the jurisdiction of compelling specific performance is not a concurrent jurisdiction ; and a suit for specific performance is within neither the words nor the purview of the statute of limitations. In *Hony v. Hony*, an action might have been sustained for the produce of the timber ; but, under the circumstances, this court had a concurrent jurisdiction in the way of account. If the value of the timber had been sought to be recovered in the shape of damages in an action, the statute of limitations would have been a good plea at law ; and, consequently, the same plea would be good here ; for a man cannot escape from the statute by coming into a court of concurrent jurisdiction. That has nothing to with a suit for specific performance.

The plea was overruled.

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### SOUTH EASTERN RAILWAY COMPANY v KNOTT.

IN CHANCERY, BEFORE SIR GEORGE JAMES TURNER, V.C., JUNE 9,  
JULY 28, 1852.

[*Reported in 10 Hare 122.*]

A BILL against William Knott and George Duerr, for the conveyance of a piece of ground, containing about eighteen perches, agreed to be

<sup>1</sup> S. & S. 568.

purchased by the company from the defendant William Knott, and on which, or part of which, the railway had since been constructed.

The plot of land was situated on the south side of Spring Street, Deptford. The agreement for purchase bore date the 21st of September, 1848, and was made between Knott of the one part, and an agent of the company of the other part. Knott thereby agreed to sell, and the company to purchase, the property described in the schedule, for the sum of £300. The company to be at liberty to take immediate possession, on depositing the purchase-money in the London and Westminster Bank, and to pay interest at £5 per cent. from the time of taking possession. The purchase to be completed within three months; and thereupon the money to be paid to the vendor or otherwise, according to the company's acts; and if a valid conveyance should not be made to the company within that period, the company to be at liberty to pay the purchase-money into the bank according to the acts, and the interest to cease upon such payment. The schedule described the property as a piece of vacant ground near Spring Street, Deptford, containing eighteen perches. The defendant Duerr was not a party to this agreement; but it appeared that, before the agreement was entered into, the company had served both him and Knott with the usual notice that the lands were required, and the usual requisition to send in their claims; and that, in consequence of the notice and requisition, Duerr had sent in a claim, demanding £500 for the land; and it also appeared that the conveyance not having been completed according to the agreement, the company paid the £300 into the bank to the following account:

*“Ex parte, The South Eastern Railway Company—The account of William Knott, claiming to be owner in fee simple of eighteen perches of land or ground situate near Spring Street, in the parish of Deptford, in the county of Kent, but failing to make title thereto except under a contract bearing date the 30th of June, 1836, entered into by the said William Knott with Frederick Duerr, for the purchase thereof at the price of £73 10s—And to the credit of George Duerr, who is the heir-at-law of the said Frederick Duerr, and also the administrator of the said Frederick Duerr; and of Beriah Drew & George Drew, solicitors of the said Frederick Duerr, who claim to have a lien or charge as solicitors on the said piece of ground or the title deeds relating thereto.”*

Some proceedings were taken under the acts with reference to the money thus paid in; and in consequence of those proceedings, and of Duerr having brought an ejectment to recover the land, this bill was filed. The effect of the evidence is stated in the judgment.

*Mr. Baily* and *Mr. Simpson* for the plaintiffs.

*Mr. Selwyn* for the defendant Knott.

*Mr. Rolt* and *Mr. Speed* for the defendant Duerr.

VICE-CHANCELLOR. The case made by this bill against the defendant Duerr is, that he is the heir and personal representative of Frederick Duerr; and that, on the 13th of June, 1836, Frederick Duerr, by an agreement of that date, agreed to sell the land in question to Knott; and that the defendant Duerr is a trustee under this agreement, and bound to convey to the company. The company's equity, therefore, wholly depends upon the equity of the defendant Knott against the defendant Duerr; and the true question is, whether Knott could not now enforce the agreement of 1836 against Duerr. Of course, it could not be enforced at this distance of time, independently of the question of possession; but, in order to make out the right to enforce it, this bill alleges that, upon the execution of the agreement of 1836, possession was delivered to Knott, and that he has ever since continued in possession of the land; and I think the evidence sufficiently proves the fact, that possession was delivered to Knott upon the execution of the agreement; but I think it fails to prove that he has ever since continued in possession.<sup>1</sup> Several witnesses have been examined as to the possession, but the evidence of most of them goes principally, if not wholly, to the possession before the agreement of 1836 was entered into. The material witnesses who speak to the possession after the date of that agreement state, in effect, that Knott used the land as garden-ground for two or three years; that it then lay waste for some time; and that Knott then brought some bricks and scaffold-poles, and put up a fence, with a board having his name upon it, apparently intending to build; and that this was done about Christmas, before the new Building act, which I find was passed in the year 1844; but these

<sup>1</sup> When, therefore, Gilbert and defendant agreed to exchange their lands, and under the contract took possession of the parcels exchanged, each became the vendee and equitable owner of the parcel received by him. The legal title was retained by the seller, but it was held by him in trust for the buyer, to be thereafter conveyed at the stipulated time and on the stipulated conditions. If Gilbert had lived, and retaining the legal title in himself, had commenced this action, there can be no question that a defense to the action, like that interposed here, would have been entirely good. . . .

But it is insisted that defendant lost the right to demand a deed from the plaintiff, because he did not perfect his title and tender his deed until after the commencement of this action, and so his cause of action was barred by the provisions of § 339 of the Code of Civil Procedure.

There are two sufficient answers to this: 1, The statute of limitations was not pleaded; and 2, Gilbert, while he held the title, acquiesced in defendant's delay in procuring his patent; and, besides, the statute never runs in favor of a trustee as against his *cestui que trust* while the latter is in possession of his estate. (*Love v. Watkins*, 40 Cal. 547; *Beebe v. Dowd*, 22 Barb. 255).—Belcher, C.C., *Gilbert v. Sleeper*, 71 Cal. 290, 293-4.—ED.

witnesses also state, that soon afterwards Knott took away the bricks and poles, and the fence was broken down; and that the land then again laid waste for a long time—they say two or three years—before the railway was formed. There is also evidence, on the part of the plaintiffs, that Knott was rated as occupier of the premises from 1839 to 1847, but it appears by the bill, that in October, 1847, and January, 1848, he was not so rated; and the property was described in the rate-book as empty.

In this state of circumstances, I am of opinion that Knott could not have enforced the agreement of 1836 against Duerr. He had never paid any part of the purchase-money; and although he had had possession under the agreement, I think it clear that he had abandoned the possession long before his agreement with the company was entered into; and it is scarcely less clear that the agreement of 1836 would never have been heard of but for the land having become valuable from the railway being about to pass over it. The jurisdiction in specific performance is discretionary; and, in my opinion, it would be a most unsound exercise of the discretion of the court to enforce a specific performance under such circumstances as exist in this case.

It was argued on the part of the plaintiffs that Knott, having taken possession, and not having expressly repudiated the contract, could not have resisted specific performance at the suit of Duerr; and that, as the agreement could be enforced against him, it could equally be enforced by him; but I do not agree either to the hypothesis on which this argument rests, or to the conclusion deduced from it. I think that under the circumstances of this case, the agreement of 1836 could not have been enforced by Duerr against Knott; and I think, moreover, that in cases of this nature the rights of the two parties to call upon the court to enforce the agreement are not co-extensive. The right of each party depends upon his conduct; and the conduct of one may give him the right to apply to the court, while the conduct of the other may debar him from that right. I am of opinion, therefore, that this bill must be dismissed against the defendant Duerr; and as the plaintiffs have established no right to sue him, I think it must be dismissed against him with costs. From the course taken at the hearing, I presume there will be no difficulty, as between the company and the defendant Knott; but if there be, I think that, as the company will not, of course, take a conveyance from him alone, the proper course will be to dismiss this bill against him without costs, and without prejudice; for this suit, as against him, is the consequence of his own claim.

## BRUCE v. TILSON.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER, 1862.

[*Reported in 25 New York Reports 194.*]

ACTION to compel the conveyance of the exclusive privilege of using, burning and carrying away stone from quarries on the defendant's farm in pursuance of a contract made January 9, 1838, by which the defendant agreed to sell to one Lawrence "the exclusive privilege of using, burning and carrying away stone from all the quarries situated on the farm of the said Tilson with three acres of land lying on the canal and extending back to said quarries, for the sum of one thousand dollars, to be secured by bond and mortgage on said premises, payable in two years from date with interest payable yearly." On the 19th January, 1838, the defendant and his wife conveyed to Lawrence four and a half acres of land described by metes and bounds, and which was surveyed and laid out by direction of the defendant and under the supervision of both parties, and Lawrence gave his mortgage thereon to secure his bond for one thousand dollars, the purchase-money mentioned in the contract and the consideration named in the deed, payable in two years thereafter, which was subsequently paid. The action was tried by a referee and on the evidence he found that "at the time of the execution and delivery of these last-mentioned instruments, the parties, Lawrence and Tilson, were together at the house of the defendant, and the exclusive privilege claimed in this suit was a matter of conversation between them. Lawrence desired a conveyance of that as well as the land. Tilson did not convey it, assigning as a reason that his wife declined. Lawrence stated that he relinquished no rights given him by the contract. No other business but the contract occupied their attention. The conveyance of the privilege was desired by Lawrence, and omitted to be given by Tilson, for the reason assigned, and Lawrence gave notice that he relinquished no right." Lawrence used the quarries upon the land conveyed to him up to 1854, when he assigned his interest in the contract to the plaintiff for two hundred and fifty dollars. In April, 1854, the plaintiff demanded a conveyance of the exclusive privilege mentioned in the contract, and upon the refusal of the defendant brought this action. The referee found, as a matter of law, that the action was barred by the Statute of Limitations, and gave judgment against the plaintiff, dismissing the complaint with costs.

From the judgment of the Supreme Court at General Term, affirming the judgment of the referee, the plaintiff appealed to this court.

*John H. Reynolds* for the appellant.

*Amasa J. Parker* for the respondent.

ALLEN, J. Prior to the enactment of the Code of Procedure, the subject matter of this action was cognizable only by a court of equity, courts of common law having no jurisdiction to entertain a suit for the specific performance of a contract. The cause of action was therefore within the ten years' limitation prescribed.<sup>1</sup> The language of that section is: "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after." If a cause of action had ever accrued to the original vendor, the plaintiff's assignor, and the Statute of Limitations had been permitted to run against it, the bar of the statute could not be avoided, and a new cause of action created, upon the same contract, by the demand of specific performance by the assignee in 1854. The right of action once barred by statute can only be revived by the act and assent of the party to be charged.<sup>2</sup> The cause of action accrued whenever the plaintiff or his assignee could have filed a bill for the relief sought in this action. If, at any time, without further act on their part, or default or breach of duty on the part of the defendant, they could have come into a court of equity and entitled themselves to a specific performance of the contract, the Statute of Limitations commenced running from that time, and the lapse of the statutory period of ten years barred the action. In order to put a party in default, in the case of dependent covenants, so as to subject him to an action at law, there must be a tender of performance by the other party to the covenant or agreement, and a demand of performance on his part, and when an act is to be done requiring time for its performance, a reasonable time must be given for such performance, unless the party of whom the demand is made absolutely refuses to perform at the first demand. An action at law upon the contract, or to recover back the consideration as upon a rescission of the contract by the act of one of the contracting parties, can only be maintained upon such technical and formal default, unless it may be in some exceptional cases, as when a party has put it out of his power to perform, so that a tender and demand would be nugatory. The rule at law is well settled by a long line of cases, some of which are cited by the plaintiff's counsel.<sup>3</sup> The same principle applies when equitable relief is sought, on the alleged ground of a rescission of the contract by the act or default of one of the parties to it.<sup>4</sup> *Wells v. Smith*<sup>5</sup> turned upon the construction of the

<sup>1</sup> 2 R. S., 301, § 52.

<sup>2</sup> *Kelsey v. Griswold*, 6 Barb. 436.

<sup>3</sup> *Hackett v. Huson*, 3 Wend. 249; *Blood v. Goodrich*, 9 id. 68; *Connolly v. Pierce*, 7 id. 129; *Fuller v. Hubbard*, 6 Cow. 13; *Lutweller v. Linnell*, 12 Barb. 512.

<sup>4</sup> *Brunell v. Jackson*, 5 Seld. 535. <sup>5</sup> 2 Ed. Ch. R. 78; affirmed 7 Paige 22.

contract, the question being whether time was of its essence, and it was held that it was so, and that the complainant had lost his rights under the contract, by not performing at the day. The general discussion by the Vice-Chancellor, of the course of procedure to secure one's rights under such a contract, has no application except to cases falling within the same category. The contract does not in this, as in the case cited, make time essential by prescribing a fixed time for its performance, and making a performance at the day, by either party, a condition precedent to the request to enforce it against the other. The agreement looks to and fixes no particular time for its performance, but imposes a present duty upon the defendant to convey the powers and privileges mentioned whenever the plaintiff shall request. A previous demand is not, nor is any act on the part of the vendor, made necessary by the terms of the contract, to fix the liability of the defendant. He has promised to convey generally, and is therefore bound to perform upon request ; in other words, there is a present liability which may be enforced at any time. The vendor at once acquired a right to a specific performance of the contract by the vendee. When such right exists it may be enforced in equity without a previous request or demand. The contract not making a request or demand essential to the right of the vendor to enforce performance, the law does not annex it as a condition, and it is sufficient if he offers to perform in his bill of complaint, and is able to perform at the time of the final decree. A request made by action is sufficient, and a request before action is not necessary. The distinction between an action for a specific performance in equity and a suit at law for damages, for non-performance, is this, that in the latter, the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former the contract itself, and not a breach of it, gives the action. A demand of performance before suit brought is only important in reference to the costs of the action, and has no bearing upon the merits or the rights of the parties.<sup>1</sup> But by a demand and refusal the party liable to perform is put in the wrong and in the situation of unreasonably resisting the claim of his adversary, and is, therefore, chargeable with costs. Costs in equity are always in the discretion of the court, and whether they are granted or withheld they are but as incidents to and no part of the relief sought. A party getting the relief asked may be compelled to pay costs, but nevertheless his cause of action had accrued upon the filing of the bill or the commencement of the suit.<sup>2</sup> A party filing a bill for a specific performance, upon an offer of performance on his part and a demand from the other

<sup>1</sup> See Pomeroy, Sp. Per. Con. §§ 361-363.—ED.

<sup>2</sup> *Vroom v. Ditmas*, 4 Paige 526.

party, must make the proper offer in his complaint; and if he is able to perform at the time of the final judgment, he is entitled to his relief, although he may not have been in a situation to perform at the time he brought his suit.<sup>1</sup> The rule is, that the plaintiff, in actions for the specific performance of contracts, must aver and plead performance, or a readiness and willingness to perform on his part.<sup>2</sup>

It is analogous to the rule of the common law that a note payable on demand is payable *instanter*, and the statute commences to run against it from its date; while, if it is payable a given time after demand, or it contains any provision showing the intent of the parties that it should not be payable until actual demand, the rule is otherwise.<sup>3</sup> The vendee has the right, immediately upon the execution and delivery of the contract, to apply to the court of equity for a specific performance, and the only consequence of such immediate application would have been to charge him with costs; but the relief could not have been denied him, merely because the suit might have been ill-advised, hasty and unnecessary. The cause of action thus arose, and the rule of courts of equity is, that the cause of action or suit arises when, and as soon as, the party has a right to apply to a court of equity for relief.<sup>4</sup>

When the party entitled to a specific performance of an agreement to convey land has been in the uninterrupted possession of the premises an objection to a decree, on account of the lapse of time, will not be sustained.<sup>5</sup> The possession saves the action and makes the case an exception to the rule which controls other executory contracts. The question of adverse possession, as to which several cases are cited by counsel, is not in the case. It is not an action *in rem* to secure the realty or its possession, but is an ordinary equitable action to enforce a simple executory contract upon which the plaintiff and those under whom he claimed have slept upon their rights until a statutory bar has arisen against them.

The maxim that in equity that which is required to be done is considered as done is invoked by the plaintiff in aid of the action. But it is not easy to see how a court can assume a fact as accomplished at the instance of a suitor who alleges that it has not been done, and asks, as the only relief sought, that the court may cause it to be done. It is a maxim applied for the advancement of justice, and as a protection and defense, and it would be a perversion to resort to it in avoidance of a statute of repose.<sup>6</sup> Had the plaintiff been in possession for twenty

<sup>1</sup> Baldwin v. Salter, 8 Paige 473; Stevenson v. Maxwell, 2 Comst. 408.

<sup>2</sup> Walker v. Jefferrys, per V. C., 1 Hare 352.

<sup>3</sup> Wenman v. The Mohawk Ins. Co., 13 Wend. 267.

<sup>4</sup> 2 Story, Eq. Jur., § 1521 *a*.

<sup>5</sup> Miller v. Bear, 3 Paige 466.

<sup>6</sup> Burch v. Mahony, 1 Barb. 648; Hasbrook v. Paddock, 1 id. 635.



years the maxim might avail him if his possession was disturbed by his vendor.<sup>1</sup> So, too, the equitable doctrine that the vendor is the trustee for the vendee of such property from the time of the contract, and that the whole title is deemed to pass by the contract cannot give length of days to an agreement for its conveyance. When dealt with as a contract, it is subject to all the rules which apply to and control other contracts, and cannot by any pretense be taken out of the operation of statutes general in their operation and applicable to all contracts. If in equity the title to the real property is vested in the plaintiff either as against the defendant or third persons, the right, just so far as it has vested, will be protected whenever it is assailed. But when the plaintiff asks the aid of a court of equity to enforce the contract for a legal conveyance he is within the statutes for the limitation of actions. The plaintiff would have the contract construed as a conveyance *in presenti*, an executed contract rather than as an agreement to convey in future, an existing contract. But the whole tenor of the instrument shows that it was intended by the parties as a memorandum of their agreement, and that further acts were contemplated to complete and carry it out, to wit, giving of a conveyance by the defendant, and of a mortgage for the purchase money by the vendee. The parties so construed it by their subsequent acts, and the plaintiff ratifies the construction by bringing this action. It was then an agreement by the defendant to execute upon request, and for the considerations named, a grant of an easement or servitude upon his land, which when executed would have charged the land; but until executed the contract was preserved, binding only the defendant and creating no charge upon the land. An agreement for a lease is not a lease, or equivalent to a lease, and an agreement to create or grant an easement is not a grant or its equivalent. If the referee had found that the deed of January 19, 1838, was a substituted and full performance of the contract of the defendant, accepted and acquiesced in by the vendee, the finding would, in my judgment, have been fully sustained by the evidence. But upon the ground upon which the case was decided by the referee there was no error, and the judgment must be affirmed.<sup>2</sup>

All the judges concurring.

Judgment affirmed.

<sup>1</sup> *Miller v. Bear*, *supra*.

<sup>2</sup> The concurring opinion of Smith, J., has been omitted.—Ed.

## GEORGE C. PETERS ET AL., APPELLANTS, v. JOHN F. DELAPLAINE ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, MAY 21, 1872.

[Reported in 49 New York Reports 362.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendants entered upon the decision of the court upon trial without a jury.

The action was to enforce specific performance of a contract for the sale of land in the city of New York. It was brought by the vendee's representatives against the vendor's representatives. The contract was dated March 1, 1852. It provided for complete performance on both sides at the office of John F. Delaplaine, the vendor, on May 1, 1852, between the hours of ten A.M. and three P.M. He was to give "a satisfactory title free of incumbrances." The plaintiffs gave *prima facie* evidence that John R. Peters, the vendee, tendered complete performance on his part at the time and place specified, and that Mr. Delaplaine, then and there, failed to perform on his part.

The action was commenced March 25, 1869. The contract was under seal. Mr. Delaplaine, the vendor, was a married man, and, at the time of refusing to perform, he assigned as a reason that his wife would not "sign the deed." This lady died shortly after July 17, 1866, and the plaintiffs contended that their cause of action arose at that time.

John F. Delaplaine, the vendor, died about June 3, 1854; John R. Peters, the vendee, died April 24, 1858.

The contract price of the property agreed to be sold was \$30,000. Its value had become enhanced to more than ten times that amount.

The vendor, or his representatives, continued at all times in possession, and in receipt of the rents and profits, without recognizing any right in or claim of the vendee or his representatives.

The court decided that the equitable remedy for specific performance, not having been sued for within ten years, was barred by the Statute of Limitations. The complaint was, therefore, dismissed, the plaintiffs excepting.

*Edgar S. Van Winkle* for the appellants.

*Charles O'Connor* for the respondents.

CHURCH, Ch.J. If the Statute of Limitations does not constitute an absolute bar to the action, no court would ever decree a specific performance of the contract at this late day, and under the circumstances

of the case. The action was commenced seventeen years after the making of the agreement and the refusal of the vendor to perform the same. In the meantime both of the original contracting parties had died, the one eleven and the other fifteen years before bringing the action.

The property has increased in value from thirty thousand to three hundred thousand dollars, and during all the time the vendor and those who have from time to time succeeded to his estate in the premises have received large sums for rents, issues, and profits, and have necessarily paid the taxes and assessments upon the property, and a specific performance of the contract will necessarily require a statement of an account with the several parties in respect of the receipts and expenditures connected with the premises. The title to the premises has become vested in the defendants, some claiming under the will of the original vendor either as trustees or in their own rights, and others under the will of a son of the vendor, taking a part of the property by devise from his father, and who survived his father some twelve years. Portions of the estate are held under various trusts administered by trustees appointed by the court.

Among the defendants and parties in interest is one lunatic, several married women and infants, one benevolent institution claiming under the will of Isaac C. Delaplaine, and the trustees of the different trusts and the personal representatives of one of the decedents named. It would not be easy upon adjudging a specific performance of the contract before us to adjust all the equities of the different parties as between themselves, and it is quite certain that the present owners of the property and the parties in interest could not be put in the same position which they might have occupied under the wills of their respective testators, and in the distribution of the several estates, had the purchaser been "ready, desirous, prompt, and eager" to perform the contract and assert his rights. The title and the interests of the claimants are complicated, and a specific performance would lead to a great perplexity and inconvenience, which would have been avoided by a prompt assertion and prosecution of the claim to a specific performance by the purchaser.

The property has greatly changed in value if not in condition, and the title has, by divers conveyances and devices, passed into other hands, and the estates and interests of the owners are complicated so that a specific performance cannot be awarded without great danger of doing injustice. In other words, the situation of the parties and the condition and value of the property have so greatly changed during the time that elapsed between the making of the contract and the bringing of the action, that it is not a case for a specific performance within the rules

governing courts of equity in administering this branch of their jurisdiction.

The granting or withholding specific performance is within the discretion of the court, and it will not be granted when it would be against conscience and justice to do so.<sup>1</sup> The Statute of Limitations, by which an action for equitable relief is absolutely barred by the lapse of time, does not affect the general doctrines of equity or the principles upon which relief is granted in particular cases, or a particular class of cases.

The time within which actions may be brought for specific performance of contracts has not been extended by implication by the statutes prescribing a time within which the action must in all cases be brought. The question still remains, and must be decided in each action, although brought within the statutory limit as to time, whether under the peculiar circumstances equity and good conscience require that the contract shall be specifically performed or whether the party should be left to his remedy at law for the non-performance.

We do not understand the remarks of the learned judge, in *Leaird v. Smith*,<sup>2</sup> as in conflict with this view.

In that case the delay was fully excused, and the remark referred to was casually made and merely to the effect that slumbering upon their respective rights by the contracting parties would terminate the contract only by such an efflux of time as would create a bar by the Statute of Limitations. This was literally true; the contract would not be terminated, but it does not follow, and it is not intended to be suggested, that because the contract was in force, it might in all cases be enforced and specifically performed in equity.

If specific performance were a strict legal right it would be otherwise. The plaintiffs, by their own showing, have not made a case for the equitable relief claimed; but passing this question without further consideration, the Statute of Limitations interposes an insuperable bar to the action.

The breach of the contract and the cause of action resulting from such breach were complete on the first of May, 1852, when the purchaser tendered performance on his part and demanded performance on the part of the seller, and the latter refused.

It is not denied that from that time there was a perfect cause of action at law for the recovery of damages, and that the statute then commenced running against that cause of action, but it is sought to distinguish the equitable action for the conveyance of the property from the legal action, upon the ground that the seller was not then capable

<sup>1</sup> Story Eq. Jur., §§ 161, 742, 776, and cases cited; *Seymour v. Delancey*, 6 J. C. R. 222; *King v. Hamilton*, 4 Peters 311.

<sup>2</sup> 44 N. Y. 618.

of fully performing the contract by giving a perfect title to the property, and that the title he could have given would have been subject to the contingent right of dower of his wife, then living, and who survived him many years. The cause of action accrued whenever the purchaser could have filed a bill for the relief sought in this action.<sup>1</sup> The relief sought is a specific performance of the contract, and the purchaser was entitled to that on the first day of May, 1852; and that the seller could not then give a perfect title did not affect the cause of action or the character or extent of the relief which the court would grant, but, in case the disability continued, would merely have operated to modify the form of the decree, by substituting, in part compensation or indemnity for a full performance in specie, the title granted with the compensation or indemnity for the defect being the equivalent of a full specific performance.

The seller could not have compelled the purchaser to accept such defective title with indemnity for the incumbrance, but the latter had an option to accept it or rely upon his action for damages. He could have brought his action for specific performance at once, and taken judgment in such form as would have secured to him the full benefit of his contract, and the property for which he contracted.<sup>2</sup> The title which the buyer would have acquired by action, prosecuted at once, would have become perfect in time, and the same title that his successors in interest now seek to have; and he would have been indemnified against the contingent claim of the wife of the seller for dower.

The law giving the purchaser an immediate action, it is no answer to the claim that the Statute of Limitations then commenced running; that the form of the relief which he could then have had was not precisely the same as that now attainable. The action, the cause of action, and the substance of the relief are in all respects the same, and the cause of action was as perfect, and the remedy, in substance, which could have been had was as complete, at the time of the refusal of the vendor to convey as it was on the death of his widow, fourteen years thereafter. The statute commenced to run in May, 1852.

The only other question relates to the time prescribed by the statute for bringing the action; that is, whether it is within the twenty years' limitation of section 90, or the ten years' limitation of section 97 of the Code.

Stress is laid upon the fact that, by the Code, the distinction between actions at law and suits in equity, and the forms of such actions and

<sup>1</sup> *Bruce v. Tilson*, 25 N. Y. 194.

<sup>2</sup> *Harsha v. Reed*, 45 N. Y. 419; *Woodbury v. Luddy*, 14 Allen 1; *Davis v. Parker*, Id. 94; *Morss v. Elmendorf*, 11 Paige 277; *Knowles v. McCamly*, 10 Id. 342.

suits, are abolished ; and the peculiar phraseology of certain sections of the Code, limiting the time for the commencement of different actions.

The change in phraseology referred to was adopted to conform the act, as far as practicable, to the new system of practice and procedure, and the theory and views of the framers of the instrument.

The change was made necessary as much by reason of the abolishing the names of the several actions as by the attempt to assimilate the forms of all actions, whether at law or in equity. The terminology of the former statutes of limitations were not adapted to the new system, and the framers of the Code sought to make the statutes applicable to the new system, in which there was but one form or name of an action, to wit, "a civil action." It was a work of some difficulty ; and it is not strange that it should be the subject of criticism, and capable, by ingenious argument, of being made to have the appearance of working a change in the law as applied to individual actions. But there is an absence of evidence of any intent on the part of the legislature, or of the authors of the Code, to effect any change in the substantial rights of parties or to subvert the substantial distinction between equitable and legal causes of actions ; distinctions which are inherent, and cannot be disregarded without seriously disturbing substantial rights. The legislature, in adopting this part of the Code, except as otherwise indicated, intended a simple revision, and not a change of the prior statutes ; and the pre-existing statutes have not been changed, except by a change of phraseology, to conform them to the union of legal and equitable procedure ; and the substance of the statutes is now the same as before the revision.<sup>1</sup> Without entering upon a critical examination of the several provisions of the Code in detail, it is quite apparent, from the entire chapter limiting the time for commencing actions other than for the recovery of real property, that section 97 is a substitute for section 52 of the Revised Statutes.<sup>2</sup> Subdivision 2 of section 90 of the Code takes the place of section 48 of the Revised Statutes, making the lapse of time to operate as a bar to the action instead of a presumption of payment ; and extending the provision to sealed instruments of all kinds instead of confining it to instruments for the payment of money. If section 90 applies to an action for equitable relief when the right grows out of a sealed instrument, then section 91, which makes six years the limit for actions upon a contract obligation or liability, express or implied, excepting those mentioned in section 90, would restrict the time for actions for specific performance of contracts other than those under

<sup>1</sup> Taylor v. Delany, 2 C. C. on E. 151 ; Goodell v. Jackson, 20 J. R. 722 ; Howard v. Thompson, 21 W. R. 319 ; Douglass v. Howland, 24 Id. 47 ; Theriat v. Hart, 2 Hill 381.

<sup>2</sup> 1 R. S. 301.

seal to six years instead of ten, and there would be two distinct and different limitations of time for bringing the same class of actions and for the same relief. Indeed, as all actions other than for tort or for the recovery of real property grow out or depend upon some contract, obligation or liability, express or implied, section 97 would, upon the interpretation now claimed for section 90, be of no force or effect.

While the framers of the Code abolished the distinction in actions and the forms of actions, they recognized the different classes of rights and causes of action, and the clear distinction between legal and equitable causes of action, and the different remedies, and did not assume to subvert the principles of the common law or of equity, and when an action for relief is spoken of in sections 91 and 97, reference is had to actions which before the Code were only cognizable in courts of equity. The commissioners of the Code in their report to the legislature expressly state that they make two important changes in the law by section 90 as proposed, and the only one made by subdivision 2 is by making the twenty years an absolute bar instead of a presumption of payment. It is true the section as reported was amended by the legislature by striking out "for the payment of money," so that it was made to include covenants and sealed agreements of all kinds; but section 77 was adopted as reported, and is now section 97 of the Code, and the commissioners in their note say that it is a substitute for the article of the Revised Statutes "Of the time of commencing suits in courts of equity,"<sup>1</sup> and provides for all the cases theretofore known as suits in equity, and that the periods of limitation were the same as those then existing, the only difference being that by the Revised Statutes they were applied to the form, while by the proposed section of the Code they were made to depend upon the substance of the remedy.

The legislature may be assumed to have concurred in the views of the commissioners, and not to have intended any change in the statutes limiting the time for commencing actions before then solely cognizable in equity, and the terms of the act certainly indicate no such intent. But this action is in no just or legal sense an action upon a sealed instrument. An action for a breach of covenant is a legal action, depending upon well-ascertained legal rights and sound in damages, and in it the plaintiff is entitled to and recovers as a positive legal right pecuniary compensation for the damages sustained by the breach of the covenant. This action is founded solely on the covenant, and, upon proof of a breach, the right of recovery is absolute.

An action for a specific performance is quite different in all that is essential, and is the same whether the contract is under seal or in writing, without seal or verbal, and does not depend and is not based solely

<sup>1</sup> 1 R. S. 301.

upon the contract, but upon other circumstances in connection with the contract. No contract, no matter how solemnly made, alone gives an absolute and strict right to a specific performance, but if it is broken, a right of action at law for damages is absolute and fixed. If the party can be compensated for the loss of the benefit of his contract in damages, it is not of course to decree a specific performance. The jurisdiction of courts of equity to decree specific performance is not affected by the form or character of the instrument.<sup>1</sup> The ground of the jurisdiction is that a court of law can only give the injured party compensation in damages, which may be far short of the redress to which in justice he is entitled. If the party therefore wants the thing in specie, and cannot be otherwise fully compensated, courts of equity will grant him a specific performance.<sup>2</sup> Courts of equity proceed upon the ground that damages at law may not in the particular case afford a complete remedy.<sup>3</sup> Sometimes a specific performance will be granted of a contract void and not capable of being enforced at law.<sup>4</sup> The exercise of this branch of equity jurisdiction is not a matter of right but of discretion, and specific performance is granted or refused according to the circumstances of each case irrespective of the character or form of the contract or the foundation of the liability.<sup>5</sup> The contract gives the right of action; that is, without it no right of action would exist, but other circumstances enter into the question, whether the party is entitled to this particular relief.

This is not an action upon a sealed instrument within the true intent and meaning of section 90, and is within the letter as well as the spirit and intent of section 97 of the Code.

The case was properly disposed of in the court below, and the judgment must be affirmed.

All concur, except ALLEN, J., not voting.

Judgment affirmed.

<sup>1</sup> Story Eq. Jur., § 715.

<sup>2</sup> Harnett v. Yielding, 2 Sch. & Lef. 552.

<sup>3</sup> Adderly v. Dixon, 1 S. & S. 607.

<sup>4</sup> Cannel v. Buckle, 2 P. Wms. 244.

<sup>5</sup> Story Eq. Jur. 742.



GEORGE R. LEWIS v. JEREMIAH C. PRENDERGAST AND  
OTHERS.

IN THE SUPREME COURT OF MINNESOTA, OCTOBER 16, 1888.

[*Reported in 39 Minnesota Reports 301.*]

APPEAL by plaintiff from an order of the district court for Washington County, McCLUER, J., presiding, sustaining a demurrer to the complaint.

*W. K. Gaston and McMillan & Beals* for appellant.

*Henry C. James* for respondents.

MITCHEL, J.<sup>1</sup> Action to compel specific performance of a contract for the sale of land. The contract was executed August 5, 1876, and by its terms the purchase-money was to be paid, and the deed delivered, in one year from that date; the two being concurrent and dependent. May, 1883, plaintiff offered to pay the purchase-money, with interest, and demanded a conveyance; but defendant Prendergast refused to accept the money or make a deed. This action was commenced April, 1887. The contract was wholly executory, and there is no allegation that the time of performance had ever been extended.

We think the action was barred by the Statute of Limitations. The case comes within section 6, chapter 66, Gen. St., which requires suit to be brought within six years after the cause of action accrues. The cause of action of a vendee, in an executory contract for the sale of land, accrues whenever he becomes entitled to file his bill for specific performance. In the present case the plaintiff (or his assignor) might have done this August 5, 1877, when, by the terms of the contract, the purchase-money was to be paid, and the deed delivered. It is contended that a tender or offer to pay the purchase-money, and a demand of a deed, was necessary before a suit could be brought for specific performance; and that as this was not done until May, 1883, therefore plaintiff's cause of action did not accrue, or the statute begin to run, until that date. Upon the question of the necessity of a tender or offer to perform by the plaintiff, and a demand of performance on part of defendant, before suit for specific performance, the decisions in this country are conflicting, and often confused in their statement of the rule. They seem frequently to fail to distinguish between an action of this kind and one at law for damages for non-performance of the contract, or for a recovery of the purchase-money paid. In order to put a party in default in case of dependent covenants, so as to subject him to such actions, undoubtedly there must be a tender or offer of per-

<sup>1</sup> Collins, J., was absent and took no part in this case.

formance by the other party to the contract, and a demand of performance on his part. But in an equitable action for specific performance, in our judgment, the true rule in principle, and amply sustained by authority, is that no such offer or demand by plaintiff before suit is necessary; that it is enough that he is ready and willing to perform at the time of bringing the action (unless his rights have been lost by laches), and that he offers to perform in his complaint. The plaintiff's performance can be provided for in the judgment, and his previous neglect will only affect the question of costs. This rule has been already recognized by this court, in *Sons of Temperance v. Brown*,<sup>1</sup> and *Coolbaugh v. Roemer*.<sup>2</sup> For a quite full citation of authorities on this question, see 3 Pom. Eq. Jur., § 1407, and notes. The reason for this equitable rule is that in such cases the court can grant just such relief as a party may show himself entitled to, and upon such conditions as will protect the other party. The order sustaining the demurrer to the complaint is therefore affirmed.

COMBS, RESPONDENT, v. SCOTT, TRUSTEE, IMP., APPELLANT.

IN THE SUPREME COURT OF WISCONSIN, APRIL 29, 1890.

[*Reported in 76 Wisconsin Reports 662.*]

APPEAL from the Circuit Court for Lincoln County.

The case is stated in the opinion.

For the appellant there was a brief by *Curtis & Curtis*, and oral argument by *H. H. Curtis* and *S. U. Pinney*. To the point that courts of equity will not decree specific performance in the case of stale or suspicious claims, they cited, in addition to cases referred to in the opinion.<sup>3</sup>

For the respondent there was a brief by *Bump & Hetzel*, and oral argument by *E. L. Bump*.

ORTON, J. This is an action for specific performance brought by the plaintiff, Harrison Combs, against Walter A. Scott, trustee of the estate of Thomas B. Scott, deceased, and his heirs, as defendants, of the following contract, viz. :

"May 1, 1882. In consideration of one dollar and other valuable

<sup>1</sup> 9 Minn. 144 (187).

<sup>2</sup> 32 Minn. 445 (21 N. W. Rep. 472).

<sup>3</sup> *Walker v. Jeffreys*, 1 Hare 348; *Heaphy v. Hill*, 2 Sim. & S. 29; *Pigg v. Corder*, 12 Leigh 69; *Madox v. McQueen*, 3 A. K. Marsh. 400; *Boston & M. Co. v. Bartlett*, 10 Gray 384; *White v. Bennett*, 7 Rich. Eq. 260.

considerations, to wit, settlement of all suits, actions, differences, and matters of difference, I agree to give to Harrison Combs, of Applington, Iowa, on or before July 1, 1882, a good and sufficient deed in fee-simple of all my right, title and interest of, in, and to the stump lands which I now own, lying within one and one-half miles of Hay Meadow creek, in Lincoln County, Wisconsin, not being adjacent to and along Prairie River, all in town thirty-two in ranges six and seven, and town thirty-three in ranges six and seven; the intention being to convey to said Combs all the lands lying on and along Hay Meadow creek from below, adjacent, and above the dam on said creek, not including cedar lands on lower end of Hay Meadow or lands below the meadow; the intention being to include all stump lands opposite, above, and in the vicinity of the dam of Combs, on Hay Meadow creek, lands that the outlet of hauling off timber that would go to Prairie River not to be included. [Signed] THOMAS B. SCOTT. [Seal.]

"In presence of D. W. McLEOD."

The plaintiff alleged in his complaint that he demanded a conveyance of said lands of Thomas B. Scott in his lifetime, and that he refused so to convey the same; and that he demanded a conveyance of the same of the defendant Walter A. Scott, the trustee of said estate, and that he also refused so to do; and that he has no adequate remedy at law for the breach of said contract, and that said lands have greatly increased in value since the breach thereof; and that he owns a mill in the vicinity of said lands, built for the purpose of manufacturing the timber thereon, which will be greatly depreciated in value in case said lands are not conveyed to him. The plaintiff also alleged the location and description of said lands according to the terms of the contract to consist of certain forty forty-acre tracts lying in townships 32 and 33, ranges 6, 7 and 9, in Lincoln County, Wisconsin, appended to the complaint.

The defendant Walter A. Scott, as such trustee, answered said complaint, and alleged that said contract was incomplete, and that it was intended thereby that the plaintiff and Thomas B. Scott should thereafter select and locate said lands, and agree to such selection, and that the plaintiff neglected to cause such selection to be made for more than four years, and until the death of said Scott, and that now it is impossible to ascertain what lands were intended by said contract. He denied that said list of lands, so appended, contained the lands contemplated by the agreement, excepting, perhaps, about seven forty-acre tracts in township 32, in range 6; and alleged further, that he is ignorant of many of the facts alleged in the complaint, and that it is now impossible, by reason of the death of his father, Thomas B. Scott, to execute said memorandum, and that the plaintiff ought not to have specific per-

formance of the same, on account of his laches and unreasonable delay in attempting to enforce the same.

On the trial both parties introduced testimony to show what lands were intended as "stump lands," and what lands came within the boundaries mentioned in the contract, and the testimony relating thereto was quite contradictory, but the Circuit Court found, upon what appears to have been, perhaps, a preponderance of the testimony, and as correctly and accurately as practicable and possible, that certain twenty-nine of said forty-acre tracts were the lands within the intent and meaning of said contract; and rendered judgment that the defendant Walter A. Scott, as such trustee, convey the same to the plaintiff. From that judgment this appeal is taken.

The objection to this judgment that has peculiar force, and makes the strongest appeal to a court of equity, is that specific performance ought not to have been adjudged in this case on account of the laches and unreasonable delay of the plaintiff in bringing his suit.<sup>1</sup> The contract is dated May 1, and was to be performed July 1, 1882. Thomas B. Scott died October 7, 1886, and this action was commenced in April, 1888. These lands, July 1, 1882, when the contract was to have been performed, according to the testimony of the plaintiff himself were of the value of only \$10 for each forty-acre tract, and at the time of the trial they were worth from twenty to fifty times as much, or from \$200 to \$500 for each forty acre tract. The timber on these lands has become much more valuable by the long delay, and a railroad has been built and is in operation through these lands, and the country generally has been greatly improved since July 1, 1882. The plaintiff has never taken any care of the lands, and has neglected to pay any taxes on them, and has allowed many of them to be sold for taxes; and Thomas B. Scott, in his life-time, paid all the taxes on them, and redeemed them from previous sales for taxes; and the defendant, as trustee, has paid all the taxes since the death of Thomas B. Scott, at an expense of many hundred dollars—many times as much as the value of the lands when the contract was made.

The enforcement of the contract at maturity would have been of merely nominal expense and damage to Thomas B. Scott, but will now impose an enormous claim upon his estate of many thousands of dollars. There was a delay of over four years while Thomas B. Scott was living, and nearly two years since, before bringing the suit, and without extenuation or excuse. It would be difficult to find a case in the books of greater change in the situation and value of the lands and the circumstances material to the relief, occasioned by the delay, or in which specific performance has ever been granted under such circumstances. Al-

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

though it may not be impossible to select, locate, and identify the lands within the intention of the contract, it has certainly been rendered much more difficult and uncertain by the death of one of the parties whose personal knowledge would seem to be requisite, if not necessary, to determine what lands were meant by "stump lands," and the meaning of the other unusual conditions of the contract. The material testimony of Thomas B. Scott has been utterly lost by the delay. He refused to convey the lands, and could do no more than to await the suit of the plaintiff for the specific performance or for the breach of the contract. The plaintiff waited until the Statute of Limitations had nearly run on the contract before bringing his suit.

"It is a settled principle that specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances."<sup>1</sup> "A matter not of absolute right in the party, but of sound discretion in the court."<sup>2</sup> "Specific performance will not be decreed when for any reason it would be inequitable. 'It is an application to sound discretion.'"<sup>3</sup> "The jurisdiction . . . is not compulsory upon the court, but the subject of discretion."<sup>4</sup> The learned counsel of the appellant has cited in his brief numerous authorities to the same effect, but the principle is elementary, and the above authorities are sufficient.

In consideration of the peculiar circumstances of this case, we cannot but think that it would be an abuse of sound discretion to grant such relief. "Unreasonable delay in bringing suit for the specific performance of a contract to convey will be a defense to the relief, especially where the other party has made improvements in the meantime, or the property has greatly increased in value."<sup>5</sup> The delay of only about two years was held sufficient to defeat the action in *Haughwout v. Murphy*<sup>6</sup> and *Merritt v. Brown*.<sup>7</sup> Where one party to the contract has notified the other party that he will not perform it, by refusing to convey as in this case, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar to this remedy.<sup>8</sup> Change in the circumstances of the parties, and in the situation of the subject matter of the contract, the destruction of evidence, and the death of one of the parties to the contract, who if living could

<sup>1</sup> Chancellor Kent, in *Seymour v. Delancey*, 6 Johns. Ch. 222.

<sup>2</sup> 1 Story's Eq. Jur. § 769.

<sup>3</sup> Chief Justice Ryan, in *Williams v. Williams*, 50 Wis. 311.

<sup>4</sup> Lord Erskine, in *Radcliffe v. Warrington*, 12 Ves. 331.

<sup>5</sup> *Johns v. Norris*, 22 N. J. Eq. 102.

<sup>6</sup> 21 N. J. Eq. 118.

<sup>7</sup> 21 N. J. Eq. 401.

<sup>8</sup> *McDirmid v. McGregor*, 21 Minn. 111.

make clear what his successor might not be able to explain, are mentioned in *Anthony v. Leftwich*,<sup>1</sup> as reasons for denying the relief. In *Ruff's Appeal*,<sup>2</sup> a railroad had been built which brought the lands within reach of the market, and greatly enhanced their value, and some of the lands had been sold, and the plaintiff laid by for years while these changes were going on. It was held inequitable to decree specific performance. That was very much like this case. The lands have been sold for taxes, and yet the plaintiff waited until they became vastly enhanced in value by railroad and other improvements. Specific performance will not be enforced if for any reason it is inequitable to do so.<sup>3</sup> The following authorities enforce the principle that laches and unreasonable delay in bringing suit will defeat an action for specific performance of a contract to convey.<sup>4</sup>

The reasons are abundant why equitable relief should be denied in this case. The disparity in the value of the lands, of from twenty to fifty fold over their value when the contract was made or when it was to have been performed, is ample reason to leave the plaintiff to his legal remedy for the breach of the contract.

In analogy to all other like cases, as in the sale of personal property, or for breach of the covenant of seizin in deeds, the plaintiff would be entitled only to recover the consideration paid and interest, or the difference between that and the value of lands when they ought to have been conveyed, or at most, and by the most liberal rule, the value of the lands at the time of the breach of the contract. The equitable remedy in this case would be so extravagantly greater than at law that it would scarcely seem to be in the same case.

<sup>1</sup> 3 Rand. (Va.) 238.

<sup>2</sup> 117 Pa. St. 319.

<sup>3</sup> *Williams v. Williams*, 50 Wis. 311.

<sup>4</sup> *Pom. Spec. Perf.* §§ 407, 408, and cases cited; *Fry Spec. Perf.* §§ 1072, 1078, 1079; *Eads v. Williams*, 4 De Gex, M. & G. 691; *Watson v. Reid*, 1 Russ. & M. 236; *Southcomb v. Bishop of Exeter*, 6 Hare 226; *Harrington v. Wheeler*, 4 Ves. 686; *Alley v. Deschamps*, 13 Ves. 225; *McWilliams v. Long*, 32 Barb. 194; *Delavan v. Duncan*, 49 N. Y. 485; *Davison v. Associates*, 71 N. Y. 333; *Henderson v. Hicks*, 58 Cal. 364; *Taylor v. Merrill*, 55 Ill. 52; *Smith v. Lawrence*, 15 Mich. 499; *Holt v. Rogers*, 8 Pet. 420; *Preston v. Preston*, 95 U. S. 200; *State ex rel. Polk Co. v. West*, 68 Mo. 229. See other cases cited in appellant's brief.

## McCABE v. MATTHEWS.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY 7, 1895.

*[Reported in 155 United States Reports 550.]*

ON March 1, 1889, the appellant, as plaintiff, filed in the Circuit Court his bill to compel the specific performance of a contract for the sale of real estate. The defendant demurred to this bill, on the ground of a lack of equity, which demurrer, on April 13, 1889, was sustained and the bill dismissed.<sup>1</sup> From this decree the plaintiff appealed to this court.

The facts as disclosed by the bill were that on February 9, 1880, Mrs. F. G. Montgomery, the owner of a tract of land, containing 1,635 acres, in Volusia County, State of Florida, entered into a written contract for the conveyance thereof to the defendant Matthews. This contract recited a consideration of one dollar, the receipt whereof was acknowledged, and the further "consideration of a tract of land situated near Orange Lake, containing five acres, the same to be planted out with five hundred orange stumps and the stumps budded with sweet buds and warranted to grow, and the party of the second part is to fence the lands and keep the trees from being damaged by stock of any kind," and provided that the purchase should be at the refusal of the defendant for a period of forty-five days. On February 10 the defendant executed a written instrument, purporting to sell and assign to plaintiff an undivided half interest in the agreement and the land; and thereafter, on the same day, a further contract for the subsequent conveyance of such half interest. This latter instrument was in the following language:

"Whereas Frances G. Montgomery, of St. John's County, Florida, has, on the 9th day of February, 1880, agreed in writing to grant and convey to me by deed all her estate and interest in section 40, in T. 13 S., of R. 32 east, and section 37, in T. 14 S., of R. 32 east, containing 1,635 acres, in Volusia County, Florida, subject to my refusal for forty-five days, for the consideration named in her agreement:

"Now, therefore, in consideration of the sum of one dollar to me in hand paid by William McCabe, of Tallahassee, Florida, the receipt whereof is hereby acknowledged, of the further sum of one hundred dollars, for which I am to draw upon said William McCabe with my deed to him, his heirs and assigns, for a one-half dividend interest in said lands attached, when I deliver to said Montgomery the deed to her referred to in said agreement and she makes to me the deed of

<sup>1</sup> 40 Fed. Rep. 338.

said lands therein referred to in her said agreement, and of the further sum of fifty dollars to be paid by said William McCabe after the issue of the patent for said lands and the completion of any proceedings founded on said patent, when issued, deemed necessary, in connection with said patent, to fortify the title to said lands and render it more marketable, the expenses connected with which issue and said proceedings connected therewith are to be borne solely by said McCabe. I do hereby sell and assign to said William McCabe, his heirs and assigns, a one-half undivided interest in said agreement of said Montgomery and in said lands so to be conveyed by her to me as aforesaid, and agree to make to the said McCabe, his heirs and assigns, a deed for said interest in said lands and to attach the same to said draft on him as aforesaid within three months from the date hereof, it being understood that the expenses connected with the claim of one Stephen Snow to said lands or a part of them and all other expenses shall be borne equally by said McCabe and myself as joint equal owners of said lands so to be conveyed as aforesaid.

"In witness whereof I hereto set my hand and seal, at Jacksonville, Fla., this 10 day of February, A.D. 1880.

"(Signed)

J. O. MATTHEWS. [SEAL.]"

Before the expiration of the forty-five days the defendant notified Mrs. Montgomery of the acceptance of the contract. The plaintiff after the execution of his contracts with the defendant went to the county seat of Volusia County for the purpose of investigating the claims of Stephen Snow, said to be in possession of the lands, or a part thereof. In such investigation he expended his time and money, and obtained valuable information concerning the lands and the title thereto, which he communicated to defendant, and shortly thereafter returned to his home in Toronto, Canada, instructing the defendant to send the deed with the draft as provided in the contract. There he attempted to open a correspondence with defendant, but the last letter received from him was dated June 20, 1880, and though plaintiff subsequently wrote several times he received no answer, and finding that defendant so failed to answer, he caused, on December 23, 1880, his contract to be recorded in the office of the clerk of the Circuit Court of that county. Subsequently the defendant procured a deed for the lands from Mrs. Montgomery, which deed bears date July 1, 1882, and was recorded in the office of the clerk of the Circuit Court of Volusia County on July 14, 1884, and in pursuance of such deed he entered into and has continued in possession. In fraud of plaintiff's rights, and with the purpose to defraud him, defendant kept the fact of the deed and the possession of the lands a secret from plaintiff, who was not informed thereof until



the spring of the year 1887, when he received notice thereof from the clerk of the Circuit Court for Volusia County. Plaintiff thereupon obtained an abstract of the title, whereupon appeared the deed from Mrs. Montgomery to defendant. As soon as it was practicable thereafter for him to leave his business affairs, and in February, 1888, he went to Florida to take steps for asserting his rights, and employed counsel, who at once demanded a conveyance to plaintiff of the undivided half interest, and at the same time notified the defendant of the plaintiff's readiness to perform his obligations.

The bill also alleged that plaintiff had always been ready and willing to comply with all the terms of the contract by him stipulated to be kept and performed, but that the defendant wholly refused and still refuses to comply on his part, and further, on information and belief, that defendant had conveyed or attempted to convey, and mortgaged or attempted to mortgage, certain unknown pieces or parcels of the tract. There was no allegation in the bill of any tender of either of the two sums of one hundred dollars and fifty dollars, stipulated by said contract to be paid by plaintiff to defendant, nor was there any allegation of the present value of the property, but after the entry of the decree of dismissal two affidavits were filed by consent of the defendant, showing the value of the tract as a whole at the date of the decree, April 13, 1889, to be over \$15,000.

*Mr. Henry Wise Garnett* for appellant.

*Mr. H. Bisbee* for appellee submitted on his brief.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case.<sup>1</sup>

Tested by this rule, the decision of the Circuit Court was unquestionably correct. There is no averment in the bill of a tender of any money by plaintiff to defendant, and while it may be that the stipulations in the contract of conveyance by defendant and payment by plaintiff are independent covenants,<sup>2</sup> and that the obligation of conveyance precedes that of payment, yet the omission of a tender is significant upon the question of how much the plaintiff suffers by reason of a refusal to decree specific performance. The only sum which defendant has received is one dollar, and that is the only definite amount which it is shown the plaintiff has expended. It is true the bill alleges

<sup>1</sup> *Pratt v. Carroll*, 8 Cranch 471; *Holt v. Rogers*, 8 Pet. 420; *Willard v. Tayloe*, 8 Wall. 557; *Hennessy v. Woolworth*, 128 U. S. 428.

<sup>2</sup> *Loud v. Pomona Land and Water Company*, 153 U. S. 564.

that after the contract he went to the county seat of Volusia County, and expended time and money in obtaining information concerning the title, but how much time and money is not disclosed. In other words, the plaintiff, having invested a dollar in this speculation, waits nine years before he comes into a court of equity to ask a decree for the performance of his contract of purchase.

On the other hand, by the agreement between the defendant and Mrs. Montgomery, he was to convey to her a tract of land containing five acres, which he was to plant with five hundred orange stumps, the stumps budded with sweet buds, and guaranteed to grow; to fence the land and keep the trees from being damaged by stock of any kind. By the first instrument executed by the defendant, to wit, the assignment of a half interest in the agreement, the plaintiff was doubtless under obligation to assume the burden of half the consideration to be paid by defendant to Mrs. Montgomery. The second instrument, the contract to convey, upon which this suit is brought, executed the same day, was apparently in substitution of the assignment, and perhaps made the payment of the \$150 the equivalent of such half of the consideration. As the defendant obtained a deed from Mrs. Montgomery, it is to be presumed that he fully complied with the terms of his contract with her; that he conveyed the five acres and performed all the work required thereon. Such was his investment over against the plaintiff's one dollar.

While plaintiff was not informed by defendant that the latter repudiated the contract, he had the very same year good reason to believe that such was the fact, because his letters to defendant were unanswered; indeed, his suspicions were aroused, and in consequence thereof he caused his contract to be recorded before the close of the year 1880. The deed to defendant was duly recorded in July, 1884, and the plaintiff had actual knowledge of this in the spring of 1887. Notwithstanding all this he waits until March 1, 1889, before filing his bill, and, upon the entry of a decree against him, on April 13, 1889, he waits until March 9, 1891, before taking his appeal to this court.

Nowhere on the face of the bill is the value of the property disclosed; nothing to show a value sufficient to give jurisdiction to the Circuit Court, but by the affidavits filed after the decree of dismissal it appears that the entire property was worth at the time of the decree (which was less than a month and a half after the filing of the bill) the sum of \$15,000. Great has been the change in the value of the premises! The half interest was worth at the date of his contract, as shown by the stipulated price, but \$150, while at the time he brings his suit it is worth \$7,500. It does not appear that he has done anything towards bringing about such increase of value, and no excuse is shown for his

ignorance of the exact condition of affairs, or his inattention to the matter, except his residence in a remote province.

So that we have presented the case of one who, investing a dollar in a proposed purchase of lands, and doing nothing to assist his vendor in furnishing the property or performing the work necessary to be furnished and performed by such vendor to acquire the title to the lands, waits nine years after his contract has been entered into, nearly nine years after he has good reason to believe that such vendor repudiates all liability under the contract, nearly five years after notice has been given by such vendor of his acquisition of the title by filing the deed in the public records, two years after he receives actual notice of that fact, and then without the tender of any money, or other consideration, appeals to a court of equity to compel such vendor to deed to him an interest in land worth at the time of his contract only \$150, and now \$7,500. It seems to us to be a case of a purely speculative contract on the part of the plaintiff; doing nothing himself, he waits many years to see what the outcome of the purchase by defendant shall be. If such purchase proves a profitable investment, he will demand his share; if unprofitable, he will let it alone. Under those circumstances the long delay is such laches as forbids a court of equity to interfere. The decision of the Circuit Court is right, and it is affirmed.

## SECTION IV.—DEFENSES (CONTINUED).

### (2) *Performance by Defendant Impossible.*

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HOOPER *v.* SMART.

BAILEY *v.* PIPER.

IN CHANCERY, BEFORE SIR CHARLES HALL, V.C., JULY 6, 1874.

[*Reported in Law Reports, 18 Equity Cases 683.*]

MOTION for decree.

By an agreement made in October, 1872, the defendants, R. F. and C. A. Piper, in the suit of *Bailey v. Piper*, agreed to sell to the plaintiff Bailey the fee simple in possession, free from incumbrances, of the entirety a certain freehold property in the bill mentioned for the sum of £6,000. The vendors were to make out a good marketable title. The plaintiff Bailey paid £400, and the residue of the purchase-money (less the sum of £105 as commission to the parties who negotiated the sale) was to be paid on the completion of the purchase. The plaintiff Bailey entered into possession and laid out the property for building purposes. Questions arose in reference to the title, and in consequence of the great delay on the part of the defendants Piper in completing the sale, the plaintiff Bailey filed a bill against them for specific performance of the agreement. The defendants Piper were subsequently adjudicated bankrupts, and their trustees in bankruptcy were by a supplemental order made defendants. In January, 1874, a decree in the suit of *Bailey v. Piper* was made, declaring that the agreement ought to be specifically performed and carried into execution in case a good title could be made to the property. Certain inquiries were directed in reference to the title, and the chief clerk certified that a good title could not be made by the defendants Piper to the entirety, and that the title to an undivided moiety of the property was the subject-matter of a suit, "*Hooper v. Smart*," in this court. It was then ordered that the suit of *Hooper v. Smart* should come on to be heard immediately before that of *Bailey v. Piper*, and it was held that the plaintiffs in that case were entitled to an undivided moiety of the property.

It appeared that in the course of the proceedings the plaintiff Bailey had entered into a subsequent agreement with the plaintiffs in Hooper *v.* Smart to purchase their moiety of the property.

*Mr. Dickinson*, Q.C., and *Mr. Horton Smith* for the plaintiff Bailey.

*Mr. Macnaghten* for Mr. Smart, the trustee in bankruptcy of R. F. Piper.

*Mr. Northmore Lawrence* for Mr. Nichols, the trustee in bankruptcy of C. A. Piper.

SIR CHARLES HALL, V.C. This is a case in which the exercise of the discretionary jurisdiction of the court is asked for, the bill being one for the specific performance of an agreement. In *Barnes v. Wood*<sup>1</sup> the plaintiff, who in ignorance purchased property in fee, the vendor being entitled to only a life interest, was held entitled to a conveyance of the life interest, with compensation, and a decree for specific performance was made. In that case no injustice was done to the vendor, for he was paid for all that he could sell to the purchaser. So in this case by making the decree asked for no injustice will be done to the trustees in bankruptcy of the Messrs. Piper, for they will get the full price of their share of the property sold, perhaps more than they would have got in case the Messrs. Piper had sold an undivided moiety, because usually the value of an undivided interest is less in proportion than that of the entirety of an estate. It has been argued that some of the authorities prevent my applying the ordinary rule, viz., that the purchaser may have all he can get from the vendor. The decision in the case of *Barnes v. Wood* was fully recognized by Lord Hatherley in giving judgment in the case of *Castle v. Wilkinson*.<sup>2</sup> The Lord Chancellor there said that the decision "that where a man proposes to convey the whole of an estate as owner of the fee simple, and it turns out that he is only entitled *pur autre vie*, and that his wife has the remainder, there the court can insist on his making good his contract to the extent to which he is able to make it good, and he must submit to an abatement of the consideration to be paid for that which he improperly alleged he was capable of selling," was in strict conformity with the other authorities. In my opinion it would be a denial of justice if I did not make a decree for the specific performance of this agreement to the extent of the undivided moiety to which the defendants, the Messrs. Piper, were entitled when they entered into the agreement, and also order that the vendors do submit to an abatement from the purchase-money of one-half the amount.

<sup>1</sup> 1 L. R. 8 Eq. 424.

<sup>2</sup> Law Rep. 5 Ch. 534, 536.

## THE EARL OF DURHAM v. SIR FRANCIS LEGARD.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JULY 5, 14, 1865.

[Reported in 34 Beavan 611.]

IN 1862 the plaintiff agreed to purchase an estate of the defendant for £66,000. It was described in the written contract as the "Kidland estate containing 21,750 acres."

In the course of the investigation of the title it turned out that the Kidland estate contained no more than 11,814 acres.

In May, 1863, the purchaser instituted this suit for the specific performance of the contract, on payment "of the purchase-money, less a proper compensation for the deficiency in quantity." The defendant was willing either to perform the contract on receiving the full price stipulated or to cancel the contract.

The plaintiff stated in his affidavit that he purchased the estate under the impression that its contents was 22,000 acres or thereabouts, that he would not have purchased if the real area had been stated, and that he had been guided in the price given by the extent of the estate and not by the rental, especially as he regarded it as affording him shooting and fishing over a large area.

On the other hand, on the part of the defendant, it was shown that the representation of the quantity was a *bona fide* mistake of his agent, and the defendant said that "throughout his negotiation, he was, in determining the value of and fixing the price he should ask for the estate, actuated solely by the consideration of the rental thereof, and upon which alone he had made his calculations."

The Attorney-General (*Sir R. Palmer*), *Mr. Wickens* and *Mr. Batten* for the plaintiff.

*Sir Hugh Cairns*, *Mr. Hobhouse* and *Mr. Williamson*, for the defendant, were not called on.

THE MASTER OF THE ROLLS. I am of opinion that this is not a case for compensation at all, it is quite distinct from that, it is a case of mistake, and not a case for compensation.

The court, it is true, exercises a discretion in cases of specific performance; but it is laid down in *White v. Damon*,<sup>1</sup> and in many other cases, that the discretion in giving specific performance is "not an arbitrary capricious discretion, but must be regulated upon grounds that will make it judicial." I admit that the general rule is that where there is a deficiency in quantity, such deficiency is properly the subject of compensation; but that rule must be confined within certain

<sup>1</sup> 7 Ves. 30.

limits. Where a person sells 21,000 acres, and finds that he has only 11,000 to sell, or, in point of fact, little more than half of what he has disposed of, that, in my opinion, is not a case for compensation, nor do I know how the court could deal with it as a case of compensation. In all these cases, where the court has found that it is utterly impossible to deal with the case as one for compensation, it has said "this is not a case for compensation, but one for avoiding the contract." For instance, if a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation; so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting, because it belongs to somebody else, I apprehend it is not a case in which the court can ascertain what should be the amount of compensation to be given. In all those cases the court simply says it will avoid the contract, and it will not allow either party to enforce it, unless the person who is prejudiced by the error be willing to perform the contract without compensation.

In *Price v. North*,<sup>1</sup> what was sold was "seven fields, fourteen acres more or less." By one of the conditions of sale, any mistake or error in the description was to be the subject of compensation. It turned out that there were twenty-seven acres, and the vendor said "this is not to annul the sale, but is to be made the subject of compensation, and I am entitled to an additional price." But the court said "that such a mis-description as this would not be the ground for modifying the contract, but for avoiding the sale altogether." So, in this case, a person buys one-half the quantity of land that he intended to buy, and the vendor intended to sell. The result is, that there has been a mistake between the parties, and I am of opinion that this is not a case in which the court could, upon any principle, assess compensation so as to make everything fair between them.

In the case of *Hill v. Buckley*,<sup>2</sup> which is usually cited upon these occasions, Sir William Grant laid it down that when the land turns out to be less than it is represented to be, the ordinary mode of calculating the compensation is, to ascertain the quantity, and allow for the deficiency. But if that principle were followed here, the plaintiff would get for less than £36,000 an estate the rental of which was accurately stated and which the defendant intended to sell for £66,000. It is, therefore, clear I should be doing great injustice if I applied that rule upon the present occasion.

I am of opinion that this is simply a case of mistake, and that the

<sup>1</sup> 2 Young & C. (Ex.) 620.

<sup>2</sup> 17 Ves. 394.

purchaser is not entitled to any compensation. He may elect to perform the contract without compensation, but, considering the defendant's offer before suit, the plaintiff must pay the costs of suit down to the present time.<sup>1</sup>

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## CASTLE v. WILKINSON.

IN CHANCERY, BEFORE LORD HATHERLEY, C., AND SIR G. M. GIFFARD, L.J., MARCH 23, 1870.

[*Reported in Law Reports, 5 Chancery Appeals 534.*]

ANN RICHARDSON, the wife of the defendant Benjamin Richardson, was equitably entitled as tenant in fee simple to an undivided moiety of certain lands in Yorkshire; and by an agreement dated the 5th of October, 1863, and made between Benjamin Richardson and his wife

<sup>1</sup> The defendant when refusing to deliver a deed in conformity with the claim of the plaintiff, and also by the answer to the suit, and at the hearing before the Master, has offered to make reasonable compensation to the plaintiff, not only by moving back his building, but also by paying him for the land claimed by him, which is cut off by the line of the street. This the plaintiff refuses to accept, but does not show that he may not thus be fully indemnified. His right to a specific performance of the agreement is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the case. This would be so even if the agreement were fully and satisfactorily made out precisely as claimed by him.

It is manifest that, if the agreement was so made, it was by inadvertence, the defendant at the time not perceiving the interference with the contemplated lines of East Street. The rights of other parties who have in good faith purchased lots upon East Street, and, as the defendant alleges, have erected buildings thereon, have intervened; and although those rights are subsequent in time, and therefore subordinate to those of the plaintiff, yet they furnish equitable considerations to be regarded in adjudicating the rights between the parties to this suit. If the plaintiff can have full and complete indemnity upon his contract otherwise, equity does not require that he should have specific performance by which he will inflict great and unnecessary injury upon other persons who are in no way responsible for the position in which he is placed.

We are of opinion therefore that specific performance should be refused, unless the plaintiff will accept a conveyance with boundaries conforming to the line of East Street, and with compensation for the land cut off by that line and for the damages occasioned by the necessity of removing his building from the limits of the street. If he shall elect to accept such conveyance and compensation, a decree may be entered accordingly, and a Master appointed to see to its execution and to determine the amount of such compensation, and the mode in which it shall be rendered. Otherwise he will be remitted to his action at law for damages upon the entire contract, and this bill will be dismissed.—Wells, J., *Curran v. Holyoke Water Power Company*, 116 Mass. 90, 91-2.—ED.



of the one part, and the plaintiff R. Castle of the other part, Richardson and his wife agreed to sell, and R. Castle to purchase, "All that the moiety or equal half part of the said B. Richardson, and Ann his wife, in right of the said Ann Richardson," of and in the lands above-mentioned, "and the freehold and inheritance thereof in fee simple, freed from all charges and incumbrances," for £600; and by the agreement provisions were made for the execution of the deed of conveyance and for the acknowledgment by Ann Richardson. Richardson and his wife alleged that they were not bound by this agreement, and refused to convey.

On the 7th of September, 1864, Richardson and his wife executed a deed of conveyance of the same moiety of the lands to the defendant Wilkinson, in consideration of £550, and the deed was duly acknowledged by Ann Richardson.

A suit of *Wilkinson v. Castle* for a partition was afterwards instituted by Wilkinson, and after several proceedings in that suit the bill in this suit was filed by Castle against Wilkinson and Richardson, charging that the agreement of the 5th of October, 1863, was binding on Richardson so far as related to his estate and interest in the moiety comprised therein, and ought to be specifically performed with such abatement of the purchase-money as the court should deem just; that the conveyance of 1864 was a fraud upon the plaintiff, and that the defendant Wilkinson was bound to give effect to the agreement of 1863. And the bill prayed for relief accordingly.

The suit now came on as an original motion for decree, together with the suit of *Wilkinson v. Castle* on a rehearing.

*Mr. Karlake*, Q.C., and *Mr. Morgan*, Q.C., for the plaintiff Castle.

*Mr. Greene*, Q.C., and *Mr. C. Russell* for the defendant Wilkinson.

*Mr. H. A. Giffard* for other parties.

LORD HATHERLEY, L.C., after stating the facts of the case, continued: The only question, however, is, whether this bill for specific performance can be maintained to the extent of holding that Richardson shall part with all the interest he can part with, namely, his estate for the joint lives of himself and his wife, and his estate by curtesy, with an abatement of the purchase-money. Now, I apprehend that the law is settled as to this upon the authorities referred to by Lord St. Leonards,<sup>1</sup> that if a man professes to be owner of the fee simple, and undertakes to sell the fee simple, and it turns out that he had not power so to do, the purchaser not being at the time aware of the difficulty, then the vendor must convey as much as he can, and submit to an abatement. But the case is wholly different where the vendor does not profess to sell the fee, but only that estate which he is able to dispose of. Here, on the

<sup>1</sup> Sug. V. & P., 14th Ed., ch. 8, § 1.

face of the agreement, the husband and wife intended to sell, and the purchaser knew that he was contracting with them for the estate of the wife, and that he could only get what the wife was willing to convey ; and there is no authority at all approaching to such a proposition as it has been necessary to contend for here, that the husband can be compelled to part with his partial interest in the estate, the agreement being by him and his wife to convey the whole.

The latest authority, *Barnes v. Wood*,<sup>1</sup> before Vice-Chancellor James, is in strict conformity with the other authorities, as, indeed, one might well expect it to be, namely, that where a man proposes to convey the whole of an estate, as owner of the fee simple, and it turns out that he is only entitled *pur autre vie*, and that his wife has the remainder, there the court can insist on his making good his contract to the extent to which he is able to make it good, and he must submit to an abatement of the consideration to be paid for that which he improperly alleged he was capable of selling. Since the case of *Emery v. Wase*,<sup>2</sup> the whole matter has been settled, and as the purchaser has chosen to file this bill with a full knowledge of the law and facts, his bill must be dismissed with costs as against Wilkinson, and without costs as against Richardson.

SIR G. M. GIFFARD, L.J. In this case the attempt made by this bill is to enforce specific performance of a contract between a husband and wife and the purchaser ; the purchaser not being misled in the slightest degree by anything appearing upon the face of the contract, because the contract states plainly and clearly upon the face of it, not that Richardson is entitled to the fee simple, but that he is entitled to the land in right of his wife, and that the fee simple is in truth in his wife.

That being so, it is the unquestionable law of this court that such a contract cannot be enforced either partially or wholly. All those cases in which the contract has been enforced partially, and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple. Here it is quite clear that the purchaser never could have believed for one moment that he could purchase the fee simple ; and that being so, the bill must be dismissed. For myself, I should have thought the law too clear for argument.

<sup>1</sup> Law Rep. 8 Eq. 424.

<sup>2</sup> 5 Ves. 846.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY  
v. EDWARD DURANT AND OTHERS.

IN THE SUPREME COURT OF MINNESOTA, OCTOBER 7, 1890.

[Reported in 44 Minnesota Reports 361.]

APPEAL by plaintiff from an order of the district court for Washington County, McCLUER, J., presiding, sustaining the separate demurrers of the defendants Edward W. Durant, Roscoe F. Hersey, Joseph C. O'Gorman, as receiver of Seymour, Sabin & Co. (a corporation), Ernest L. Hospes, Isaac Staples, and the Union Depot, Street Railway & Transfer Co., to the plaintiff's complaint.

*W. H. Norris* for appellant.

*J. N. & I. W. Castle, Fayette Marsh, and Searles & Gail* for respondents.

VANDERBURGH, J. The demurrers to the complaint interposed in behalf of defendants Durant, Hospes, Hersey, Staples, the Union Depot Company, and O'Gorman, receiver, were sustained by the trial court, and the complaint held sufficient as to the other defendants. From the order sustaining the demurrer the plaintiff appeals, and the principal question presented for our determination is whether the complaint states a cause of action in respect to the defendants above named. Generally, in equitable actions of this kind, the merits can be best determined upon proofs after answer, but we will examine and consider such questions as are fairly before us on this appeal.

The city has not furnished the right of way as agreed, and the defendants have not caused it to be done or procured it themselves, through either block. The question now arises whether, upon the facts herein stated, a case is made for the interposition of a court of equity so as to warrant a decree for specific performance as to the defendants Union Depot Company and Sabin, and to award a judgment for damages against other defendants, by way of compensation for the deficiency.<sup>1</sup> The court will not undertake to compel the defendants, jointly or severally, to purchase the specific property, or to procure the right of way from the city. And it is not a case for compensation, because, conceding that the court might compel the depot company and Sabin to convey a partial interest representing a relative or proportionate share of individual obligors, as above described, the same would be relatively so small, as compared with the whole amount embraced in the contract, that the compensation or damages would apparently be the main object

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

of the suit. In such cases a court of equity will not assess damages as compensation, but only where they are incidental to the principal ground of relief; and the court will leave the party to his action at law unless he will consent to accept the part subject to conveyance without damages.<sup>1</sup> In some cases, however, where the vendor shows title to a portion only of the land contracted, or has wrongfully parted with part, justice may be done by an apportionment of the consideration, if the vendee consent to take part with an abatement of the price.<sup>2</sup> So, where the vendee knows at the time of entering into the contract (as may be implied in this case from the terms of the contract) that the vendor has title to a part only of the land, compensation will be denied.<sup>3</sup> This is not a case between vendor and vendee. By the contract the right of way was to be procured by or from others by gift or purchase. The plaintiff did not contract for a conveyance from the defendants. It did not rely upon the individual ownership of the obligors. The city was to give the right of way; and, as to block twenty-seven, the defendants were to purchase the entire half-block jointly, and jointly bear the burden. It was not fairly within the contemplation of the parties that the interests which the individual obligors might have in some of the land embraced in the proposed right of way should be made subject to enforced conveyance under the contract, if unfulfilled in its scope and purpose by the obligors who jointly entered into it. Equity, it is true, looks at the substance of the contract, and, when the agreement can be substantially, though not literally, carried out, without changing the nature of the contract or substituting a new one, and do justice between the parties, it will be so enforced. The doctrine of compensation rests upon this principle. And so where land is held as tenants in common by several persons who have jointly agreed to convey the same, some of whom are not bound or are deceased, those who are liable, or who survive, may be compelled, in a suit on the contract, to convey their individual or proportionate interests as tenants in common.<sup>4</sup> But such is not this case. The contract did not contemplate a conveyance of individual interests, but the acquisition of the right of way by the public, and by the joint act or purchase by the obligors, and, as to block twenty-seven, an essential condition and inducement to the parties was the purchase of the half-block, and not the right of way merely.

In any view of the case, and apart from the question of laches, considering the nature of the contract, the state of the title, the indefinite-

<sup>1</sup> Earl of Durham v. Legard, 34 Law J. Ch. 589.

<sup>2</sup> 2 Lead. Cas. Eq. (4th Ed.) pt. 2, p. 1146.

<sup>3</sup> Wat. Spec. Perf. § 506; 5 Wait, Act. & Def. 781.

<sup>4</sup> Hooker v. Pyncheon, 8 Gray 550.

ness and uncertainty in the description set forth in the contract, we think that the parties should be left to their action at law, and the interposition of a court of equity is not warranted.

Order affirmed.

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MICHAEL H. HAFLEY, APPELLANT, *v.* SARAH LYNCH,  
RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 9, 1894.

[*Reported in 143 New York Reports 241.*]

APPEAL from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made at the April term, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This was an action to compel the specific performance by defendant of an agreement to sell certain real estate.

The facts, so far as material, are stated in the opinion.

*Charles Strauss* for appellant.

*Henry H. Anderson* for respondent.

EARL, J. At an auction sale of the defendant's real estate the plaintiff purchased a parcel of land described in the complaint at the price of \$7,800, and paid ten per cent. of the purchase-price, besides certain fees and expenses. The parties signed a written contract specifying the terms of sale and the time and place of full performance by the parties. By the written contract the defendant was to convey the land "by the usual deed containing full covenants with warranty." The defendant did not tender to the plaintiff such a deed as he claimed he was entitled to, and then he commenced this action against her to compel the specific performance of the contract. Upon the trial of the action it appeared that she had at the time of the sale such a title to the land as she was bound to give. But subsequently one Nathaniel Jarvis, Jr., claiming the land in fee, brought an action of ejectment against her to recover the land and filed a *lis pendens*. The plaintiff knew of this claim and the *lis pendens* when he commenced this action, and solely on account of the existence of the *lis pendens* and such knowledge thereof the court refused specific performance and dismissed the complaint. We think the learned court fell into error, and that upon the undisputed facts found it should have given to the plaintiff judgment for specific performance.

We must first notice the issue joined by the pleadings. The plaintiff alleged in his complaint the contract; that he had performed the

same and was ready and willing to perform the same upon receiving such a conveyance as he was entitled to; that after several postponements of time for the performance of the contract at the request of the defendant, her attorney tendered to him a deed of the land, at the same time saying to him that she could not give him a valid and marketable title to the land because it was encumbered; that he rejected the deed on the ground of the alleged incumbrance upon the land, at the same time notifying her that he was ready and willing to perform on his part if she would give him such a deed as he was entitled to; that she refused to give him such a deed; that the title to the land was encumbered and rendered unmarketable by the *lis pendens* filed in the ejectment action; that the defendant could at all times have obtained the cancellation and discharge of the *lis pendens* and could have conveyed to him such a title as the contract entitled him to. She, in her answer, admitted the making of the contract; denied that he had performed or was ready and willing to perform the contract on his part; admitted the commencement of the ejectment suit and the filing of the *lis pendens*; alleged that she had tendered to him such a deed as she was bound to give; denied that she was at any time unable or unwilling to convey the land, and alleged that she could at all times since the execution of the contract have conveyed the title of the land to him according to the contract had she been so disposed, and that she has at all times been ready and willing so to do.

It thus appears that the issue between the parties was as to the performance of the contract, the plaintiff alleging that he had performed and was ready and willing to perform, and the defendant alleging that she had performed and was ready, willing, and able to perform on her part.

On the trial the plaintiff was the sole witness sworn, and the trial judge, after finding the ownership of the land by the defendant and the making of the contract, found as follows: "That the plaintiff has in all things performed all the terms and conditions of said contract, and has been, on his part, ready and willing to fulfill the same and accept a conveyance of the fee of the said property." "That the said defendant, through her attorneys, has, prior to the commencement of this action, refused to make said conveyance under the said agreement, notwithstanding the plaintiff's frequent requests therefor." "That such refusal on the part of the defendant to make such conveyance was due to the fact that one Nathaniel Jarvis, Jr., had, after said sale but before the day fixed for the delivery of the deed thereunder, commenced an action in ejectment in this court against said

defendant, claiming the ownership of the premises in question, and had filed a notice of the pendency of said action in the office of the clerk of the city and county of New York on March 6, 1889."

"That thereafter, and before the trial of this action, the said ejectment suit was brought to trial, and the complaint therein was dismissed, and from the judgment entered on such dismissal an appeal was taken to the General Term of this court, which court affirmed said judgment; and no appeal from said order of the General Term has been taken to the Court of Appeals, and the time to do so has now expired."

"That the said plaintiff has expressed his consent at the trial of this action to accept from the defendant a conveyance of said land by the usual deed containing full covenants with warranty, subject to the reservations contained in the eighth paragraph of the said terms of sale."

"That less than three years have passed since the rendering of judgment and the filing of the judgment roll in the said decision of *Jarvis v. Lynch*."

And he found, as conclusions of law, "that the sale having been made in good faith, and the question as to the title of the said premises having arisen since the sale, the defendant should not be compelled to give a warranty deed or procure a policy of title insurance of the Lawyers' Title Insurance Company, insuring the title to the said premises to the plaintiff." "That the defendant is entitled to judgment dismissing the complaint upon the merits of the action." "That such judgment should be without prejudice to the right of the plaintiff to bring an action for damages for breach of the contract set forth in complaint."

The plaintiff has been defeated in his action thus far on the ground that it was impossible for the defendant to perform her contract at the time of the commencement of the action, and that he knew it was. She did not set up such a defense in her answer, but, on the contrary, alleged that she was able and ready to perform her contract; and there was no proof showing that it was then impossible for her to perform the contract. There was no evidence showing what basis, if any, the claim of title to the land by *Jarvis* had. It may have been colorable and not real or substantial. It did not appear that she had made any effort whatever to remove the incumbrance of the *lis pendens*. It was her duty to perform the contract and to make all reasonable efforts to remove any obstacle which stood in the way of her performance.

The plaintiff was not in fault for refusing to accept a deed which

the defendant at the time declared would convey an encumbered title. He was entitled to a marketable title.<sup>1</sup>

It is a general rule in equity that the specific performance of a contract to convey real estate will not be granted when the vendor, in consequence of a defect in his title, is unable to perform. In such cases specific performance is denied because the court cannot enforce its judgment and because also it would be oppressive to the vendor. But if the defect in the title existed at the date of the contract, or was due to some fault or to some act of the vendor subsequent to the contract, the court will generally entertain an action for specific performance and retain jurisdiction for the purpose of awarding damages for the breach of the contract. But where, as in this case, the defect in the title arises after the making of the contract, without any fault of the vendor, and the vendee knew of the defect in the title when he commenced his action, it was formerly the rule that the court would not retain the action for the purpose of awarding damages.<sup>2</sup> This rule was adopted because the vendee should not commence a fruitless action in equity simply to recover there his damages for a breach of contract.<sup>3</sup> The rule has been modified since the Code practice which

<sup>1</sup> *Moore v. Williams*, 115 N. Y. 586 ; *Vought v. Williams*, 120 *id.* 257.

<sup>2</sup> *Wiswell v. McGowan*, Hoffman's Ch. 125 ; *Mooss v. Elmendorf*, 11 Paige 277.

<sup>3</sup> It is settled, with little or no conflict of authority, that when a defendant in a bill in equity disenables himself, pending the suit, to comply with an order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made ; and for this purpose will retain the bill, and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law. The character of the investigation is, therefore, not an insuperable objection to this mode of proceeding.

There is also authority, though apparently questioned in the English decisions, for the application of the same rule when the disability was caused before suit, but after the date of the agreement relied on. In this country it seems to be generally accepted as the rule, provided the plaintiff brought his bill without knowledge of the disability, in good faith seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief.

In the opinion of a majority of this court there is equal ground in equity for applying the same rule, with the same qualifications, to all cases where a defect of title, right or capacity in the defendant to fulfill his contract is developed by his answer, or in the course of the hearing, or upon reference of his title or capacity, after an order of fulfillment.

The rule assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case in chancery ; and that the special relief sought is defeated, not by any defense or counter-equities, but simply because an order therefor would be fruitless, from the inability of the defendant to comply. The



authorizes the joinder of legal and equitable causes of action, and while the equitable relief will be denied in such a case, now the action will be retained and the issue as to the breach of contract and damages will be sent to a jury for trial.<sup>1</sup>

But this rule was adopted in equity not solely because at the time of the commencement of the action the defects in the title existed to the knowledge of the vendee, but also because the case was such that at the time of the rendition of the judgment the court could not grant the equitable relief. The rule and the ground upon which it is based have no application to a case where the defect has disappeared at the time of the trial and the court can then give an effective judgment for the equitable relief demanded; and no case can be found prior to this where an equity court has denied specific performance because the vendor's title was defective at the commencement of the action, but valid and perfect at the time of the trial. In such a case why should not the vendor perform? He is able to, and the vendee is entitled to performance unless some other defense has intervened, and the court is able to enforce performance. Here the plaintiff was willing to take such a title as the defendant could convey at the trial. The ejectment suit had finally resulted in favor of the defendant. The *lis pendens* had ceased to be operative, and could, if necessary, have been removed. The fact that Jarvis could have paid the

jurisdiction is fixed by establishing the equitable right of the plaintiff. Relief might then be given by a decree in the alternative, awarding damages unless the defendant should secure the specific performance sought. In many cases this would be an effective and proper course, inasmuch as the defendant, although not having himself, at the time, the title or capacity requisite for such performance, might be able to procure it otherwise. The jurisdiction is not lost when the court, instead of such alternative decree, determines to proceed directly to an award of damages or compensation. The peculiar province of a court of chancery is to adapt its remedies to the circumstances of each case, as developed by the trial. It is acting within that province when it administers a remedy in damages merely in favor of a plaintiff who fails of other equitable relief to which he is entitled, without fault on his own part. The diversity of practice in this respect, and the doubt as to the jurisdiction, we think must have arisen less from the nature of the relief to be afforded than from the character of the means for determining the amount of compensation to be rendered.

The usual mode of determining such questions in chancery is by reference to a Master. If, however, the case be such as to require a jury to assess the damages, or to make that the more appropriate reference, it is then a matter of convenience and discretion only whether to order such an assessment, upon an issue of *quantum damni ficatus*, or to dismiss the bill and remit the parties to a trial in an action at law.—Wells, J., *Mickman v. Ordway*, 106 Mass. 232, 253-4.—ED.

<sup>1</sup> *Sternberger v. McGovern*, 56 N. Y. 12.

costs and taken a new trial under the statute is of no importance. There was final judgment against him, and the contingency that he might take a new trial is of no more importance than the contingency that some other person might at some time commence an action to recover the same land. Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action, and adapt their relief to those conditions. The plaintiff, in an equity action, as a general rule, should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such that, if he then commenced his action, he would be entitled to the equitable relief sought.

If a vendor has no title or a defective title to land which he contracts to sell, and subsequently obtains a perfect title, he can be compelled by his vendee to perform his contract.<sup>1</sup> And why should the vendor not be compelled to perform if he perfects his title while the action for specific performance is pending? A perfect title by the vendor is no part of the vendee's cause of action, and he is just as much entitled to the equitable relief, and the equity court is just as competent to give it, whether the title of the vendor was perfected before or after the commencement of the action.

It does not appear that anything occurred after the commencement of the action which should bar the relief asked by the plaintiff. There are no complications growing out of the lapse of time, and no material change in the situation of the parties or of the land in controversy.

We therefore see no reason to doubt, upon the facts found, that the plaintiff was entitled to specific performance of the contract; and the judgment should be reversed and a new trial granted, costs to abide event.

FINCH, O'BRIEN, and BARTLETT, JJ., concur; PECKHAM and GRAY, JJ., dissent; ANDREWS, Ch.J., not sitting.

Judgment reversed.

<sup>1</sup> Fry on Specific Performance [3d ed.] 480.

ABEL YOUNG, APPELLANT, v. JOHN RODMAN PAUL,  
RESPONDENT.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, NOVEMBER TERM, 1855.

*[Reported in 2 Stockton 401.]*

THE bill alleges that Abel Young, the defendant, is the owner of a farm, supposed to contain one hundred and seven acres, situated in the township of Oxford, in the County of Warren, in the State of New Jersey; that on or about the 14th of December, 1854, the complainant applied to him to purchase his farm; and that, after some negotiation, it was agreed between them, that if the plaintiff would purchase of J. Elias Butz his farm, of about the same number of acres, the defendant would exchange his farm for the Butz farm and a thousand dollars difference; that at the request of the complainant, the defendant went to consult his wife and family, and, on returning, said they would all assent to the arrangement; that the complainant then went and purchased the Butz farm; and being obliged to leave immediately for his home in Philadelphia, he authorized his brother, as agent for him, to enter into a written agreement with the defendant for the exchange of farms; that his brother, as his agent, and the said defendant, on the same day, executed an agreement in writing, by which it was agreed, that on the first day of April, the said complainant should convey, free and clear of all incumbrance, the Butz farm to the defendant, and that on the same day the said defendant should convey to the complainant the said farm then owned and occupied by the said defendant; and further, that the said difference in exchange should be \$1,000, which the said complainant agreed to pay to the defendant. The bill alleges that the wife of the defendant expressed herself satisfied with the agreement; that, on the first of April, the complainant was ready on his part to fulfill the agreement, and tendered to the defendant a deed for the Butz farm, signed by himself and wife with full covenants; and that, on the same day, the defendant tendered to the complainant a deed for his farm, but that the deed was not signed by the wife; that the defendant pretended his wife could not execute the deed; that the complainant then offered to take the deed without the wife's joining in the conveyance, provided the defendant would indemnify him on the Butz farm against any claim of dower which the wife of the defendant might be entitled to hereafter, or by giving him other satisfactory security.

The bill prays that the said defendant may be decreed specifically to perform the said agreement by a proper conveyance with his wife, or

that he be decreed to make compensation for the value of the wife's incumbrance, to be deducted from the purchase-money; or, if more agreeable to equity, that the covenants of the defendant for incumbrances be declared a lien on the Butz farm, as an indemnity against any right or claim of dower which may hereafter be made by the defendant's wife.

The defendant answered the bill, and depositions were taken by both parties.

The defense set up will appear fully by the opinion of the Chancellor.

The cause was argued in the Court of Chancery by *P. Kennedy* and *W. L. Dayton*, for the complainant, and *J. H. Norton* and *James S. Nevius* for defendant.

At the term of February, 1855, a decree was made in favor of the complainant. From this decree an appeal was taken. The Chancellor furnished the court with the following opinion, as containing the reasons for his decree :

The CHANCELLOR. There are several grounds upon which the defendant resists a decree for specific performance. I shall notice them in the order in which they were presented on the argument.

The principal ground upon which a decree is resisted is, that when the agreement was entered into, the defendant supposed that his wife would execute the deed ;<sup>\*</sup> but since she has resisted all his reasonable persuasions, and (by her refusal) it is rendered impossible for him to perform his contract, the court ought not, under such circumstances, to make a decree against him to do that which is out of his power to do.

In examining the evidence of the case, it is impossible to resist the conclusion, that the defendant has acted in bad faith in this transaction, and that the unwillingness and refusal of the wife to execute the deed is more in compliance with the wishes of her husband than her own disposition and unrestrained judgment. There is enough evidence to show that the complainant was unwilling to enter into the contract until the wife of the defendant was first consulted, and gave her assent ; and that, notwithstanding the denial in the answer, she did assent to the contract. She gave her reasons why she considered the bargain an advantageous one to herself and husband. It is proved that the defendant declared his determination to back out, as he expressed it. His position is not one to ask any favor of the court, or to give him the benefit of a doubtful principle to which fair and upright dealing might justly lay a claim.

But the fact is, the wife now refuses to execute the deed ; and it is necessary to its validity that she should sign it, and acknowledge, before

<sup>1</sup> Only so much of the opinion is given as relates to this question.—ED.

the proper officer, that she signed, sealed and delivered it as her voluntary act and deed freely, without any fear, threats or compulsion of her husband. If the court decrees a specific performance according to the terms of the contract, the husband must procure his wife to sign the deed in some way, *per fas aut nefas*, or else take the consequences of disobedience to the order of the court. This then is, in effect, a decree by which the wife is forced into executing a deed. When she is brought before the proper officer, he certifies to her acknowledgment of its being her free and voluntary act, when it is notorious that it is the decree of this court, held up to her *in terrorem*, which must be either obeyed by her husband through her submission, or he be subject to punishment for disobedience. Such a decree is against the policy of the law protecting the rights of a wife in the lands of her husband. It is plain to be seen that this mode of alienation might be adopted by an improvident and oppressive man to strip a prudent wife of all the reliance for her future support. Her refusal to sign a deed would be easily overcome by her husband entering into a contract that she shall join him in a conveyance; and then a decree of this court is looked to as the instrument of her oppression. She may have firmness enough to resist his unreasonable demand and entreaties, but yield to the persuasion of a decree of this court, which threatens her continued refusal with the incarceration of her husband. Upon an examination of the authorities, it will be found that the doctrine is not as firmly established as a cursory view of them might lead us to suppose.

Judge Story<sup>1</sup> pointedly and emphatically condemns the doctrine, that a court of equity will decree the specific performance of an agreement, by which the husband covenants that his wife shall execute a conveyance to bar her of her estate, when performance is resisted on the ground of the wife's refusal to join in the deed. The authorities are referred to; but the author does not give his opinion whether they are such as should lead to the conclusion that the doctrine should be considered as settled by authority either way.

The case of *Hall v. Hardy*<sup>2</sup> was a bill for the specific performance of an award, by which the plaintiff was to pay £10 to the defendant on such a day, and £30 at another day; and that thereupon the defendant should procure his wife to join with him in conveying the premises to the plaintiff and his heirs. The answer did not set up the refusal of the wife. The Master of the Rolls says: "There have been a hundred precedents, where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it,

<sup>1</sup> Story's Eq. 732.

<sup>2</sup> 3 P. Wms. 185-6.

if he does not perform it." And yet the note to this very remark of the Master of the Rolls (note B, page 188) leaves it quite uncertain as to the extent to which these hundred precedents carried the doctrine; "because in all these cases it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose. So said by the Master of the Rolls in the case of *Winter v. Devereux*, Trinity, 1723; and that the interest in such covenants has been taken to be an inheritance descending to the heir of the covenantee. But, after all, it can be made appear to have been impossible for the husband to procure the concurrence of his wife (as suppose there are differences between them), surely the court would not decree an impossibility, especially where the husband offers to return all the money, with interests and costs, and to answer all the damages." (Note B, referred to.) But here is the very point we want precedent for—the court's making a decree for the defendant to do an impossibility—to control the will of his wife and compel her voluntarily to execute a deed; for the deed is worthless, except done of her free will. There is no difficulty where the defendant does not set up the refusal of his wife as a defense. But where the refusal is set up as a defense, and it appears by the evidence that such refusal is the reason why the defendant does not perform his covenant, for this court to make a decree which compels the wife to execute a deed, and then to accept it as a free-will offering, is carrying the jurisdiction of the court very far.

The case of *Barry v. Wade* <sup>1</sup> I have not seen; but the book is admitted not to be very reliable authority. In *Barrington v. Stone* <sup>2</sup> the decree was, that the husband should procure his wife to join with him in a fine to the plaintiff, according to his covenant. The answer set up that the wife did not seal the deed, but not her refusal to join with her husband in a fine.

In *Otread v. Round* <sup>3</sup> Lord Cowper refused to decree a specific performance of such a covenant, the husband offering to refund the purchase-money with costs. The case, as cited in *Viner*, is as follows: "Husband and wife did, upon a valuable consideration, by lease and release, convey the wife's land in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser. The wife refused to levy a fine. The plaintiff brought his bill to have his title perfected by a specific performance of the covenant, and a precedent was cited where a specific performance had been decreed in the like case; but the Chancellor would not decree a specific performance in this case, because upon such decree the husband could not compel his wife to levy a fine; and if she would not comply, imprisonment would

<sup>1</sup> Rep. Temp. Finch 180.    <sup>2</sup> Eq. Abridg. 17, pl. 8.    <sup>3</sup> 4 Vin. Ab. 202, pl. 4.

fall upon the husband for contempt, which was the ill consequence of the decree in the said cited case."

In *Emery v. Ware*,<sup>1</sup> Lord Eldon refuses his assent to the doctrine carried to the extent of the court's making the decree in the face of the refusal of the wife; and in *Martin v. Mitchell*<sup>2</sup> Sir Thomas Plumer, Master of the Rolls, decides these points: that a husband and wife, having a joint power of appointment by deed over the wife's estate, agree in writing to sell it, a decree for specific performance cannot be against them; and under a contract by husband and wife for sale of the wife's estate, the court will not decree him to procure her to join. He remarks, "the point, that the court should compel the husband to coerce the wife to join with him in the conveyance, was abandoned. The counsel did not urge that that is the law now, and that the husband was to go to prison if she refuses to concur."

Upon a careful examination of all the authorities, if the alternative were presented to me of making a decree for specific performance by procuring the wife to join in the deed, or to dismiss this bill, I should accept the latter.

I am, however, relieved in this case from denying the complainant relief on account of any such embarrassment. The complainant offers by his bill, in case of the refusal of the defendant's wife to join in the deed, to take indemnity. The power of the court to direct indemnity is denied. The case eminently calls for its exercise, and I do not think it can be denied upon authority or principle.

In the case of *Milligan v. Cooke*,<sup>3</sup> for the plaintiff it was stated, that he desired not a reduction of the purchase-money, but an indemnity against the risk, which must not be a personal indemnity, but upon real estate, or by part of the purchase-money to be kept in court, the defendant taking the dividends. Lord Eldon said the purchaser was entitled to that; that the proper compensation was indemnity, by which the loss, if it should happen, would be made good, and if it did not happen, there was no occasion for compensation. A reference was made to a Master to settle such security by way of indemnity, as, under all the circumstances of the title, it should appear just and reasonable that the defendant should execute. Upon an intimation of the Lord Chancellor, the case was reargued, and the decree was affirmed. I cannot find that, by any subsequent case, the propriety of this decision of Lord Eldon has been questioned.

In *Balamanno v. Lumley*,<sup>4</sup> Lord Eldon confined the order to compensation, and is reported to have said he did not apprehend the court could compel the purchaser to take an indemnity, or the vendor to give

<sup>1</sup> 8 Ves. 505.

<sup>3</sup> 16 Ves. 1.

<sup>2</sup> 2 Jac. & Walk. 418.

<sup>4</sup> 1 V. & B. 224.

it. He certainly did not mean to question the correctness of the principle upon which he had made the decree in *Milligan v. Cooke*. The manner in which both those cases are referred to, in a note to *Patton v. Brebner* and another,<sup>1</sup> shows that they were not considered in conflict, or that the latter overruled the former ; but that, while it is a general rule that courts of equity will not compel a vendor to give an indemnity, there is no inflexible rule or principle to prevent the court's doing it when a proper case presents itself. If there is anything in the reasoning, that a court of equity cannot, upon principle, decree an indemnity because the parties have not contracted for it, it would equally apply against the jurisdiction of the court to award compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate. In *Graham v. Oliver*,<sup>2</sup> Lord Langdale says : "There is, however, a very great difficulty in all these cases, and I scarcely know how it can be overcome ; though a partial performance only, it has been somewhat incorrectly called a specific performance. The sentiments of Lord Redesdale on this point, as expressed by him in two cases before him, are strongly impressed on my mind. The court has thought it right, in many cases, to get over these difficulties for the purpose of compelling parties to perform the agreements into which they have entered ; and it is right they should be compelled to do so, where it can be done without any great preponderance of inconvenience."

In the case before the court, if it is beyond the reach of its jurisdiction to decree indemnity, then it has not the power to do what is manifestly equitable and just between the parties to this contract, and the complainant must submit to a fraud without any adequate means of redress. Indemnity can be ordered in this case, not only "without any great preponderance of inconvenience," but without any inconvenience at all. As the case is presented, it is the very remedy which suggests itself as the proper and natural mode of administering equity between the parties, and is free from every objection as to hardship or inconvenience. The defendant need not be called upon to give collateral indemnity, but it may be obtained in settling the mutual conveyances to be made between the parties.

By the terms of the agreement, the complainant is to convey to the defendant the Butz farm, and pay him one thousand dollars, as the consideration for the premises which the defendant has agreed to convey to the complainant. The wife of the defendant refuses to unite with her husband in the conveyance ; and this refusal is owing entirely to the contrivance and fraud of the defendant, who, in this way, is endeavor-

<sup>1</sup> 1 Bligh 67.

<sup>2</sup> 3 Beav. 124.



ing to deprive the complainant of the benefit of a specific performance of the contract. The court should order this agreement performed, and the conveyances to be so made between the parties that the complainant may hold in the land which he conveys an indemnity against any future claim to be set up by the defendant's wife.

I shall decree a specific performance and a reference to a Master, with directions to settle the conveyances; and if the wife of the defendant refuses to join her husband in a deed, then to direct the conveyances in such manner as will afford the complainant a complete indemnity in the premises.

The appeal was argued by

*Bradley and Nevius* for appellant.

*Browning and Dayton* for respondent.

The following opinions were now delivered.

POTTS, J. I am of opinion that the decree of the Chancellor, in this case, should be affirmed. It does substantial justice between the parties, and this is the great end of equity.

I see nothing in the evidence to impugn the fairness of the contract. Mr. Young had all the time for consideration that he required. He acted voluntarily. He was well acquainted with the subject matter in respect to which he was dealing; he knew the value of his own farm, and of the one he agreed to take in exchange for it. The one thousand dollars difference was the sum proposed by himself.

There is no doubt his wife assented to the sale in the first instance.

It was not until some time afterwards that she changed her mind, and determined not to execute the deed; whether this was of her own volition, or brought about by the influence of her husband, makes no difference. The decree in no way impairs or affects her rights.

The controlling equity of the appellee's case is, that upon the faith of his agreement with Young, he was drawn into the purchase of the Butz farm, and was thus placed in a position from which he could not extricate himself. He bought that farm, not for himself—he did not want it—but for Mr. Young. That was distinctly understood beforehand by Mr. Young. The appellee has that farm upon his hands, and a court of law cannot relieve him from it.

The decree made by the Chancellor meets and satisfies the equity of the case. It directs performance only so far as the appellant is able to perform—a conveyance of the Young farm free of the incumbrance of the wife's dower, if she chooses voluntarily to join her husband in the conveyance; subject to the incumbrance, if she declines to do so; and in the last alternative directs indemnity to be made by Young out of the one thousand dollars and the Butz farm.

The objection taken is to the indemnity.

Batten, in his recent treatise on the law of specific performance,<sup>1</sup> says, "the court will not compel a purchaser to take an indemnity, nor a vendor to give it; and he cites, as his authority, the cases of *Balamanno v. Lumley*, *Aylett v. Ashton*, and *Patten v. Brabner*.

*Balamanno v. Lumley*<sup>2</sup> is the leading case. It was a bill, by the vendee, for specific performance of a contract for the purchase of an estate. The title was alleged to be defective, and the purchaser moved for a reference to look into the title, and if found defective, to settle the proper compensation or indemnity, his counsel suggesting that, as to part of the estate, indemnity might be more convenient than compensation. The vendor's counsel objected to indemnity, which, he said, might prove inconvenient to families; and Lord Eldon said "he did not apprehend the court would compel the purchaser to take an indemnity, or the vendee to give it," and accordingly confined the order to compensation. This is the whole case.

*Aylett v. Ashton*<sup>3</sup> was a bill for the specific performance of a contract for a lease. The contract was entered into by the wife alone, and in respect to her separate property. It turned out that, as to part of the premises, she had no title. The bill was against her and her husband. The court held that there was no jurisdiction to make a decree against the wife, her trustees not being parties, nor against the husband, he not having signed the contract; and the Master of the Rolls merely added, at the close of his opinion, that "parties may, no doubt, contract for a covenant of indemnity; but if they do not, the court cannot compel a party to execute a conveyance and to give an indemnity," referring, as authority, to *Balamanno v. Lumley* and *Patten v. Brabner*, in which last case<sup>4</sup> Lord Eldon merely refers to the rule, as stated in the former case.

On the other hand, in the case of *Milligan v. Cooke*,<sup>5</sup> Lord Eldon, after two arguments and upon full consideration, held that that was a case for compensation, and that the proper compensation was indemnity; for by this, he said, the loss, if it happened, would be made good, and if it did not happen, there was no occasion for compensation. It was a bill for specific performance brought by the purchaser of a leasehold estate. The defect consisted in the representation by the particular of a church lease for twenty-one years, with covenants for renewals to sixty-three years, the lease being actually for lives, and the covenants limited and contingent. The consequent uncertainty whether any loss would occur was the controlling reason why indemnity was decreed in-

<sup>1</sup> 67 Law Lib. 171.

<sup>2</sup> 1 Mylne & Craig 105.

<sup>3</sup> 16 Vesey 1.

<sup>4</sup> 1 Ves. & Beam. 224.

<sup>5</sup> Reported in 1 Bligh 66.

stead of compensation. This reason exists in the case before us, and is, in my judgment, a solid one.

Compensation settled by the Court of Chancery, or damages assessed at law, might do great injustice, if the wife should not survive her husband, to the vendor, if she should survive him very many years, to the vendee, while indemnity would do certain justice. As to its being an inconvenience to Mr. Young, it will always be in the power of the wife to remove the inconvenience by perfecting the title.

It is said, if Young refuses to comply with the directions of the decree of the Chancellor, and is committed for contempt, that will operate to compel the wife to join in executing the deed: and that this is against principle. But there would be no more compulsion in this than there would be in a decree that a husband should pay a sum of money, or be in contempt for not doing so, where the wife might relieve him by raising and paying the money out of her separate estate. If Young puts himself in contempt at all, it will be not because his wife refuses to execute the deed, but because he refuses to convey and to give in-nity.

RYERSON, J. I concur in affirming the decree of the Chancellor, being satisfied that the contract was entered into with fairness and good faith on the part of the complainant, after full advisement and deliberation on the part of the defendant, having first consulted his wife and obtained her full approval and consent, and that her subsequent refusal to join in the conveyance resulted from his interference.

On the faith of this contract, the complainant purchased the Butz farm, and he cannot obtain adequate relief at law in an action for damages which would leave him with that farm upon his hands, a farm that he did not want, and purchased only to fulfill his contract.

Justice can be done in no other way than by the Chancellor's decree, and it will work no wrong to the defendant; his wife having once changed her mind to aid him in the determination of backing out, which he so emphatically expressed, will probably as readily change back to her first opinion, when he finds it to be to his interest to do so, and join with him in the conveyance; if she declines to do this, her husband will be subjected to no other hardship than what he has brought upon himself by his own misconduct, and which he should bear, rather than deny adequate relief to the complainant.

The objection of want of mutuality has no application to this case, and I am well satisfied that in a proper case, such as this eminently is, the Court of Chancery has power to decree indemnity, and ought to do it, rather than allow the defendant to practice what would be a fraud upon the complainant; while the rights of married women should be

protected to their full extent, a husband ought not to be allowed to avail himself of such a plea in a case like this.

Not intending to write a formal opinion, it is nevertheless proper to express concisely my reasons for affirming the decree, lest this case might be made a precedent for cases differently situated, cases where the wife's refusal to join in the conveyance was *bona fide*, and not the result of the husband's interference, or cases where an action for damages would give adequate redress.

ELMER, J., concurred in the above opinion.

Decision affirmed by the following vote :

*For affirmance*—Judges CORNELISON, HAINES, OGDEN, RYERSON, ELMER, HUYLER, POTTS, VREDENBURGH.

*For reversal*—CHIEF JUSTICE, Judges ARROWSMITH, RISLEY, VALENTINE, WILLS.

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### BARNES v. WOOD.

IN CHANCERY, BEFORE SIR W. M. JAMES, V.C., JUNE 29, 1869.

[*Reported in Law Reports, 8 Equity Cases 424.*]

THIS was a bill praying a declaration that certain property at Stan-ningly, in Yorkshire, was purchased by and conveyed to the defendant Wood subject in equity to a contract by the plaintiff for the purchase thereof, and that the defendant held the property bound by such contract to the extent of the fee simple thereof, or if not to that extent, then to the extent of such estate and interest therein as John Stringer was entitled to, or able to sell or convey ; a proportionate abatement of the purchase-money being made of the plaintiff in respect of such estate and interest as John Stringer could not sell and convey. The bill went on to pray a conveyance by the defendant either of the fee, or subject to such abatement, of all the estate and interest therein of John Stringer.

The property in question, subject to a mortgage, stood limited in February, 1868, to the use of John Stringer and his heirs for the life of Harriet Whitehead, with remainder to the use of Betty his wife, in fee simple. On the 7th of February the plaintiff entered into an agreement with John Stringer (whom he then believed to be owner in fee simple) for the purchase of the property free from incumbrances. A memorandum of agreement, which was expressed to be made the 7th day of February, 1868, between John Stringer of the one part, and plaintiff of the other part, and whereby "the said John Stringer agrees to sell, and the said John Fairbank Barnes agrees to purchase, free from incum-

brances, all those (describing the property), for the price or sum of £710," was signed by the plaintiff and Stringer, and the plaintiff paid a deposit of £50. On receiving the abstract of title the plaintiff for the first time discovered that Betty Stringer was interested in the property. His solicitor required that the deed of conveyance should be acknowledged by Mrs. Stringer, and no objection was then raised on her behalf. The 1st of May was the day fixed in the agreement for completion, but on the evening of the 25th of April Stringer and two other persons came to the house of the plaintiff, who was then in bed, and threw on the bed £50 in bank notes, saying that plaintiff had got his money back. The plaintiff did not accede to the return of the deposit or to the breach of his contract. On the 30th of April his solicitors were informed that the property had been sold to another purchaser (the defendant) on Saturday, the 25th of April. On the 1st of May the plaintiff caused a memorial of his contract to be registered in the West Riding Registry, but shortly before such registration a conveyance of the property to the defendant in fee simple (subject to the mortgage), by John and Betty Stringer, duly acknowledged by Betty Stringer, had been registered. The bill alleged that the defendant and John Stringer secretly and fraudulently contrived and combined to defeat the plaintiff's contract (of which the defendant had the fullest notice) in order to effect a sale of the premises to the defendant in fraud of the plaintiff, and availing themselves of the fact that Betty Stringer had not signed or acknowledged any deed or contract in the plaintiff's favor, they obtained her acquiescence in the sale of the defendant, and her execution and acknowledgment of the conveyance to him. The property being now vested in the defendant in fee simple, subject only to the mortgage, and free from any claim on the part of John and Betty Stringer, the plaintiff charged that under the circumstances the defendant acquired and now held the property subject in equity to the contract with the plaintiff, and to the obligation of performing the same; and relief was prayed on this footing.

It was also stated that the plaintiff, in reliance on his contract, had purchased for £14 a small adjacent piece of land (wholly useless without Stringer's property), and expended a considerable sum in walling it in and altering its level, so as to suit it for being occupied together with Stringer's property.

On behalf of the plaintiff it was alleged that the defendant not only knew of the plaintiff's contract, but had told him that the property was for sale, and advised him to buy it, and been present in the room when the contract was signed on the 7th of February, 1868.

According to the defendant's version he was, about the 15th of April, 1868, repeatedly asked by John Stringer to purchase the property, and

told both by him and by Betty Stringer that the bargain with the plaintiff was off, as she positively refused to sanction the sale to the plaintiff, or join in conveying the property to him. One reason alleged was, that the plaintiff had, as Betty thought, behaved badly about the fixtures in declining to take them at a valuation. The defendant, on the other hand, was ready to pay a valuation for them, in addition to his purchase-money; and accordingly was accepted as, if not pressed to become the purchaser, by both John and Betty Stringer.

*Mr. Amphlett, Q.C., and Mr. W. H. G. Bagshawe for the plaintiff.*

*Mr. Kay, Q.C., and Mr. G. Williamson for the defendant.*

SIR W. M. JAMES, V.C. In this case the plaintiff seeks specific performance of a contract which he entered into with John Stringer. The contract whereby he undertook to sell the property in fee simple to the plaintiff was binding on John Stringer himself, but it turned out that John Stringer was not owner of the property in fee simple, but simply had an estate *pur autre vie*, with the possibility of a tenancy by the courtesy; the remainder, on the determination of the particular life, being vested in his wife, Betty Stringer. The wife did no act by which she was bound to ratify the contract. She was owner, and had the power, by certain means known to our law, of assenting to such a contract. She did not adopt those means, and therefore I must assume that she was in no way bound by the contract, and that her husband was under no obligation which this court recognizes to compel her to consent. In truth the wife was, in respect of this contract, a free agent and *sui juris*, because she could convey, and could convey only by those means which the law has provided for enabling her to act according to her own uncontrolled will. The position of matters, therefore, is just the same as if the vendor had been tenant for life, with remainder to any other person in the world with whom he had no connection. In that state of things the defendant comes in, and, with full knowledge of the contract which the plaintiff has made, makes a fresh contract with the tenant for life and the person entitled in remainder, and takes a conveyance from them of the estate. It is said, that having known of the contract with the plaintiff he is bound to give effect to the whole of that contract out of the estate which he has acquired by conveyance both from the tenant for life and the person interested in remainder. I do not think that the plaintiff's case can be carried to that extent. I do not think that the purchaser from the wife of her interest is in any way bound by the equity of a contract which did not affect that estate in the hands of the wife. The wife is not obliged to convey. Her estate is in no way bound by the equity of the contract with the plaintiff, and the present purchaser from her takes it in exactly the same position as she held it. That, however, is not the whole of the plain-

tiff's case. He says, that if he cannot get from the purchaser, any more than from the wife, the interest which she had to convey, he ought, at least, to get the husband's interest, which the purchaser took with full knowledge of his (plaintiff's) contract, and that he has the same equity against the purchaser that he had against the husband. I think that is so. The question is whether, supposing the defendant had not intervened, and a simple bill had been filed against Stringer and wife, praying the same relief as here, viz.: a conveyance of the fee simple by the husband and wife, or if the wife declined to concur, then a conveyance of the husband's interest, with compensation, whether the plaintiff would not have been entitled to the second branch of the relief prayed. On that point two cases were cited, one on each side. In *Thomas v. Dering*<sup>1</sup> it seems to have been thought that the difficulty of making a valuation would be an insuperable objection to the enforcement of the rule that where a vendor has only a limited interest in the estate contracted to be sold, and cannot perform the whole contract, the purchaser is entitled to have the contract performed to the extent of the vendor's interest, with compensation for the deficiency. In *Nelthorpe v. Holgate*,<sup>2</sup> however (in which *Thomas v. Dering* was cited), relief was given under circumstances which appear to be exactly the same as here, except in this one respect, that there the person making the contract had the remainder subject to a life interest, and here a life interest only, which makes no difference in the case. The husband here represented himself to be owner of the fee, being, in fact, only entitled to the limited interest I have mentioned. The purchaser entered into his contract with the husband in total ignorance of the state of the title, and without any knowledge that the husband could only sell with the concurrence of his wife. The husband, therefore, is bound to convey all the interest that he has, according to the principle of the authorities that have been cited, and the court must endeavor to find out, in the best way it can, what compensation is to be made in respect of the interest which he is unable to convey. The plaintiff is therefore entitled to relief according to the second part of his prayer, and the defendant must pay the costs of the suit. Reference to Chambers to ascertain what compensation should be given to the plaintiff for the interest of Betty Stringer.

<sup>1</sup> 1 Keen 729.<sup>2</sup> 1 Coll. 203.

MAYER STERNBERGER ET AL., APPELLANTS, v. OWEN  
MCGOVERN, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 10, 1874.

[*Reported in 56 New York Reports 12.*]

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, reversing a judgment in favor of plaintiffs, entered upon the decision of the Court at Special Term.

This action was brought to enforce a contract between the parties, by which in substance plaintiffs agreed to sell to defendant certain premises situate in the city of New York, on Thompson Street, for the price of \$125,000, payable as follows: \$20,000 by defendant's assuming two mortgages thereon, \$64,500 by a deed from defendant and wife to plaintiffs, Mayer and Simon Sternberger, of certain premises at Mott Haven, and the balance \$40,500 (subject to alteration in the exact amount by the allowance of interests on the mortgages on both sides), by defendant executing a mortgage on the premises to said plaintiffs, payable April 1, 1875. Defendant upon his part agreed to sell and convey to said plaintiffs certain premises in Mott Haven for \$82,500, \$18,000 to be paid by said plaintiffs assuming a mortgage thereon to that amount, and the balance by the deed of the Thompson Street property. The deeds to be duly executed by the parties and their wives and to be exchanged on the 1st day of April, 1872, at noon, at a place specified. Plaintiffs asked for the appointment of a receiver, that the Thompson Street property be sold and the net proceeds paid to plaintiffs upon the amount due for the purchase-money, and for a judgment against defendant for \$125,000 with interest, or for such other relief, etc.

It appeared upon the trial that, at the time and place specified, plaintiffs attended with a deed duly executed of the Thompson Street property, which they presented also with a deed and mortgage properly made out for defendant to execute in accordance with his contract; defendant did not appear for the reason that his wife refused to join with him in a deed of the Mott Haven property. This fact was known to plaintiffs prior to the commencement of this action.

Upon these facts the court at Special Term found, as conclusions of law, as follows:

"First. That the respective stipulations of the parties to accept conveyances of the said lands to and from the other at certain valuations was in effect to receive such conveyances for an amount of money equal to such valuations.



"Second. That as to the premises, the plaintiffs agreed to convey to the defendant, for the consideration of \$125 000, they were entitled to a specific performance of said agreement, and that defendant should accept the said conveyance thereof so tendered, and pay the consideration-money of \$125.000 therefor, in the manner specified in said agreement, and interest thereon from said 10th day of April, 1872, after crediting any rents, issues, or profits the plaintiffs may have collected and received therefrom over and above any just allowance and expenses.

"That the plaintiffs have a lien on said premises for the payment of the amount of such balance, and that such premises should be decreed to be sold to pay the same, and the costs and expenses of sale of this action, and also that the plaintiffs have judgment against the defendant for the payment of any deficiency."

Judgment was entered accordingly.

The General Term reversed this judgment and dismissed the complaint, "without prejudice to any other action which the plaintiffs may be advised to commence."

*Everett P. Wheeler* for the appellants.

*T. C. T. Buckley* for the respondent.

GROVER, J. The different conclusions arrived at by the Special and General Terms arose from the different construction of the contract of the parties which was respectively adopted.<sup>1</sup>

But the counsel for the appellants insists that, assuming this to be the true construction, he was entitled to a specific performance of the entire contract, and that as the defendant had agreed that his wife should unite in the conveyance of the Mott Haven property, so as to bar her right of dower, and it appearing that she refused so to do, he was entitled to a conveyance from the defendant of the property and to have deducted from the price the value of the inchoate right of dower. No such claim was made upon the trial; but if the plaintiffs are entitled to this relief they can obtain it upon a new trial. The question must, therefore, be decided.

The counsel cites numerous authorities showing that when a vendor is unable to perform the entire contract the purchaser may, if he chooses, enforce performance of that part which the vendor can perform and recover compensation for the part unperformed. I have examined these and find that, in general, they are cases where there is a failure of title in the vendor to a part of the premises agreed to be conveyed; and when a proper deduction from the purchase-price can be ascertained and determined so as to do complete justice between the parties in the case before the court. When this cannot be substantially

<sup>1</sup> So much of the opinion as relates to this question has been omitted.—ED.

done, it is obvious that specific performance ought not to be decreed, as this should be done only when the court can see that the ends of justice require it. In *Peters v. Delaplaine*,<sup>1</sup> which was an action for specific performance, and where the question was whether the action was barred by the Statute of Limitations, and whether the relief should not be denied on the ground of delay in commencing the action, which was attempted to be excused by reason of the inability of the defendant to procure a release of dower from his wife at the time the premises should have been conveyed. It is said (p. 368): "The seller could not have compelled the purchaser to accept such defective title, with indemnity for the incumbrance; but the latter had an option to accept it or rely upon his action for damages." He could have brought his action for specific performance at once, and taken such judgment as would have secured to him the full benefit of his contract and the property for which he contracted, citing several authorities. What follows shows that, in the opinion of the learned judge, the vendor, in such a case, would be compelled to convey, and in some form, not specified, indemnify the purchaser against the contingent right of dower of the wife. In *Woodbury v. Luddy*,<sup>2</sup> it was held that the purchaser might in such a case compel the vendor to convey, with a deduction from the price of the fair value of the inchoate right of dower of his wife, who refused to release the same, but that such deduction was not the difference in the market value of the property with a perfect title and its value subject to such right; and that the value of this right should be determined by the tables of morality. In *Davis v. Parker* (id., 94) a similar judgment was given. The point was not directly involved in *Peters v. Delaplaine* (*supra*), nor have I found any case in this State in which it has been determined, in an action for a specific performance, that a purchaser may compel a vendor, unable to procure his wife to release her dower, to convey subject to such right and abate from the price such a sum as the court determined was its value. But be this as it may, the application of the doctrine in this case would work injustice. Here the parties have agreed to exchange, in substance, one parcel of real estate for another, and for the payment by the defendant to the plaintiffs of the estimated excess in value of their parcels, by giving a general mortgage thereon payable in future; the value placed upon each parcel not being its estimated cash value but its relative value with the other parcel; no cash payable by either. Under such a contract, to require the defendant to convey the Mott Haven property to the plaintiffs and pay such compensation as the court should determine its market value was impaired by the outstanding inchoate right of dower, or such sum as the real value of such right ascertained by the

<sup>1</sup> 49 N. Y. 362.<sup>2</sup> 14 Allen 1.

tables of mortality would be harsh and oppressive. The defendant never made a contract to do this. To charge him with the difference in the market value would be unjust, as it is obvious that this incumbrance upon the title would impair that to a much greater extent than the real value of the right. To compel him, in effect, to purchase the right by paying the plaintiff therefor its value determined by the tables of survivorship and mortality would in a case like this be unjust. He, as we have seen, contracted for an exchange of his property for that of the plaintiffs; under such a contract he ought not to be compelled to take the risk of the loss which the application of those tables to this particular case might subject him. These tables when applied to a great number of cases will, in the aggregate, show correct results; hence they may be used by life insurance companies with safety in fixing their rates, and are resorted to by courts when the probable duration of life must be determined in adjusting the rights of parties. But to determine the value of the inchoate right of dower in this way, for the purpose of enforcing the specific performance of a contract for the exchange of real estate, with compensation, would be unsustained by precedents or sound principle.

My conclusion, therefore, is that upon the facts found by the Special Term, the plaintiffs were not entitled to the specific performance of the contract or any part of it. The plaintiffs must resort to their legal remedy for the damages, if any, that they have sustained from the defendant's breach of the contract.

The remaining question is whether the General Term ought not to have ordered a new trial instead of giving final judgment dismissing the complaint. It appears from the opinions that the latter course was adopted for the reason that it appeared, upon the trial, that the plaintiffs were aware at the time of the commencement of the action, that the defendant could not perform the contract, and that in such a case equity would not retain the suit for the purpose of awarding damages which could be recovered in an action at law. This was the rule prior to the adoption of the Code.<sup>1</sup> But the Code authorizes the uniting of causes of action, both legal and equitable, arising out of the same transaction in the complaint.<sup>2</sup> The facts constituting these causes of action must be stated in the complaint. The court held in that case that no facts constituting a legal cause of action were stated in the complaint, and that as the plaintiff failed to prove the equitable cause of action stated, the complaint was properly dismissed. This shows that when the complaint states facts giving an equitable cause of action and also a legal cause of action arising out of the same transaction, the party

<sup>1</sup> *Mors v. Elmendorf*, 11 Paige 277.

<sup>2</sup> *Bradley v. Aldrich*, 40 N. Y. 504, 512.

is entitled to have both tried, if necessary to obtain his rights. That is this case. The complaint sets out the contract and alleges a tender of performance by the plaintiff and a breach by the defendant, and demands judgment for \$125,000 and other relief. True, he demands equitable relief, based upon the ground that he was entitled to a specific performance of that part of the contract relating to the Thompson Street property. He failed in showing a right to this. He then had a right to a trial of his claim for damages sustained by the breach. True, the mode of trial may be different. The former must be tried by the court or a referee unless some question or questions of fact involved are ordered by the court to be tried by jury. Either party has the right to a jury trial of the latter. This creates no practical difficulty. The one issue may be tried by the court and the other by jury if the ends of justice require the trial of both, or both may be tried by the court or a referee if the parties so desire.

The judgment of the General and Special Terms must be reversed and a new trial ordered; costs to abide event.

FOLGER and JOHNSON, JJ., concur; ALLEN, J., concurs in result upon the peculiar circumstances of the case, without passing upon the question whether specific performance with money compensation for inchoate right of dower may not be awarded in cases of exchange as well as upon a contract for the purchase of real property. CHURCH, Ch.J., and ANDREWS, J., not voting; RAPALLO, J., absent.

Judgment reversed and new trial granted.

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PEELER v. LEVY AND WIFE.

IN THE COURT OF CHANCERY OF NEW JERSEY, MAY TERM, 1875.

[*Reported in 26 New Jersey Equity Reports 330.*]

FINAL hearing on bill, answer and proofs.

*Mr. F. K. Howell* and *Mr. Cortlandt Parker* for complainant.

*Mr. John W. Taylor* for defendants.

The VICE CHANCELLOR. This is an action for specific performance, founded on a contract under seal, bearing date June 18, 1874. By it the defendant agreed to exchange four tracts of land located in Montclair Township, Essex County, for a farm of the complainant, containing about two hundred and thirty-six acres, situate in the township of Montgomery, Orange County, New York, subject to a mortgage of \$26,000. The title to two of the four tracts was in the defendant's wife, at the date of the contract, and had been since September 8, 1871. They

were conveyed by the defendant to David A. Frome, and by him to the wife. She is made a defendant.

The prayer is that both defendants may be compelled to perform the contract specifically, or if that cannot be done, then that the husband may be compelled to perform, so far as he can, and to make compensation for so much of the land as he cannot convey.

The wife did not sign the contract ; indeed, the proof is clear she had no information the exchange was contemplated until some days after the contract was made. Some weeks before negotiations were opened she left her husband in consequence of his grossly intemperate habits, and went to her father's house in Troy, New York. There is no evidence of ratification or approval of the contract by her, but, on the contrary, it is shown she warned her husband not to make it, as soon as she was informed negotiations were on foot.

Under this state of facts, it must be conceded it is not within the power of this court to compel a conveyance by the wife, nor to decree a conveyance by the husband of the lands of the wife.<sup>1</sup>

Even if she was a party to the contract by ratification, or had signed it herself, a decree for specific performance could not be made against her.<sup>2</sup>

The important question presented by this branch of the case is, shall the husband be decreed to make compensation for the lands of his wife which he cannot convey ? The court has power to give compensation, but, like the general power of decreeing or refusing specific compensation, it is discretionary.<sup>3</sup> Compensation is to be awarded, when it appears, from a view of all the circumstances of the particular case, it will subserve the ends of justice ; and it will be denied when, upon a like view, it appears it will produce hardship or injustice to either of the parties. No inflexible rule can be adopted applicable to all cases, but each case must be decided on its own special facts. Generally, it will be denied where the party asking it had notice at the time the contract was made, that the vendor was agreeing for more than he could give or convey, and it appears the vendee has not, in consequence of the contract, placed himself in a situation from which he cannot extricate himself without loss.<sup>4</sup> This rule has the support of the clearest dictates of justice. It is unconscionable for one man to

<sup>1</sup> *Emery v. Wase*, 8 Vesey 513 ; *Welsh v. Bayaud*, 6 C. E. Green 187 ; *Nelthorpe v. Holgate*, 1 Coll. 216 ; 2 *Chitty's Con.* 1485, 1486, *note n* (11th Am. ed.)

<sup>2</sup> *Wooden v. Morris*, 2 *Green's Ch.* 65 ; *Pentz v. Simonson*, 2 *Beas.* 232 ; *Pierson v. Lum*, 10 C. E. Green 391.

<sup>3</sup> *Gariss v. Gariss*, 1 C. E. Green 79 ; *Willard v. Tayloe*, 8 Wall. 567.

<sup>4</sup> 2 *Chitty's Con.* (11th Am. ed.) 1490, *Fry on Spec. Perf.*, § 795, *note 2* ; *Nelthorpe v. Holgate*, 1 Coll. 223 ; *Harnett v. Yeilding*, 2 Sch. & Lef. 559 ; *Wisswall v. McGowan*, 1 Hoff. Ch. 131 ; *Thomas v. Dering*, 1 Keen 747.

take the promise of another to do a particular thing, which the promisee knows, at the time the promise was made; the promissor cannot perform except by the consent or concurrence of a third person, and then, when consent or concurrence is refused by the third person in good faith, to demand a strict and literal fulfillment of the promise. He contracts with full notice of the uncertainty or hazard attending the promissor's ability to perform, and has no right, therefore, to ask the extraordinary aid of a court of conscience in repairing the loss he has sustained by the non-fulfillment of the contract. He must be content with his ordinary legal remedy.

A court of equity will not take jurisdiction of a naked claim for damages, even when it is made under the guise of a suit for specific performance.<sup>1</sup>

The evidence as to whether or not the complainant had notice the title to the two tracts was in the defendant's wife, at the time the contract was made, is very conflicting. The complainant swears he did not know it, and did not learn it until after the defendant's refusal to perform. The defendant's brother, Bernard, swears he notified the complainant during the negotiations, and assured him the defendant could not trade without his wife's consent. The defendant and Bernard both wanted the farm. The negotiations commenced with Bernard, and both brothers went with complainant to Grange County, on the day the contract was made, with a view of making a joint bargain for the farm, and then dividing it between them. It seems, according to the evidence of the complainant, they attempted to agree upon a division before making a contract for it, disagreed as to which should have the large dwelling-house, and became involved in a wrangle, when Bernard said to the defendant: "If you are going to take the big house, after my coming up here first, and having all this trouble looking at it, I won't have anything further to do with it." According to all the evidence, it is certain Bernard was greatly dissatisfied, and in just the mood to disclose any fact likely to arrest negotiation and prevent a contract being made. All the witnesses agree the defendant alluded to his wife during the negotiation. Harris, the real estate broker, who was ostensibly acting for the defendant, but who, it is quite manifest from his evidence, is now acting in concert with the complainant, says, during the negotiation, the defendant said he did not know whether his wife would "coincide" in the trade or not; that the complainant replied, if we do not trade to-day, we will not trade at all; and then the defendant said he would run the risk of his wife. The complainant does not state the occurrence quite so strong. He says the defendant

<sup>1</sup> *Morss v. Elmendorf*, 11 Paige 287; *Hatch v. Cobb* 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 193.

said he would like his wife to see the farm, or something of that kind, and he (complainant) replied the trade must be made that day, or not at all. The complainant, however, says this, in reply to a question as to whether the defendant did not say to Harris he must reduce his commissions in case his wife did not assent to the trade, that the defendant did say, if the trade did not go through, or something like that, Harris must make a light charge for commissions. His evidence fully shows the complainant had notice of three facts, at least: first, the defendant desired to consult his wife before completing the contract finally; second, in consequence of not consulting her before making the contract a risk was incurred; and, third, there was a possibility of his not being able to fulfill the contract. They were sufficient to excite inquiry. A prudent man, engaged in making a contract of so much importance as this, could not have avoided it. None appears to have been made. If Bernard Levy made the communication to the complainant he swears he did, none was necessary, and the conduct of the complainant in this regard was natural and rational.

The evidence convinces me the complainant knew, at the time this contract was made, the defendant did not have title to two of the tracts he agreed to convey. The establishment of this fact, in a case where the complainant shows no special ground entitling him to equitable relief, where he has not changed his situation in consequence of the contract, so that he must suffer loss if it is not specifically performed, and his claim for relief stands solely upon his right to the advantage he has obtained by the contract, and where nothing appears from which it can be fairly inferred, a suit at law will not afford him full and complete redress, makes it the duty of the court, in the exercise of a sound discretion, to deny compensation, and leave the complainant to his ordinary legal remedy.

I think it is sufficiently shown the wife refused to join in the execution of a deed for the lands owned by the husband. The bill charges the defendant is able to make a good and sufficient title to the lands he agreed to convey. An answer under oath was required. The answer avers that the wife, of her own accord, and without the procurement of the husband, refuses to join. It is strictly responsive to the charge contained in the bill, and dispenses with proof of the fact.

The rule is beyond question in this state, that in an action for specific performance a husband will not be decreed to procure his wife to join in the execution of a deed for the purpose of releasing her inchoate right of dower, if she is unwilling to do so.<sup>1</sup> A rule requiring him to do

<sup>1</sup> *Hulmes v. Thorpe*, 1 Halst. Ch. 423; *Young v. Paul*, 2 Stockt. 401; *Hawralt v. Warren*, 3 C. E. Green 128; *Welsh v. Bayaud*, 6 C. E. Green 187; *Reilly v. Smith*, 10 C. E. Green 158.

so would overthrow a wise statutory safeguard designed to protect married women against coercive alienations. But if the refusal of the wife is made in bad faith, or by the procurement of the husband, merely to enable him to escape his just obligation, the court may decree a conveyance by the husband alone, and compel him to give indemnity by mortgage, or otherwise, against the claim of the wife. However, to warrant a decree of indemnity, it must appear the refusal is not the voluntary act of the wife, but the device of the husband.<sup>1</sup> Nothing appears in this case to justify the suspicion even that the refusal was fraudulent. I think it is apparent it was prompted by the highest considerations of prudence. Her husband was the victim of an appetite almost certain to bring him to ruin and premature death. Whether the farm was worth more than the mortgage debt of \$26,000 or not the debt was sufficient, when viewed in connection with the husband's habits, to make it certain any interest she would acquire by the conveyance of the farm to him would be speedily swept away. Besides, the complainant cannot say the refusal of the wife is an unexpected difficulty. He was warned there was risk to be incurred. His haste to tie the hands of the defendant before he had an opportunity to consult his wife will not, in a court of conscience, leave him entirely free from the hazards of such a transaction.

Independent of the considerations already mentioned, I am not satisfied the complainant has a right to the relief he seeks. I have a strong conviction the defendant's agent, Harris, induced him to sign the contract, or to make the bargain, by a representation it would not bind him unless his wife assented. Upon no other theory can the letters of the defendant to the complainant, of June 27th and July 7th, be explained. They evince a total unconsciousness that the contract possessed any force of virtue, and seem to have been written under the belief the complainant understood it was entirely optional with him whether it should be observed or not. If the complainant knew the defendant's signature to the contract was procured by the perfidy of his own agent, and he did nothing to protect him against the deceit, he should be denied the relief he asks.

For the reasons stated, I think the complainant should be left to his remedy at law, and his bill should be dismissed; but, inasmuch as one of the principal defenses set up in the answer, viz., that the complainant first made the defendant drunk, and then inveigled him into making this contract, is without the slightest support in the proofs, the dismissal must be without costs. If the wife had answered separately, she would have been entitled to costs.

I will advise a dismissal on the terms stated.

<sup>1</sup> *Young v. Paul and Hawralty v. Warren, supra.*



SECTION IV.—DEFENSES (CONTINUED).

(j) *Penal or Liquidated Sum Named in Contract.*

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O'CONNOR v. TYRRELL ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY, JANUARY 21, 1895.

[*Reported in 30 Atlantic Reporter 1061.*]

BILL by Lawrence O'Connor against Peter Tyrrell and others for specific performance of a contract to convey land. On motion to dismiss bill. Motion denied.

*Charles L. Corbin* for the motion.

*John Garrick* opposed.

MCGILL, C. The motion is made in virtue of the 213th rule, and takes the place of a demurrer to the bill. The case presented by the bill is this: James Tyrrell, for himself, and as attorney in fact for others, who are co-tenants with him of certain land in the city of Bayonne, on the 20th of April, 1894, agreed to sell that land to the complainant for \$7,250, of which \$250 was to be paid upon the execution of the agreement of sale, and the balance was to be paid upon the delivery of the deed, on the 21st of the following May—\$5,000 in cash, and the remainder by assumption of the payment of a mortgage of \$2,000, by which the property was encumbered. Upon examination of the title, it was discovered that the power of attorney under which James Tyrrell assumed to act for his co-tenants, who lived in Ireland, though duly executed, was defectively acknowledged by some of the co-tenants. Therefore, it was agreed that instead of having the power of attorney re-acknowledged, the deed should be directly executed by all owners of the property, and be sent to Ireland for that purpose. As more time would be required in such execution than the terms of the contract of sale would admit of, a new agreement was entered into on the 8th day of May, by which the former contract was annulled, and the 26th of June was fixed for the delivery of the deed, and the full consummation of the transaction. The

latter agreement contains this stipulation. "Said party of the second part (O'Connor) shall have possession of said premises on the 14th day of May, 1894; and, in the event of the failure of said parties of the first part to deliver the deed at the time and in the manner hereinafter referred to, the said parties of the first part hereby agree to repay to said party of the second part the said sum of \$250, heretofore paid as part of the consideration money, and, in addition thereto, such sum, not exceeding \$1,250, as said party of the second part shall have paid upon the examination or guaranty of the title to said premises, or in the repair, improvement, or furnishing of the building, or ground, or the survey thereof, or shall have in any way incurred or expended in the preparation for the purchase of and taking of title to said premises, not exceeding the said sum of \$1,250; such payment to be accepted by said party of the second part as liquidated damages for any breach of this agreement by the said parties of the first part; and, in event of the failure of said parties of the first part so to deliver said deed at the time herein stated, said party of the second part hereby agrees to surrender possession of said premises, within fifteen days from June 26, 1894, to James Tyrrell, one of said parties of the first part hereto. And said party of the second part shall not, under any circumstances, be held to be liable for any rental for the occupancy of said premises." In pursuance of this agreement, the complainant paid \$250 in cash, broke up his home in the city of New York, and moved to the premises contracted to be conveyed to him, upon which he made repairs which have cost him nearly \$2,000. On the 26th of June, 1894, he duly tendered the \$5,000 he was then to pay, and demanded a deed, in accordance with the terms of the agreement. To which tender and demand, James Tyrrell replied that, as attorney in fact, he was unable to deliver the deed, and that he desired a statement of the complainant's expenditures, contemplated by the clause of the contract which has been quoted, in order to ascertain and pay the sum agreed upon as liquidated damages, and also that he desired to fix a day, within the terms of the contract, upon which the complainant would surrender to him possession of the land.

The only question presented in the argument was whether this court will compel a conveyance to the complainant, notwithstanding the provision for the payment of liquidated damages upon the breach of the contract; the contention in behalf of the defendants being that by the agreement the parties have expressly stipulated the measure of the damages which will result from the defendants' non-performance of the agreement, and therefore equity will leave the complainant to the recovery of those damages, on the ground that an ap-

peal to equity is unnecessary, since the legal relief, by agreement, has been rendered adequate.

For the breach of contracts the common law gives a single remedy. It requires the wrongdoer to pay a sum of money as compensation. When the contract broken is an obligation to pay money, that remedy amounts to specific performance. But there are many contracts for the breach of which such a remedy is inadequate; and that inadequacy has given rise to the jurisdiction of chancery to enforce specific performance of contracts, requiring the performance or omission of the very acts agreed upon. The remedy is thus made identical with the right withheld, and the defendant is thereby deprived of the option, which the legal remedy practically gives him, to disregard the actual obligation by which he is bound, and pay a sum of money in the place thereof.<sup>1</sup> The inadequacy of the legal remedy, by compensation in damages is generally regarded as conspicuous in cases of agreements for the sale and purchase of real estate, each parcel of which differs in some respects from others. Such property is usually bought because it possesses some feature which attracts by personal gratification, and determines the purchaser to make some particular use of it. The present case is not an exception to this usual condition. The description of the property discloses its boundary upon the shore of the Newark Bay, with its expanse of water, and the occupancy of it by the complainant indicates that he has determined to make it his residence, and his expenditures upon it give evidence of his appreciation of its situation and surroundings. It is thus made plain that compensation in damages will not be the full measure of relief which a breach of the contract by the defendants, in justice, demands. This situation primarily leads to a critical examination of the contract and the meaning of its clause which I have quoted, to ascertain the correctness of the defendants' assumption that a stipulated sum has been fixed as damages to be had for the mere non-performance of the contract by the defendants. That which was contracted for was the purchase and sale of land. A portion of the purchase-money was to be paid at once, and the purchaser was to go into possession pending the execution and delivery of the deed, when the remainder of the purchase-money was to be paid. It was in contemplation that he would proceed to repair, improve, and furnish the property. In the event of the defendants' failure to deliver the deed, he was to surrender the possession of the land to their agent; receive back the purchase-money paid, together with his expenditures, not exceeding \$1,250. That repayment and surrender were expressly made dependent upon the failure of the defendants to deliver the

<sup>1</sup> Pom. Spec. Perf. § 3.

deed. In this arrangement, which contemplated repayment upon the happening of the one event—failure to deliver the deed—was interpolated the parenthetical clause, that such repayment was to be accepted by the complainant as liquidated damages for “any breach” of the contract by the defendants. As the repayment was limited to a single event, and made payable upon the happening of that event only, the words “any breach,” in the parenthetical clause, could not have a broader significance than failure to deliver the deed, for the complainant was bound to accept the repayment only in that event. It is to be noted that, upon the defendants’ failure to deliver the deed, the complainant is to have merely pecuniary reimbursement, and not compensatory damages. He is to have nothing for his disappointment, trouble, and, discomfort. The inference from a submission to such inadequate damages is, I think, that a stronger meaning was intended to be given to the word “failure” than mere arbitrary refusal of the defendants to deliver the deed. “Failure” is the result of action which predicates earnest effort, and not mere inaction and refusal to do. It is in this sense, I think, that the word was used in this contract. It demanded from the defendants a *bona fide* effort to deliver the complainant a deed which would vest in him the title to the property. It was failure after such effort that was to constitute the breach for which reimbursement was to be accepted as satisfaction. It is obvious that the contract was not an alternative one, to convey or pay damages. Damages were to be paid upon a “breach” of the contract, which primarily required an honest effort to perform, and failure, and do not become a factor in the consideration of remedies until that precedent condition is performed. The professed inability of James Tyrrell to deliver the deed required does not prove the inability of him and his co-tenants to carry out the contract upon their part. The case presented, then, is this: A certain sum is agreed upon as satisfaction to the complainant, if *bona fide* effort to make him title fails. So far as it appears by the bill, the defendants can make that title, and the aid of this court is invoked to compel them to do so. I think that, as the facts now appear, the complainant is clearly entitled to a decree, and that the case is not brought within the controversy referred to in *Crane v. Peer*,<sup>1</sup> or affected by the intimation of Chancellor Halsted in *St. Mary’s Church v. Stockton*,<sup>2</sup> as the defendants’ proposition suggests. The motion will be denied, with costs.<sup>3</sup>

<sup>1</sup> 43 N. J. Eq. 553, 4 Atl. 72.

<sup>2</sup> 8 N. J. Eq. 520.

<sup>3</sup> *Crane v. Peer* is reported as follows in 43 N. J. Eq. 553:

On pleadings and proofs heard by Henry C. Pitney, Esq., advisory master. For several years before January 5, 1885, the defendant had been engaged

in the boot and shoe business in a store occupied by him in Montclair, and had established a trade there. On that day the parties entered into an agreement, under seal, by which the defendant agreed to sell, and the complainants to purchase, the defendant's stock in trade and fixtures at a valuation, and to make payment therefor in a particular manner by or before the 16th day of the same month, under a penalty of \$100.

The agreement also contained the following clause, which has given rise to this controversy :

"It is further agreed by the parties hereto that the said party of the first part (Peer) shall not be directly or indirectly interested in any store for the sale of boots and shoes in the township of Montclair, within five years from the date of this agreement, under a penalty of \$500."

The agreement to purchase was carried out, and complainants took possession of the store and have since carried it on.

On Wednesday, February 24, 1886, defendant notified the complainants that he intended to start a boot and shoe store in a building lately occupied for that purpose by one Bayley, on the same street, and a few doors distant from complainants' store. On the same day he purchased Bayley's fixtures, took a lease of the store, and, on the same afternoon, commenced to purchase stock in New York City. The stock began to arrive on Thursday or Friday, and defendant got out and distributed hand-bills stating that the store would be open on Saturday, the 27th.

On that Saturday complainants consulted counsel and placed the matter in his hands. The bill herein was prepared on Monday, March 1st, and filed on Tuesday, March 2d, on which day the Vice-Chancellor advised an order to show cause why an injunction should not issue, returnable March 8th, which was served on the defendant the same evening. Between that day and the 8th, defendant made repeated tenders to complainants and their counsel, first of the sum of \$500, and then of the sum of \$550, adding \$50 to cover costs, etc., in payment and satisfaction of the sum mentioned as a penalty in the agreement.

Complainants refused to accept it. On the 8th of March the offer was repeated before the Vice-Chancellor, who, nevertheless, ordered an injunction to issue.

An answer and cross-bill was filed March 19th, and a replication by way of answer to the cross-bill on April 12th, on which day and the following the cause was heard upon pleadings and oral evidence before the advisory master.

The offer to pay the \$500 and all costs was repeated before the advisory master, and declined by the complainants.

*Messrs. Whitehead & Gallagher* for complainants.

*Mr. F. W. Stevens* and *Mr. Austin Van Gieson* for defendant.

The MASTER. The power and duty of the court, in a proper case, to enjoin the breach of a covenant in restraint of trade is well settled, and was not disputed by the defendant.

The defense relied upon in the answer and at the hearing is two-fold.

First. That the complainants are estopped by what occurred on February 2d,th from resorting to equity, and are confined to their remedy at law to recover \$500.

Second. That by the true construction of the clause of the agreement in question, the defendant had the right, if he chose, to pay the \$500 and to resume business.

Third. And, in case of failing in both of those defenses, defendant, by his cross-bill, sets up that the intention of the parties was that the agreement should be in the alternative, and that the defendant should have the right to commence business upon payment of said sum, and prays a reformation in that respect.

I will consider these defenses in the order above stated.

First, as to the estoppel. I do not think the rights of the parties were affected by anything that occurred at the interview of February 24, 1886.

In considering this question of estoppel, we must, of course, assume, that, by the true construction of the agreement, complainants are entitled to their choice of remedies, either in equity by injunction, or at law to recover the \$500, as liquidated damages, for it is against the equitable remedy that the estoppel is set up.

It follows that the defendant must prove either that the parties, on the 24th of February, made a new contract, or that the complainants consented to his opening his store under such circumstances that it would be inequitable for them to withdraw their consent.

The circumstances of the interview were the following : Defendant had submitted the agreement to counsel, and had obtained his opinion upon it, and called upon the complainants for the purpose of settling, and compromising the matter by procuring the complainants' consent to his starting business by the payment of a less sum than \$500, and he made an offer of what he says amounted to \$125 to the complainants to procure such consent, which complainants declined.

There is evidence to the effect that the complainants said they would not take less than the \$500 mentioned in the agreement, and it is contended that this was said in such a connection as to amount to an offer to accept that sum, and to consent to the defendant's proposed enterprise. But if it may be reasonably inferred, from the evidence, that complainants did make such offer (which I by no means concede), still it is beyond dispute that defendant did not accept it, and that no new bargain or modification of the contract was made that day, or at any other time before the bill was filed.

It is admitted that at or near the end of the interview, when asked by defendant what they proposed to do, complainants said they intended to stand by the contract, and that the defendant had no right, under any circumstances, to start again in his old business in Montclair.

Further, I did not understand defendant to pretend, on the stand, that he was at all influenced in his subsequent conduct by what passed on the occasion in question.

Second, this brings us to the principal question in the cause, viz., the construction of the contract.

Defendant contends (1) that, notwithstanding the language used is that of penalty, the subject matter and context lead to the conclusion that the parties intended that the sum named should be considered as liquidated damages; citing, in support of his position, the leading case of *Sainter v. Ferguson*, 7 M., G. & S. 716, and the other cases following in that line ; and contending further (2) that, as a necessary consequence of the establishing of this first proposition, the contract must be construed as an alternative one, under which the party assuming the obligation in restraint of his action has the right, at his option, to pay the sum so fixed, and free himself from the restraint, and that the party to be protected by the restraint agrees and consents that, upon payment of the sum fixed, the restraint shall be removed.

I am unable to assent to this latter proposition, and therefore do not think it necessary to determine the question of penalty or liquidated damages. I think that the question of alternative contract or not is to be determined in this, as in all other cases, by a consideration of the language of the contract and subject matter, and by determining therefrom what was the real intention of the parties as expressed by them. Did the parties intend to give to the defendant the privilege of doing one of two things—on the one hand, to abstain from going into business, and, on the other, to go into business and pay \$500? If so, then the going into business is not a breach of the covenant, nor in any sense a wrongful act. Or did the parties intend to prohibit absolutely the doing of the act in question, and fix the sum mentioned as damages, to be paid for the injury to result from a disregard of the restriction? If so, then the doing of the act is wrongful, and a breach of the covenant.

I am unable to see how the mere circumstance that the parties have agreed upon, liquidated and fixed the sum to be recovered as damages for the doing of a forbidden act renders that act any the less a forbidden act, and therefore wrongful.

Mere liquidation and ascertainment in advance of the damages to be sustained does not necessarily alter their nature, or render them any the less "a compensation awarded by law for the injury sustained by the doing of a wrongful act."

Mr. Sutherland, in his book on Damages, vol. 1, p. 90, uses the following language: "Damages are not the primary purpose of contracts, but are given by law in place of, and as a compensation and equivalent for something else which had been agreed to be done, and has not been done."

And if A promises B that he will not do a certain act which will be injurious to B, and, by way of insuring B that he will not do it, further agrees that if he breaks his promise he will pay B a sum of money agreed upon as damages for the injury to result to B therefrom, I do not see how the acceptance of such a promise by B amounts to consent on B's part to the doing of the injurious act upon payment of the agreed damages.

I am aware that there are judicial *dicta* of great weight, and expressions by distinguished commentators which tend to support in some measure the view contended for by the defendant.

In *Whitfield v. Levy*, 6 Vr. 149, Mr Justice Depue, at page 153, says: "*In a court of law, in an action to recover damages, there is no distinction which can be supported on principle between agreements for liquidated damages and alternative contracts.*" The italics are my own.

Mr. (now Lord Justice) Fry, in his book on Specific Performance § 67, says: "The question always is, What is the agreement? Is it that one certain thing shall be done, with a penalty added to secure its performance, or is it that one of two things shall be done, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penalty being annexed will not prevent equity from enforcing performance of the very thing, and thus carrying out the intention of the parties; if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for equitable procedure against the party having the election"; and, in his succeeding sections, seems to assume that a provision for liquidated damages has the effect of making the agreement an alternative one, and Professor Pomeroy (1 Eq. Jur. § 447, and Pomeroy on Cont. § 70) assumes the same position.

But, notwithstanding this array of authoritative expressions, I feel constrained

to say that, in my judgment, the weight of authority and of reason is the other way.

Most of the English and Irish cases prior to 1842 are collected and commented upon by Lord St. Leonards in *French v. Macale*, 2 Dru. & War. 269.

Among them *Howard v. Hopkyns*, 2 Atk. 371, and *City of London v. Pugh*, 3 Bro. P. C. 374, are worthy of notice.

In *French v. Macale* the bill was filed, as here, to restrain a breach of covenant. The defendant covenanted "not to burn or bate the demised premises (presumably turf), or any part thereof, under penalty of £10 per acre, to be recovered as the reserved yearly rent for every acre burned."

It will be seen that this language is equally as capable of being considered as providing for liquidated damages as that in the case in hand, and Lord St. Leonards did not hold that it was not a case of liquidated damages, but intimated the contrary.

Yet, after full consideration, he refused to dissolve the injunction, which had been granted by the Master of the Rolls.

At the hearing, and preliminary to the consideration of the case, he remarked : "The question is, whether the specification of this sum of £10 is a waiver altogether of the remedy which the law gives if a man does what he has covenanted not to do. Now, where a party covenants not to do a certain thing, and then proceeds to say, 'If I do that thing, I will pay you £10 by way of satisfaction,' this agreement does not prevent the court from saying, 'You shall be enjoined from doing that particular thing.'"

And, in delivering his considered judgment (page 274), he says : "The terms of the lease are that the parties will not do the act under a penalty (the very words used here) ; therefore, it is a covenant against doing the act, and a stipulation that, if he shall do it, he is to pay a particular sum per acre."

And at page 275, after citing several cases, he says : "Now, from all these cases, it appears that the question for the court to ascertain is, whether the party is restricted by covenant from doing the particular act, although, if he do it, a payment is reserved ; or whether, according to the true construction of the contract, its meaning is that the one party shall have the right to do the act on payment of what is agreed upon as an equivalent."

And again, at page 284, in conclusion, he says : "Where the covenant is not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, this penalty does not authorize the party to do this act ; and, before the act is done, this court will restrain him by injunction ; but if the act is done, the penalty must be paid, and the amount is unimportant."

This language shows that he considered the case as one in which the party would, at law, recover the whole sum as liquidated damages.

Next, in order of time (1849) to *French v. Macale*, comes *Sainter v. Ferguson*, 1 Macn. & G. 286. See 13 Jur. 833, where the facts are more fully stated. The covenant and circumstances there are undistinguishable from those of the present case, and the common law court held the sum mentioned to be liquidated damages.

Complainant, a practicing surgeon, engaged the defendant as his assistant, and defendant agreed that he would not practice, etc., under a penalty of £500. Plaintiff discharged defendant from his employment, and defendant commenced practice.

Complainant, in the first instance, filed his bill for an injunction, and Vice-Chancellor Knight Bruce declined the injunction, because (as appears by his



opinion on the second application) he was not satisfied on one or two questions of fact, but held the bill giving plaintiff leave to bring his action at law to establish his right.

On an appeal from this order refusing the injunction, Lord Chancellor Cottenham affirmed it.

Plaintiff then brought his action at law and succeeded, as reported in 7 M., G. & S. 716. He then renewed his application for an injunction to Vice-Chancellor Knight Bruce, as reported in 13 Jur. 833, and was met there with the very same argument that was advanced in behalf of the defendant at the hearing in this case.

That very distinguished judge, in delivering judgment, said: "The question is as to the construction of the agreement and the intention of the parties. I am clearly of the opinion that the plaintiff had the option of forbidding the defendant from practicing at Macclesfield." And, after remarking that he had sent the plaintiff to law, not for the purpose of ascertaining whether the £500 was to be treated as a penalty or liquidated damages, but whether the plaintiff's excuse for discharging the defendant (he had debauched the plaintiff's wife) was true and sufficient or not, he held that the plaintiff had not lost his right to his equitable remedy by going to law, and granted the injunction on terms that plaintiff should not prove in bankruptcy against defendant for the £500.

This judgment, which was clearly according to right and justice, was reversed by Lord Cottenham on appeal, on the sole ground that the action, verdict, and judgment at law were fatal to the plaintiff's remedy in equity.

At page 289 (1 Macn. & G.) he says: "It is true that if the plaintiff had seen the difficulty which has since arisen, he might have put the matter so as to have had the option left to him either of exercising his legal right or his equitable remedy, and not to have been precluded from the alternative which, before the action, he had, either to ask for an injunction or to obtain compensation at law."

The pertinency of this language to the present case is apparent.

The next English case in order of time (1854) is *Coles v. Sims*, 5 De G., M. & G. 1.

In that case an *interim* injunction had been granted by Vice-Chancellor Wood (afterward Lord Hatherly), to restrain a breach of a covenant in restraint of building which was "protected" by as plain a provision for liquidated damages as could well be contrived. This provision had been overlooked at the hearing before the Vice-Chancellor, but on appeal it was pointed out and made the principal ground of reversal. The injunction was nevertheless sustained, with the declaration that it would not be considered as the final decision of the question.

Lord Justice Knight Bruce said (page 9): "If I were now deciding the cause, I should probably come to the conclusion that, in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the court, according to the contents of the whole instrument, and the nature and circumstances of the particular instance, whether to hold itself bound or not bound, upon the ground of it, to refuse an injunction if otherwise proper to be granted; and that, in the present case, the circumstances are such as to render it right for the court to grant an injunction."

The next English case is *Long v. Bowring* (1854), 33 Beav. 585; 10 Jur. (N. S.) 668.

That was a bill for specific performance of an agreement to underlet to the

complainant, and to procure a license for that purpose from the superior landlord, with a *proviso*, couched in the strongest conceivable language, for liquidated damages in the sum of £1,000, to be recovered "as a debt in an action at law."

Lord Romilly, in delivering judgment in favor of the plaintiff for specific performance, says: "I have the strongest opinion as to the construction of this agreement. . . . When Mr. Bowring entered into this agreement with the plaintiffs he might have introduced a clause to the effect that he should be discharged from his agreement, if he thought fit, upon payment to the plaintiffs of £1,000, and, if this had been the meaning of the parties to this agreement, it would have been very easy so to express it. But I am clearly of opinion that this agreement gives the option to the plaintiffs whether they shall have the agreement specifically performed, or whether they shall be paid £1,000."

The next case is *Howard v. Woodward*, 10 Jur. (N.S.) 1123; 34 L. J. Ch. 47, before Vice-Chancellor Wood.

This was a bill, like the one before the court, for a perpetual injunction to restrain a breach of a covenant in restraint of trade (practicing as a solicitor), which was again protected by a provision for the payment of a sum agreed upon as liquidated damages.

Here, again, the point was made that the damages being liquidated gave the defendant the right to practice as a solicitor upon paying the sum fixed.

The Vice-Chancellor gave judgment for the complainant, saying: "The question, of course, is whether the agreement is that he may purchase liberty to do the act, or that the act shall not be done at all." And he held the latter.

To the same effect is *Jones v. Heavens*, L. R. (4 Ch. Div.) 636.

Among the cases in this country to which I have been referred is *Gray v. Crosby*, 18 Johns. 219, the head-note of which is this: "Where a party to an agreement insists on the payment of stipulated damages as a discharge, it must appear that the damages stipulated are in lieu of a performance of the contract, the payment for which damages is an alternative for his election."

*Ayres v. Pease*, 12 Wend. 393, is to the same effect.

Also, *Cartwright v. Gardner*, 5 Cush. 273, 280, 281.

A significant case precisely in point, though arising on a question of pleading, is *Stewart v. Bedell*, 79 Pa. St. 336.

The head-note is: "The defendant sold his store and good will to the plaintiff, and covenanted not to carry on the same business within a specified district and time; if he should, 'he shall and will pay (to plaintiff) the sum of \$10,000 as liquidated damages.' Held, not alternative covenants, the latter being merely the agreed consequence of the breach of the former."

And see the language of the court at page 339.

The rule, as laid down by Judge Waterman in his book on Specific Performance §§ 21 and 22, is in accord with the view I have taken.

See, also, 1 Suth. on Dam. 471, where the rule is thus stated:

"Alternative Contracts.—These are such as by their terms may be performed by doing either of several acts at the election of the party from whom performance is due. Performance in one of the modes is a performance of the entire contract, and no question of damages arises. Such a contract, therefore, is not one for liquidated damages. . . . Stipulating the damages and promising to pay them in case of a default in the performance of an otherwise absolute undertaking, does not constitute an alternative contract. The promisor is bound to perform his contract, though there is generally a practical option to violate it

and take the consequence, but he is entitled to no election to pay the liquidated damages and thus discharge himself."

The only case to which my attention has been called, which appears to be in any serious degree opposed to these views, is *Hahn v. Concordia Society*, 42 Md. 460. There Hahn (an actor), the defendant, had entered into a contract with the society (a dramatic association), complainant, to perform professionally for it and for no one else, with a provision for the payment of a fixed sum as a fine for a breach. The original contract was in the German language, and the verbiage throughout is peculiar, thus:

"This sum of \$200 is already forfeited by any violation of the contract, and requires no particular legal proceedings for its execution."

The Baltimore county circuit court, at the prayer of the society, granted an injunction restraining Hahn from acting except for the society.

On appeal, the only question discussed by counsel was that considered and decided by Lord St. Leonards in *Lumley v. Wagner*, 1 De G., M. & G. 604, namely, whether chancery would interfere to prevent a breach of a contract for personal services. But the Maryland court declined to decide that question and held that the parties to the contract had themselves, by the language used, restrained their remedy to an action at law to recover the fine of \$200, and on that ground reversed the order of the court below granting the injunction. No decided cases are cited, nor any extended reasoning indulged in, in support of the conclusion arrived at. The court simply construed that contract standing by itself, and did not rely upon the principle contended for—namely, that every contract which provides for liquidated damages for a breach necessarily amounts to an alternative contract, and results in giving an option to the party bound, to perform his contract or pay the damages.

Turning, therefore, to the language of the present contract and the circumstances of the case, I come to the very clear and decided opinion that it was not the intention of the parties that the defendant should have the right to pay \$500 and resume business within the specified time and limits of territory.

Third. This leaves to be considered only the question of reformation of the contract.

I do not think that the evidence adduced with that view is at all sufficient to meet the requirement of the rule in such cases.

On the contrary, I am inclined to think it rather militates against defendant's contention. He represented to complainants that his object in selling out was to quit the business, being compelled thereto by the state of his health, and that he had no desire or intention to ever engage in the business again.

I will advise a decree for a perpetual injunction, upon terms that the complainants will execute a proper waiver or release of their right to an action at law to recover the liquidated damages.—ED.

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[For a further consideration of defenses to bills for the specific performance of contracts, the student is referred to Volume III. of this collection of cases on Equity Jurisdiction, Chapter I., dealing with the reformation and rescission of contracts.—ED.]















